



FEDERAL REGISTER

Vol. 88

Friday,

No. 164

August 25, 2023

Pages 58065–58494

OFFICE OF THE FEDERAL REGISTER



The **FEDERAL REGISTER** (ISSN 0097-6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see www.federalregister.gov.

The seal of the National Archives and Records Administration authenticates the **Federal Register** as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at www.govinfo.gov, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, gpocusthelp.com.

The annual subscription price for the **Federal Register** paper edition is \$860 plus postage, or \$929, for a combined **Federal Register**, **Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is \$330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register**, including postage, is based on the number of pages: \$11 for an issue containing less than 200 pages; \$22 for an issue containing 200 to 400 pages; and \$33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for \$3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see bookstore.gpo.gov.

There are no restrictions on the republication of material appearing in the **Federal Register**.

How To Cite This Publication: Use the volume number and the page number. Example: 88 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche 202-09512-1800
Assistance with public subscriptions 202-512-1806

General online information 202-512-1530; 1-888-293-6498

Single copies/back copies:

Paper or fiche 202-512-1800
Assistance with public single copies 1-866-512-1800
(Toll-Free)

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:
Email FRSubscriptions@nara.gov
Phone 202-741-6000

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: <https://www.gpo.gov/frsubs>.



Contents

Federal Register

Vol. 88, No. 164

Friday, August 25, 2023

Agriculture Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58234–58235

Air Force Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58254–58255

Meetings:

Scientific Advisory Board, 58253–58254

Bureau of Consumer Financial Protection

RULES

Agency Contact Information; Technical Corrections, 58065–58071

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58252–58253

Census Bureau

NOTICES

Charter Amendments, Establishments, Renewals and Terminations:

2030 Census Advisory Committee, 58237–58238

Requests for Nominations:

2030 Census Advisory Committee, 58236–58237

Centers for Disease Control and Prevention

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58278–58281

Award of a Single-Source Cooperative Agreement to Fund: icddr,b (International Centre for Diarrhoeal Disease Research, Bangladesh), 58281

Meetings:

Advisory Committee on Immunization Practices, 58277–58278

Centers for Medicare & Medicaid Services

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58281–58282

Agency Information Collection Activities; Proposals, Submissions, and Approvals; Correction, 58282

Civil Rights Commission

NOTICES

Meetings:

New York Advisory Committee, 58236

Coast Guard

RULES

Drawbridge Operations:

Mill Neck Creek, Bayville, NY, 58102–58104

Safety Zone:

Annual Events in the Captain of the Port Buffalo Zone, 58112–58113

Lake Erie, Black River, Lorain, OH, South of East Erie Avenue Bridge Adjacent to Black River Landing, 58106–58108

Lake of the Ozarks, Mile Marker 8, Lake Ozark, MO, 58104–58106

Ohio River Mile Markers 79.5–80, Wellsburg, WV, 58108–58110

Ohio River, Mile Markers 322.5 to 323, Ashland, KY, 58110–58112

Special Local Regulation:

Olympia Harbor Days Tug Boat Races, Budd Inlet, WA, 58102

PROPOSED RULES

Drawbridge Operations:

Mianus River, Greenwich, CT, 58174–58176

Reynolds Channel, Atlantic Beach, NY, 58176–58178

NOTICES

Meetings:

National Commercial Fishing Safety Advisory Committee, 58289–58290

Commerce Department

See Census Bureau

See Foreign-Trade Zones Board

See Industry and Security Bureau

See International Trade Administration

See National Oceanic and Atmospheric Administration

Committee for Purchase From People Who Are Blind or Severely Disabled

NOTICES

Procurement List; Additions and Deletions, 58250–58251

Commodity Futures Trading Commission

PROPOSED RULES

Swap Confirmation Requirements for Swap Execution Facilities, 58145–58157

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Customer Clearing Documentation and Timing of Acceptance for Clearing, 58251–58252

Consumer Product Safety Commission

NOTICES

Meetings; Sunshine Act, 58253

Defense Department

See Air Force Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58255–58256

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Contract Financing, 58276

Preaward Survey Forms, 58277

Prospective Subcontractor Requests for Bonds, 58275–58276

Education Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Charter Online Management and Performance System Annual Performance Report, 58256–58257

Meetings:

National Board for Education Sciences, 58257–58258

Election Assistance Commission**NOTICES**

Meetings; Sunshine Act, 58258

Employee Benefits Security Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58312–58316

Energy Department

See Federal Energy Regulatory Commission

Environmental Protection Agency**RULES**

New Source Performance Standards Review for Steel

Plants:

Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels, 58442–58494

PROPOSED RULES

Air Quality State Implementation Plans; Approvals and Promulgations:

Maryland; Regional Haze State Implementation Plan for the Second Implementation Period, 58178–58202

New York; Elements of the 2008 and 2015 Ozone National Air Quality Standards, 58202–58210

NOTICES

Application:

Emergency Exemption; Ortho-phthalaldehyde, 58265–58266

Environmental Impact Statements; Availability, etc., 58264

Integrated Science Assessment for Ozone and Related Photochemical Oxidants, 58264–58265

Federal Aviation Administration**RULES**

Airspace Designations; Incorporation by Reference, 58071–58072

PROPOSED RULES

Airworthiness Directives:

Airbus SAS Airplanes, 58116–58120

Pratt and Whitney Engines, 58114–58116

The Boeing Company Airplanes, 58120–58123

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Carbon Offsetting and Reduction Scheme for International Aviation Monitoring, Reporting, and Verification Program, 58433–58434

Federal Bureau of Investigation**PROPOSED RULES**

Child Protection Improvements Act Criteria for Designated Entity Determinations, 58167–58173

Federal Communications Commission**PROPOSED RULES**

Cybersecurity Labeling for Internet of Things, 58211–58229

Television Broadcasting Services:

Alamogordo, NM, 58210–58211

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58266–58268

Federal Deposit Insurance Corporation**NOTICES**

Meetings; Sunshine Act, 58268–58269

Federal Emergency Management Agency**NOTICES**

Flood Hazard Determinations, 58290–58299

Federal Energy Regulatory Commission**NOTICES**

Combined Filings, 58258–58260, 58263

Environmental Assessments; Availability, etc.:

City of River Falls Municipal Utilities, 58260

Pyrites Hydro, LLC, 58263

Post-Technical Conference Comments:

Physical Security Technical Conference, 58260–58262

Waiver Period for Water Quality Certification Application:

Pyrites Hydro, LLC, 58263–58264

Federal Motor Carrier Safety Administration**NOTICES**

Exemption Application:

Commercial Driver's License; State of Hawaii, 58434–58435

Federal Railroad Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58435–58436

Federal Reserve System**NOTICES**

Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities, 58269

Federal Trade Commission**NOTICES**

Analysis of Agreement Containing Consent Order to Aid Public Comment:

EQT and Quantum, 58269–58275

Food and Drug Administration**PROPOSED RULES**

Fish and Shellfish; Canned Tuna Standard of Identity and Standard of Fill of Container, 58157–58167

NOTICES

Withdrawal of Approval of New Drug Application:

Pepaxto, Equivalent to 20 Milligrams Base per Vial, 58282–58284

Foreign Assets Control Office**RULES**

Cuban Assets Control Regulations; CFR Correction, 58102

Foreign-Trade Zones Board**NOTICES**

Approval of Subzone Status:

LL Flooring Services, LLC, Sandston, VA, 58238

General Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Contract Financing, 58276

Preaward Survey Forms, 58277

Prospective Subcontractor Requests for Bonds, 58275–58276

Health and Human Services Department

See Centers for Disease Control and Prevention

See Centers for Medicare & Medicaid Services

See Food and Drug Administration

See Health Resources and Services Administration

See National Institutes of Health

Health Resources and Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Standardized Work Plan Form for Use with Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements, 58284–58285

Homeland Security Department

See Coast Guard

See Federal Emergency Management Agency

Indian Affairs Bureau**NOTICES**

Documented Petition:
Federal Acknowledgment as an American Indian Tribe, 58299

Industry and Security Bureau**NOTICES**

Order Denying Export Privileges:
Ilya Balakaev, Radiotester OOO a/k/a Radiotester LLC; Renewal, 58238–58242

Interior Department

See Indian Affairs Bureau

See National Park Service

See Ocean Energy Management Bureau

Internal Revenue Service**NOTICES**

Meetings:
Art Advisory Panel, 58439

International Trade Administration**NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Certain Steel Nails from the People's Republic of China, 58242–58244
Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 58244–58245
Determination of Sales at Less than Fair Value:
Corrosion-Resistant Steel Products from Taiwan, 58245–58248

Justice Department

See Federal Bureau of Investigation

See Justice Programs Office

NOTICES

Proposed Consent Decree:
CERCLA, 58311

Justice Programs Office**NOTICES**

Meetings:
Coordinating Council on Juvenile Justice and Delinquency Prevention, 58311–58312

Labor Department

See Employee Benefits Security Administration

Management and Budget Office**NOTICES**

Statistical Policy Directive No. 3: Compilation, Release, and Evaluation of Principal Federal Economic Indicators:
Proposal to Change Timing of Public Comments by Employees of the Executive Branch, 58316–58318

National Aeronautics and Space Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 58318
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Contract Financing, 58276
Preaward Survey Forms, 58277
Prospective Subcontractor Requests for Bonds, 58275–58276

National Endowment for the Arts**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery, 58318–58319

National Foundation on the Arts and the Humanities

See National Endowment for the Arts

National Highway Traffic Safety Administration**PROPOSED RULES**

Corporate Average Fuel Economy Standards:
Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035, 58232–58233
Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035; Correction, 58229–58232

NOTICES

Petition for Decision of Inconsequential Noncompliance:
Ricon Corp. and Navistar, Inc., 58436–58439

National Institutes of Health**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application Process for Clinical Research Training and Medical Education at the Clinical Center and its impact on Course and Training Program Enrollment and Effectiveness, 58286–58287

Meetings:

National Center for Complementary and Integrative Health, 58288
National Institute of Biomedical Imaging and Bioengineering, 58288–58289
National Institute of General Medical Sciences, 58287
National Institute on Aging, 58285, 58287–58288
National Institute on Alcohol Abuse and Alcoholism, 58285–58286

National Labor Relations Board**RULES**

Representation Case Procedures, 58075–58102

National Oceanic and Atmospheric Administration**RULES**

Fisheries of the Northeastern United States:
Northeast Multispecies Fishery; Framework Adjustment 65, 58113

PROPOSED RULES

Chumash Heritage National Marine Sanctuary, 58123–58145

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Assessing Public Preferences and Values to Support Coastal and Marine Management, 58248–58250

Meetings:

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops; Correction, 58248

National Park Service**NOTICES**

National Register of Historic Places:
Pending Nominations and Related Actions, 58299–58300

National Science Foundation**NOTICES**

Meetings:

Proposal Review Panel for Innovation and Technology Ecosystems, 58320

Permits; Applications, Issuances, etc.:

Antarctic Conservation Act, 58319–58320

Nuclear Regulatory Commission**NOTICES**

Environmental Assessments; Availability, etc.:

Independent Spent Fuel Storage Facilities
Decommissioning Funding Plans, Finding of No Significant Impact, 58320–58323

Ocean Energy Management Bureau**PROPOSED RULES**

Risk Management and Financial Assurance for OCS Lease and Grant Obligations, 58173–58174

NOTICES

Oil and Gas Lease Sale:

Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 261, 58300–58310

Gulf of Mexico, Outer Continental Shelf, Oil and Gas Lease Sale 261, 58310–58311

Personnel Management Office**NOTICES**

Meetings:

Federal Prevailing Rate Advisory Committee, 58323

Postal Regulatory Commission**NOTICES**

New Postal Products, 58323–58324

Securities and Exchange Commission**NOTICES**

Self-Regulatory Organizations; Proposed Rule Changes:

Cboe BZX Exchange, Inc., 58327–58329, 58334–58336

Cboe Exchange, Inc., 58336–58341

Miami International Securities Exchange, LLC, 58378–58404

MIAX Emerald, LLC, 58341–58364

MIAX PEARL, LLC, 58404–58430

Nasdaq BX, Inc., 58373–58378

Nasdaq ISE, LLC, 58368–58373

Nasdaq MRX, LLC, 58329–58334

Nasdaq PHLX, LLC, 58324–58327

NYSE National, Inc., 58364–58368

The Nasdaq Stock Market, LLC, 58341

Small Business Administration**NOTICES**

Disaster Declaration:

New Jersey, 58430–58431

Tennessee, 58431

Social Security Administration**NOTICES**

Privacy Act; Matching Program, 58431–58432

State Department**RULES**

Access to Information; Privacy Act Provisions, 58072–58075

Surface Transportation Board**NOTICES**

Operation Exemption:

Washington, Idaho and Montana Railway, LLC; BLPI RR, LLC, 58432–58433

Transportation Department

See Federal Aviation Administration

See Federal Motor Carrier Safety Administration

See Federal Railroad Administration

See National Highway Traffic Safety Administration

Treasury Department

See Foreign Assets Control Office

See Internal Revenue Service

U.S. Committee on the Marine Transportation System**NOTICES**

Guidance:

Responding to Munitions and Explosives of Concern in United States Federal Waters, 58235–58236

Veterans Affairs Department**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Per Diem to States for Care of Eligible Veterans in State Homes, 58439–58440

Separate Parts In This Issue**Part II**

Environmental Protection Agency, 58442–58494

Reader Aids

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

To subscribe to the Federal Register Table of Contents electronic mailing list, go to <https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new>, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

12 CFR

1002.....	58065
1022.....	58065
1026.....	58065

14 CFR

71.....	58071

Proposed Rules:

39 (3 documents)	58114,
	58116, 58120

15 CFR**Proposed Rules:**

922.....	58123

17 CFR**Proposed Rules:**

23.....	58145
37.....	58145

21 CFR**Proposed Rules:**

161.....	58157

22 CFR

171.....	58072

28 CFR**Proposed Rules:**

105.....	58167

29 CFR

102 (2 documents)	58075,
	58076

30 CFR**Proposed Rules:**

550.....	58173
556.....	58173
590.....	58173

31 CFR

515.....	58102

33 CFR

100.....	58102
117.....	58102
165 (5 documents)	58104,
	58106, 58108, 58110, 58112

Proposed Rules:

117 (2 documents)	58174,
	58176

34 CFR

165.....	58112

40 CFR

60.....	58442

Proposed Rules:

52 (2 documents)	58178,
	58202

47 CFR**Proposed Rules:**

Ch. I.....	58211
73.....	58210

49 CFR**Proposed Rules:**

531 (2 documents)	58229,
	58232
533 (2 documents)	58229,
	58232
535 (2 documents)	58229,
	58232
537 (2 documents)	58229,
	58232

50 CFR

648.....	58113

Rules and Regulations

Federal Register

Vol. 88, No. 164

Friday, August 25, 2023

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

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

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Parts 1022, 1002, and 1026

Agency Contact Information; Technical Corrections

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule; correction.

SUMMARY: On March 20, 2023, the Consumer Financial Protection Bureau (Bureau or CFPB) published the “Agency Contact Information” final rule in the **Federal Register**. The Bureau has identified four clerical errors in that final rule. These errors are found in the Federal agency contact information that must be provided with Equal Credit Opportunity Act adverse action notices in appendix A to Regulation B, the Fair Credit Reporting Act Summary of Consumer Rights in appendix K to Regulation V, and a Bureau website address where the public may access certain APR tables referenced in comment appendix J–2 to Regulation Z. This document corrects these errors.

DATES: This correction is effective on September 25, 2023.

FOR FURTHER INFORMATION CONTACT:

Luke Diamond, Counsel or Ruth Van Veldhuizen, Senior Counsel, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION: On March 20, 2023, the Consumer Financial Protection Bureau (Bureau or CFPB) published the “Agency Contact Information” final rule in the **Federal Register**. This final rule made non-substantive corrections and updates to Bureau and other Federal agency contact information found at certain locations in Regulations B, E, F, J, V, X, Z, and DD, including Federal agency contact information that must be provided with Equal Credit Opportunity Act adverse action notices and the Fair

Credit Reporting Act Summary of Consumer Rights. This final rule also revised the chapter heading, made various non-substantive changes to Regulations B and V, and provided a Bureau website address where the public may access certain APR tables referenced in Regulation Z.

The Bureau has identified four clerical errors in the final rule. First, in appendix A to Regulation B, “National Credit Union Administration, Office of Consumer Financial Protection (OCFP), Division of Consumer Compliance Policy and Outreach, 1775 Duke Street, Alexandria, VA 22314” should read “National Credit Union Administration, Office of Consumer Financial Protection (OCFP), 1775 Duke Street, Alexandria, VA 22314.” Second, on page two of the Fair Credit Reporting Act Summary of Consumer Rights (found in appendix K to Regulation V), the toll-free opt out phone number listed as 1–800–XXX–XXXX should read 1–888–567–8688. Third, on page four of the Fair Credit Reporting Act Summary of Consumer Rights, “Assistant General Counsel for Office of Aviation Protection” should read “Assistant General Counsel for Office of Aviation Consumer Protection.” Fourth, in comment appendix J–2 to Regulation Z, <https://www.consumerfinance.gov/resources/applicable-requirements/annual-percentage-rate-tables/> should read <https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/annual-percentage-rate-tables/>.

Regulatory Requirements: The Bureau finds that public comment on this correction is unnecessary because the Bureau is correcting inadvertent, technical errors, about which there is minimal, if any, basis for substantive disagreement. Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. The Bureau has determined that these corrections do not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.

List of Subjects

12 CFR Part 1002

Aged, Banks, Banking, Civil rights, Consumer protection, Credit, Credit unions, Discrimination, Fair lending, Marital status discrimination, National banks, National origin discrimination, Penalties, Race discrimination, Religious discrimination, Reporting and recordkeeping requirements, Savings associations, Sex discrimination.

12 CFR Part 1022

Banks, Banking, Consumer protection, Credit unions, Fair Credit Reporting Act, Holding companies, National banks, Privacy, Reporting and recordkeeping requirements, Savings associations, State member banks.

12 CFR Part 1026

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

Authority and Issuance

For the reasons set forth above, the Bureau amends 12 CFR chapter X, as set forth below:

PART 1002—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

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

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1691b.

■ 2. Revise appendix A to read as follows:

Appendix A to Part 1002—Federal Agencies To Be Listed in Adverse Action Notices

The following list indicates the Federal agency or agencies that should be listed in notices provided by creditors pursuant to § 1002.9(b)(1). Any questions concerning a particular creditor may be directed to such agencies. This list is not intended to describe agencies’ enforcement authority for ECOA and Regulation B. Terms that are not defined in the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in the International Banking Act of 1978 (12 U.S.C. 3101).

1. *Banks, savings associations, and credit unions with total assets of over \$10 billion and their affiliates:* Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Such affiliates that

are not banks, savings associations, or credit unions also should list, in addition to the Bureau: Federal Trade Commission, Consumer Response Center, 600 Pennsylvania Avenue NW, Washington, DC 20580.

2. To the extent not included in item 1 above:

a. *National Banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks*: Office of the Comptroller of the Currency, Customer Assistance Group, P.O. Box 53570, Houston, TX 77052.

b. *State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act*: Federal Reserve Consumer Help Center, P.O. Box 1200, Minneapolis, MN 55480.

c. *Nonmember Insured Banks, Insured State Branches of Foreign Banks, and Insured State Savings Associations*: Division of Depositor and Consumer Protection, National Center for Consumer and Depositor Assistance, Federal Deposit Insurance Corporation, 1100 Walnut Street, Box #11, Kansas City, MO 64106.

d. *Federal Credit Unions*: National Credit Union Administration, Office of Consumer Financial Protection (OCFP), 1775 Duke Street, Alexandria, VA 22314.

3. *Air Carriers*: Assistant General Counsel for Office of Aviation Consumer Protection, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

4. *Creditors Subject to Surface Transportation Board*: Office of Public Assistance, Governmental Affairs, and Compliance, Surface Transportation Board, 395 E Street SW, Washington, DC 20423.

5. *Creditors Subject to Packers and Stockyards Act*: Nearest Packers and Stockyards Division Regional Office.

6. *Small Business Investment Companies*: Associate Administrator, Office of Capital Access, United States Small Business Association, 409 Third Street SW, Suite 8200, Washington, DC 20416.

7. *Brokers and Dealers*: Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

8. *Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations*: Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

9. *Retailers, Finance Companies, and All Other Creditors Not Listed Above*: Federal Trade Commission, Consumer Response Center, 600 Pennsylvania Avenue NW, Washington, DC 20580.

PART 1022—FAIR CREDIT REPORTING (REGULATION V)

■ 3. The authority citation for part 1022 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1681a, 1681b, 1681c, 1681c-1, 1681c-3, 1681e, 1681g, 1681i, 1681j, 1681m, 1681s, 1681s-2, 1681s-3, and 1681t; Sec. 214, Pub. L. 108-159, 117 Stat. 1952.

■ 4. Revise appendix K to read as follows:

Appendix K to Part 1022—Summary of Consumer Rights

The prescribed form for this summary is a disclosure that is substantially similar to the Bureau's model summary with all information clearly and prominently displayed. The list of Federal regulators that is included in the Bureau's prescribed summary may be provided separately so long as this is done in a clear and conspicuous way. A summary should accurately reflect changes to those items that may change over time (e.g., dollar amounts, or telephone numbers and addresses of Federal agencies) to remain in compliance. Translations of this summary will be in compliance with the Bureau's prescribed model, provided that the translation is accurate and that it is provided in a language used by the recipient consumer.

BILLING CODE 4810-AM-P

Para información en español, visite www.consumerfinance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.
- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your “file disclosure”). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
 - a person has taken adverse action against you because of information in your credit report;
 - you are the victim of identity theft and place a fraud alert in your file;
 - your file contains inaccurate information as a result of fraud;
 - you are on public assistance;
 - you are unemployed but expect to apply for employment within 60 days.

In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.
- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer

reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete, or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.
- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.
- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need – usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.
- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.
- **You may limit “prescreened” offers of credit and insurance you get based on information in your credit report.** Unsolicited “prescreened” offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt out with the nationwide credit bureaus at 1-888-567-8688.
- The following FCRA right applies with respect to nationwide consumer reporting agencies:

CONSUMERS HAVE THE RIGHT TO OBTAIN A SECURITY FREEZE

You have a right to place a “security freeze” on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gets access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, or any other account involving the extension of credit.

As an alternative to a security freeze, you have the right to place an initial or extended fraud alert on your credit file at no cost. An initial fraud alert is a 1-year alert that is

placed on a consumer's credit file. Upon seeing a fraud alert display on a consumer's credit file, a business is required to take steps to verify the consumer's identity before extending new credit. If you are a victim of identity theft, you are entitled to an extended fraud alert, which is a fraud alert lasting 7 years.

A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.
- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:

TYPE OF BUSINESS:	CONTACT:
1. a. Banks, savings associations, and credit unions with total assets of over \$10 billion and their affiliates b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:	a. Consumer Financial Protection Bureau 1700 G Street NW Washington, DC 20552 b. Federal Trade Commission Consumer Response Center 600 Pennsylvania Avenue NW Washington, DC 20580 (877) 382-4357
2. To the extent not included in item 1 above: a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and Insured State Branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations d. Federal Credit Unions	a. Office of the Comptroller of the Currency Customer Assistance Group P.O. Box 53570 Houston, TX 77052 b. Federal Reserve Consumer Help Center P.O. Box 1200 Minneapolis, MN 55480 c. Division of Depositor and Consumer Protection National Center for Consumer and Depositor Assistance Federal Deposit Insurance Corporation 1100 Walnut Street, Box #11 Kansas City, MO 64106 d. National Credit Union Administration Office of Consumer Financial Protection 1775 Duke Street Alexandria, VA 22314
3. Air carriers	Assistant General Counsel for Office of Aviation Consumer Protection Department of Transportation 1200 New Jersey Avenue SE Washington, DC 20590
4. Creditors Subject to the Surface Transportation Board	Office of Public Assistance, Governmental Affairs, and Compliance Surface Transportation Board 395 E Street SW Washington, DC 20423
5. Creditors Subject to the Packers and Stockyards Act, 1921	Nearest Packers and Stockyards Division Regional Office
6. Small Business Investment Companies	Associate Administrator, Office of Capital Access United States Small Business Administration 409 Third Street SW, Suite 8200 Washington, DC 20416
7. Brokers and Dealers	Securities and Exchange Commission 100 F Street NE Washington, DC 20549
8. Institutions that are members of the Farm Credit System	Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
9. Retailers, Finance Companies, and All Other Creditors Not Listed Above	Federal Trade Commission Consumer Response Center 600 Pennsylvania Avenue NW Washington, DC 20580 (877) 382-4357

BILLING CODE 4810-AM-C

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

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

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

■ 6. Supplement I is amended by revising *Appendix J* to read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Appendix J—Annual Percentage Rate Computations for Closed-End Credit Transactions

1. *Use of appendix J.* Appendix J sets forth the actuarial equations and instructions for calculating the annual percentage rate in closed-end credit

transactions. While the formulas contained in this appendix may be directly applied to calculate the annual percentage rate for an individual transaction, they may also be utilized to program calculators and computers to perform the calculations.

2. *Relation to Bureau tables.* The Bureau's Annual Percentage Rate Tables also provide creditors with a calculation tool that applies the technical information in appendix J. An annual

percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation. Volume I of the tables may be used for credit transactions involving equal payment amounts and periods, as well as for transactions involving any of the following irregularities: odd first period, odd first payment and odd last payment. Volume II of the tables may be used for transactions that involve any type of irregularities. These tables may be obtained from the Bureau, 1700 G Street NW, Washington, DC 20552, upon request. The tables are also available on the Bureau's website at: <https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/annual-percentage-rate-tables/>.

* * * * *

Paul Hannah,

Senior Counsel and Federal Register Liaison,
Consumer Financial Protection Bureau.

[FR Doc. 2023-18240 Filed 8-24-23; 8:45 am]

BILLING CODE 4810-AM-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2023-1785; Amendment No. 71-55]

RIN 2120-AA66

Airspace Designations; Incorporation by Reference

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends 14 CFR part 71 relating to airspace designations to reflect the approval by the Director of the Federal Register of the incorporation by reference of FAA Order JO 7400.11H, Airspace Designations and Reporting Points. This action also explains the procedures the FAA will use to amend the listings of Class A, B, C, D, and E airspace areas; air traffic service routes; and reporting points incorporated by reference.

DATES: These regulations are effective September 15, 2023, through September 15, 2024. The incorporation by reference of FAA Order JO 7400.11H is approved by the Director of the Federal Register as of September 15, 2023, through September 15, 2024.

ADDRESSES: A copy of this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number.

Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT: Sarah A. Combs, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

SUPPLEMENTARY INFORMATION:

History

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, effective September 15, 2022, listed Class A, B, C, D and E airspace areas; air traffic service routes; and reporting points. Due to the length of these descriptions, the FAA requested approval from the Office of the Federal Register to incorporate the material by reference in the Federal Aviation Regulations, section 71.1, effective September 15, 2023. During the incorporation by reference period, the FAA processed all proposed changes of the airspace listings in FAA Order JO 7400.11G in full text as proposed rule documents in the **Federal Register**, unless there was good cause to forego notice and comment. Likewise, all amendments of these listings were published in full text as final rules in the **Federal Register**. This rule reflects the periodic integration of these final rule amendments into a revised edition of FAA Order JO 7400.11H, Airspace Designations and Reporting Points. The Director of the Federal Register has approved the incorporation by reference of FAA Order JO 7400.11H in section 71.1, as of September 15, 2023, through September 15, 2024. This rule also explains the procedures the FAA will use to amend the airspace designations incorporated by reference in part 71. This rule also updates sections 71.5, 71.15, 71.31, 71.33, 71.41, 71.51, 71.61, 71.71, and 71.901 to reflect the incorporation by reference of FAA Order JO 7400.11H.

This rule reflects the periodic integration of these final rule amendments into a revised edition of FAA Order JO 7400.11H, Airspace Designations and Reporting Points. The Director of the Federal Register has approved the incorporation by reference of FAA Order JO 7400.11H in section 71.1, as of September 15, 2023, through September 15, 2024. This rule also explains the procedures the FAA will use to amend the airspace designations incorporated by reference in part 71. This rule also updates sections 71.5, 71.15, 71.31, 71.33, 71.41, 71.51, 71.61, 71.71, and 71.901 to reflect the incorporation by reference of FAA Order JO 7400.11H.

Incorporation by Reference

This document incorporates by reference FAA Order JO 7400.11H, Airspace Designations and Reporting

Points, dated August 11, 2023, and effective September 15, 2023, in section 71.1. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this final rule. FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 to reflect the approval by the Director of the Federal Register of the incorporation by reference of FAA Order JO 7400.11H, effective September 15, 2023, through September 15, 2024. During the incorporation by reference period, the FAA will continue to process all proposed changes of the airspace listings in FAA Order JO 7400.11H in full text as proposed rule documents in the **Federal Register**, unless there is good cause to forego notice and comment. Likewise, all amendments of these listings will be published in full text as final rules in the **Federal Register**. The FAA will periodically integrate all final rule amendments into a revised edition of FAA Order JO 7400.11 and submit the revised edition to the Director of the Federal Register for approval for incorporation by reference in section 71.1.

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

Regulatory Notices and Analyses

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

■ 2. Section 71.1 is revised to read as follows:

§ 71.1 Applicability.

A listing for Class A, B, C, D, and E airspace areas; air traffic service routes; and reporting points can be found in FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The approval to incorporate by reference FAA Order JO 7400.11H is effective September 15, 2023, through September 15, 2024. During the incorporation by reference period, proposed changes to the listings of Class A, B, C, D, and E airspace areas; air traffic service routes; and reporting points will be published in full text as proposed rule documents in the **Federal Register**, unless there is good cause to forego notice and comment. Amendments to the listings of Class A, B, C, D, and E airspace areas; air traffic service routes; and reporting points will be published in full text as final rules in the **Federal Register**. Periodically, the final rule amendments will be integrated into a revised edition of the Order and submitted to the Director of the Federal Register for approval for incorporation by reference in this section. This incorporation by reference (IBR) material is available for inspection at the Federal Aviation Administration (FAA) and at the National Archives and Records Administration (NARA). Contact the FAA at: Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591, (202) 267–8783. An electronic version of FAA Order JO 7400.11H is available on the FAA website at www.faa.gov/air_traffic/publications. Copies of FAA Order JO 7400.11H may be inspected in Docket No. FAA–2023–1785; Amendment No. 71–55, on www.regulations.gov. For information on the availability of this material at NARA, visit www.archives.gov/federalregister/CFR/IBR-locations.html or email fr.inspection@nara.gov.

§ 71.5 [Amended]

■ 3. Section 71.5 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.15 [Amended]

■ 4. Section 71.15 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.31 [Amended]

■ 5. Section 71.31 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.33 [Amended]

■ 6. Paragraph (c) of section 71.33 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.41 [Amended]

■ 7. Section 71.41 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.51 [Amended]

■ 8. Section 71.51 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.61 [Amended]

■ 9. Section 71.61 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.71 [Amended]

■ 10. Paragraphs (b), (c), (d), (e), and (f) of section 71.71 are amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

§ 71.901 [Amended]

■ 11. Paragraph (a) of section 71.901 is amended by removing the words “FAA Order JO 7400.11G” and adding, in their place, the words “FAA Order JO 7400.11H.”

Issued in Washington, DC, on August 22, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–18344 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 171

[Public Notice: 12014]

RIN 1400–AF62

Access to Information; Privacy Act Provisions

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is removing Email Archive Management Records, State–01, from the list of system of records notices (SORNs) for which Privacy Act exemptions are claimed. The Department has determined that the system covered by this SORN, eRecords Archive, does not constitute a system of records under the Privacy Act of 1974.

DATES: This rule is effective on August 25, 2023.

FOR FURTHER INFORMATION CONTACT: Eric F. Stein, Senior Agency Official for Privacy; U.S. Department of State; Office of Global Information Services, A/GIS; Room 4534, 2201 C St. NW, Washington, DC 20520 or by calling on (202) 485–2051.

SUPPLEMENTARY INFORMATION: Email Archive Management Records, State–01 must be rescinded because the characteristics of the eRecords Archive system, which State–01 covers, do not render it a system of records within the meaning of 5 U.S.C. 552a. The millions of emails, diplomatic cables, and other files that the system ingests are not “records” as defined by § 552a(a)(4), as they are not records “about” the individuals incidentally mentioned in the files. eRecords is not a “system of records” as defined by section 552a(a)(5) because it (1) does not index files by personal identifier and (2) is not used to retrieve data by using a personal identifier.

Pursuant to 5 U.S.C. 552a (j)(2), records in State–01 were exempted from subsections (c)(3) and (4), (d), (e)(1), (2), (3), and (e)(4)(G), (H), and (I), and (f) of the Privacy Act. Pursuant to 5 U.S.C. 552a (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7), records in State–01 were exempted from subsections (c)(3), (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), (f)(1), (f)(2), (f)(3), (f)(4), and (f)(5). This rulemaking amends 22 CFR 171.26 by removing STATE–01 from the lists of exemptions.

Regulatory Analysis

This rulemaking is published as a final rule with immediate effect due to the good cause exemption of the Administrative Procedure Act, 5 U.S.C.

553(b)(3)(B) and 553(d). The Department finds that public comment on this rulemaking would be unnecessary.

List of Subjects in 22 CFR Part 171

Privacy.

For the reasons stated in the preamble, 22 CFR part 171 is amended as follows:

PART 171—PUBLIC ACCESS TO INFORMATION

■ 1. The authority citation for part 171 is revised to read as follows:

Authority: 22 U.S.C. 2651a; 5 U.S.C. 552, 552a; 5 U.S.C. Ch. 131; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; 5 CFR part 2634.

■ 2. Section 171.26 is amended by revising paragraphs (a)(2)(iii) and (b)(1) through (7) to read as follows:

§ 171.26 Exemptions.

* * * * *

(a) * * *

(2) * * *

(iii) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal

laws from arrest or indictment through release from supervision. The reason for invoking these exemptions is to ensure effective criminal law enforcement processes. Records maintained by the Department in the following systems of records are exempt from all of the provisions of the PA except paragraphs (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (e)(7), (e)(9), (e)(10), and (e)(11), and (i), to the extent to which they meet the criteria of section (j)(2) of 5 U.S.C. 552a. The names of the systems correspond to those published in the **Federal Register** by the Department.

TABLE 1 TO PARAGRAPH (a)(2)(iii)

Title	Number
Information Access Program Records	STATE-35.
Office of Inspector General Investigation Management System	STATE-53.
Risk Analysis and Management	STATE-78.
Security Records	STATE-36.

(b) * * *
(1) *Exempt under 5 U.S.C. 552a(k)(1).*
Records contained within the following

systems of records are exempt under this section to the extent that they are

subject to the provisions of 5 U.S.C. 552(b)(1).

TABLE 2 TO PARAGRAPH (b)(1)

Title	Number
Board of Appellate Review Records	STATE-02.
Congressional Correspondence	STATE-43.
Congressional Travel Records	STATE-44.
Coordinator for the Combating of Terrorism Records	STATE-06.
External Research Records	STATE-10.
Extradition Records	STATE-11.
Family Advocacy Case Records	STATE-75.
Foreign Assistance Inspection Records	STATE-48.
Human Resources Records	STATE-31.
Information Access Programs Records	STATE-35.
Intelligence and Research Records	STATE-15.
International Organizations Records	STATE-17.
Law of the Sea Records	STATE-19.
Legal Case Management Records	STATE-21.
Munitions Control Records	STATE-42.
Office of Inspector General Investigation Management System	STATE-53.
Overseas Citizens Services Records	STATE-05.
Passport Records	STATE-26.
Personality Cross-Reference Index to the Secretariat Automated Data Index	STATE-28.
Personality Index to the Central Foreign Policy Records	STATE-29.
Personnel Payroll Records	STATE-30.
Records of Domestic Accounts Receivable	STATE-23.
Records of the Office of the Assistant Legal Adviser for International Claims and Investment Disputes	STATE-54.
Records of the Office of White House Liaison	STATE-34.
Refugee Records	STATE-59.
Risk Analysis and Management Records	STATE-78.
Rover Records	STATE-41.
Security Records	STATE-36.
Visa Records	STATE-39.

(2) *Exempt under 5 U.S.C. 552a(k)(2).*
Records contained within the following systems of records are exempt under

this section to the extent that they consist of investigatory material compiled for law enforcement purposes,

subject to the limitations set forth in 5 U.S.C. 552a(k)(2).

TABLE 3 TO PARAGRAPH (b)(2)

Title	Number
Board of Appellate Review Records	STATE-02.
Coordinator for the Combating of Terrorism Records	STATE-06.
Extradition Records	STATE-11.
Family Advocacy Case Records	STATE-75.
Foreign Assistance Inspection Records	STATE-48.
Garnishment of Wages Records	STATE-61.
Information Access Program Records	STATE-35.
Intelligence and Research Records	STATE-15.
Munitions Control Records	STATE-42.
Office of Foreign Missions Records	STATE-81.
Office of Inspector General Investigation Management System	STATE-53.
Overseas Citizens Services Records	STATE-05.
Passport Records	STATE-26.
Personality Cross-Reference Index to the Secretariat Automated Data Index	STATE-28.
Personality Index to the Central Foreign Policy Records	STATE-29.
Risk Analysis and Management Records	STATE-78.
Security Records	STATE-36.
Visa Records	STATE-39.

(3) *Exempt under 5 U.S.C. 552a(k)(3).*
Records contained within the following
systems of records are exempt under

this section to the extent that they are
maintained in connection with

providing protective services pursuant
to 18 U.S.C. 3056.

TABLE 4 TO PARAGRAPH (b)(3)

Title	Number
Extradition Records	STATE-11.
Information Access Programs Records	STATE-35.
Intelligence and Research Records	STATE-15.
Overseas Citizens Services Records	STATE-05.
Passport Records	STATE-26.
Personality Cross-Reference Index to the Secretariat Automated Data Index	STATE-28.
Personality Index to the Central Foreign Policy Records	STATE-29.
Security Records	STATE-36.
Visa Records	STATE-39.

(4) *Exempt under 5 U.S.C. 552a(k)(4).*
Records contained within the following

systems of records are exempt under
this section to the extent that they are

required by statute to be maintained and
are used solely as statistical records.

TABLE 5 TO PARAGRAPH (b)(4)

Title	Number
Foreign Service Institute Records	STATE-14.
Human Resources Records	STATE-31.
Information Access Programs Records	STATE-35.
Overseas Citizens Services Records	STATE-05.
Personnel Payroll Records	STATE-30.
Security Records	STATE-36.

(5) *Exempt under 5 U.S.C. 552a(k)(5).*
Records contained within the following
systems of records are exempt under
this section to the extent that they
consist of investigatory material

compiled solely for the purpose of
determining suitability, eligibility, or
qualifications for Federal civilian
employment, military service, Federal
contracts, or access to classified

information, but only to the extent that
disclosure of such material would reveal
the identity of a confidential informant.

TABLE 6 TO PARAGRAPH (b)(5)

Title	Number
Foreign Assistance Inspection Records	STATE-48.
Foreign Service Grievance Board Records	STATE-13.
Human Resources Records	STATE-31.
Information Access Programs Records	STATE-35.

TABLE 6 TO PARAGRAPH (b)(5)—Continued

Title	Number
Legal Adviser Attorney Employment Application Records	STATE–20.
Office of Inspector General Investigation Management System	STATE–53.
Overseas Citizens Services Records	STATE–25.
Personality Cross-Reference Index to the Secretariat Automated Data Index	STATE–28.
Records Maintained by the Office of Civil Rights	STATE–09.
Records of the Office of White House Liaison	STATE–34.
Risk Analysis and Management Records	STATE–78.
Rover Records	STATE–41.
Security Records	STATE–36.
Senior Personnel Appointments Records	STATE–47.

(6) *Exempt under 5 U.S.C. 552a(k)(6).*
Records contained within the following systems of records are exempt under this section to the extent that they

consist of testing or examination material used solely to determine individual qualifications for appointment or promotion in the

Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process.

TABLE 7 TO PARAGRAPH (b)(6)

Title	Number
Foreign Service Institute Records	STATE–14.
Human Resources Records	STATE–31.
Information Access Programs Records	STATE–35.
Records Maintained by the Office of Civil Rights	STATE–09.
Security Records	STATE–36.

(7) *Exempt under 5 U.S.C. 552a(k)(7).*
Records contained within the following systems of records are exempt under

this section to the extent that they consist of evaluation material used to determine potential for promotion in the

armed services, but only to the extent that such disclosure would reveal the identity of a confidential informant.

TABLE 8 TO PARAGRAPH (b)(7)

Title	Number
Human Resources Records	STATE–31.
Information Access Programs Records	STATE–35.
Overseas Citizens Services Records	STATE–25.
Personality Cross-Reference Index to the Secretariat Automated Data Index	STATE–28.
Personality Index to the Central Foreign Policy Records	STATE–29.
Security Records	STATE–36.

Eric F. Stein,

Deputy Assistant Secretary, Global Information Services (A/GIS), Department of State.

[FR Doc. 2023–18143 Filed 8–24–23; 8:45 am]

BILLING CODE 4710–AD–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN 3142–AA12

Representation Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule; stay of effective date.

SUMMARY: On March 10, 2023, the National Labor Relations Board (Board) stayed two provisions of its 2019 final

rule (“2019 Final Rule”) amending its representation case procedures. The two provisions, which have never been in effect, were stayed until September 10, 2023 to account for new court decisions and because the Board was considering whether to revise or rescind the 2019 Final Rule, including potential revisions to the two provisions. In a rule that published in this edition of the **Federal Register**, the Board rescinds those provisions, among other changes. In light the new rule, and to ensure the two provisions do not go into effect for only a short period of time, the September 10, 2023 stay of the two provisions is extended to December 26, 2023, the date on which the rule repealing the two provisions is effective.

DATES: As of August 25, 2023, the amendments to 29 CFR 102.64(a) and 29 CFR 102.67(b) in the final rule that

published at 84 FR 69524, on December 18, 2019, and delayed at 85 FR 17500 (March 30, 2020) and 88 FR 14913 (March 10, 2023), are stayed from September 10, 2023, until December 26, 2023.

FOR FURTHER INFORMATION CONTACT:

Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half St. SE, Washington, DC 20570–0001, (202) 273–2940 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: On December 18, 2019, the Board published the 2019 Final Rule amending various aspects of its representation case procedures. *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019). The Board published the 2019 Final Rule as “a procedural rule which is exempt from notice and public

comment . . . as a rule of ‘agency organization, procedure, or practice.’” Id. at 69587. On March 30, 2020, the Board delayed the effective date of the 2019 Final Rule to May 31, 2020. *Representation Case Procedures*, 85 FR 17500 (Mar. 30, 2020).

On May 30, 2020, the United States District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20–cv–0675, vacating five provisions of the 2019 Final Rule and enjoining their implementation. 466 F. Supp. 3d 68 (D.D.C. 2020). The District Court concluded that each of the five provisions was substantive, not procedural, in nature, and that the Board therefore violated the Administrative Procedure Act by failing to use notice and comment rulemaking. Id. at 92.

On January 17, 2023, the United States Court of Appeals for the District of Columbia Circuit issued a decision and order reversing the District Court as to two of the five provisions, agreeing with the Board that those provisions were procedural in nature and not subject to notice and comment rulemaking. *AFL-CIO v. NLRB*, 57 F. 4th 1023, 1043–1046 (D.C. Cir. 2023). The two provisions are: (1) an amendment to 29 CFR 102.64(a) allowing the parties to litigate disputes over unit scope and voter eligibility prior to the election;¹ and (2) an amendment to 29 CFR 102.67(b) instructing Regional Directors not to schedule elections before the 20th business day after the date of the direction of election.² The D.C. Circuit remanded the case to the District Court to consider two counts in the complaint that challenge those two provisions and that remain viable in light of its decision.

Due to the District Court’s injunction, these two provisions had never taken effect. Accordingly, before the D.C. Circuit’s mandate issued on March 13, 2023 and the District Court’s injunction was lifted, the Board changed the effective date of the two provisions from the original May 31, 2020 effective date to September 10, 2023, approximately six months from the D.C. Circuit’s mandate. *Representation Case Procedures*, 88 FR 14913 (Mar. 10, 2023). The Board determined that a delayed effective date was necessary and appropriate, in part, because it was considering whether to revise or repeal the 2019 Final Rule, including potential revisions to the two provisions. Id.

In a final rule published in this issue of the **Federal Register**, the Board has decided to repeal those two provisions,

as well as other provisions in the 2019 Final Rule. In light of today’s rule, the Board has decided to stay the effective date of the two provisions from September 10, 2023 to December 26, 2023, the effective date of the rule repealing the two provisions. A further stay of these provisions will avoid the possible waste of administrative resources and public uncertainty if the provisions were to go into effect only for a short period of time before their repeal. Because the two provisions have never been in effect, the amendment to their effective date merely extends the status quo.

This change in effective date is published as a final rule. The Board considers this rule to be a procedural rule that is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(A), because it concerns a rule of “agency organization, procedure, or practice.”

Dissenting Opinion of Member Kaplan

Today, my colleagues once again stay the implementation of the unit-scope-and-eligibility and 20-days rules, both of which were part of the 2019 Final Rule. They do so because, in a companion final rule issued today, they have decided to repeal these two provisions, along with other provisions of the 2019 Final Rule. I disagree with my colleagues’ decision to rescind these two provisions and with their concomitant decision to stay implementation for the reasons stated in my dissent to their earlier stay, *Representation Case Procedures*, 88 FR 14913, 14914–14916 (March 10, 2023), and my dissent to the companion final rule issued today.

Dated: August 18, 2023.

Roxanne L. Rothschild,
Executive Secretary.

[FR Doc. 2023–18130 Filed 8–24–23; 8:45 am]

BILLING CODE 7545–01–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN 3142–AA18

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Direct final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act, which protects the exercise by workers of full freedom of association, self-

organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. While retaining the essentials of existing representation case procedures, this rule substantially rescinds the amendments made by a rule the Board promulgated in 2019 (which has been the subject of ongoing litigation) and thereby substantially returns representation case procedures to those that existed following the Board’s promulgation of a rule concerning representation case procedures in 2014 (which was uniformly upheld by the federal courts). By doing so, this rule effectuates what the Board deems to be appropriate policy choices that enhance the fair, efficient, and expeditious resolution of representation cases.

DATES: This rule is effective December 26, 2023.

FOR FURTHER INFORMATION CONTACT:

Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board (the Board) administers the National Labor Relations Act (the Act) which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and employers are unable to agree whether employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board the authority to resolve the question of representation. The Supreme Court has recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940); see *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 37 (1942).

¹ 84 FR at 69593.

² 84 FR at 69595.

Representation case procedures are set forth in the Act, Board regulations, and Board case law.¹ The Board's General Counsel has also prepared a non-binding Casehandling Manual describing representation case procedures in detail.²

Section 9 of the Act, 29 U.S.C. 159, itself sets forth the basic steps for resolving a question of representation. They are as follows. First, a petition is filed by an employee, a labor organization, or an employer. Second, the Board investigates the petition and, if there is reasonable cause, an appropriate hearing is held to determine whether a question of representation exists, unless the parties agree that an election should be conducted and agree concerning election details. Hearing officers are authorized to conduct pre-election hearings but may not make recommendations as to the result. Third, if there is a question of representation, an election by secret ballot is conducted in an appropriate unit. Fourth, the results of the election are certified.

The Act also permits the Board to delegate its authority to the regional directors who lead the Board's regional offices across the country and provides that, upon request, the Board may review any action of a regional director but that such requests do not stay regional proceedings unless specifically ordered by the Board. 29 U.S.C. 153(b).

Underlying these basic provisions is the essential animating principle that representation cases should be resolved quickly and fairly. As the Supreme Court has recognized, the Act secures a "democratic framework" in which "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *A.J. Tower Co.*, 329 U.S. at 331. Thus, the Board, the regional directors, and the General Counsel³ have sought to achieve timely, efficient, fair, accurate, uniform, and transparent resolution of representation cases.

To further these goals, in 2014 the Board issued a final rule that, while retaining the essentials of then-existing representation case procedures, implemented amendments that removed unnecessary barriers to the fair and expeditious resolution of representation

cases.⁴ The 2014 rule codified best practices, simplified representation case procedures, made those procedures more transparent and uniform across regions, and modernized those procedures in view of changing technology.⁵

In short, the 2014 rule was intended, in significant part, to help the Board better achieve its statutory duty to accurately, efficiently, and speedily resolve questions of representation.⁶ The evidence is that the 2014 rule achieved its goals. The 2014 rule reduced the median time from petition to election by more than three weeks in cases involving a pre-election hearing and by two weeks in cases involving an election agreement.⁷ The Board also achieved an improvement in the percentages of representation cases that it closed within 100 days of a petition's filing.⁸ Those improvements in processing representation cases were obtained at the same time that: parties were permitted to electronically file and serve petitions and other documents, thereby saving time and money, and affording non-filing parties the earliest possible notice; Board procedures were made more transparent and more meaningful information was guaranteed to be disseminated at earlier stages of proceedings; employees' Section 7 rights were afforded more equal treatment through the establishment of uniform time frames across regional offices, hearing dates became more

predictable, and litigation was made more uniform; parties and the Board were more often spared the expense and inefficiency of litigating and deciding issues that are unnecessary to determine whether a question of representation exists and which may be mooted by election results; nonemployer parties were able to communicate about election issues with voters using modern means of communication such as email, texts, and cell phones, and were less likely to challenge voters out of ignorance; notices of election were made more informative and more often electronically disseminated; and employees voting subject to challenge were more easily identified, and the chances were lessened of their ballots being commingled.

The 2014 rule thus did a successful job of furthering the Board's statutory mandate. And it resulted from a careful and comprehensive notice and comment process. Specifically, the Board, over the course of three-and-a-half years, considered tens of thousands of public comments generated over two separate comment periods totaling 141 days, including four days of hearings with live questioning by Board Members.⁹ By means of that canvassing and consideration of the views and perspectives of all stakeholders, the Board was able to make important improvements to its representation case procedures.

The 2014 rule was also subjected to legal challenges, which included arguments that it went beyond the Board's statutory authority and was inconsistent with the Act, the Constitution, and/or the Administrative Procedure Act (APA). The courts uniformly rejected these claims and upheld the 2014 rule. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The "rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]"); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting claims that the 2014 rule contravenes either the Act or the Constitution or is arbitrary and capricious or an abuse of the Board's discretion); see also *RadNet Mgmt. v. NLRB*, 992 F.3d 1114, 1121–1123 (D.C. Cir. 2021) (rejecting a challenge to various 2014 rule provisions implicating, among other things, the scope of the pre-election hearing, the alleged restriction of opportunities for employer and employee pre-election speech, and the alleged arbitrary and capricious

⁴ See *Representation—Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

⁵ Id. at 74308, 74315.

⁶ Id. at 74316–74318.

⁷ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2012, 2013, and 2014—the last three years before the 2014 rule was in effect—the median number of days between the petition and the election in contested cases was 66, 59, and 59, respectively, whereas in fiscal years 2016, 2017, and 2018—the first three years after the 2014 rule was in effect—the median number of days between the petition and the election in contested cases was 35, 36, and 41, respectively. In fiscal years 2012, 2013, and 2014—the last three years before the 2014 rule was in effect—the median number of days between the petition and the election in cases with an election agreement was 37, 37, and 37, respectively, whereas in fiscal years 2016, 2017, and 2018—the first three years after the 2014 rule was in effect—the median number of days between the petition and the election in cases with an election agreement was 23, 22, and 23, respectively.

⁸ In the four full fiscal years that the 2014 rule was fully in effect, the percentage of representation cases fully resolved within 100 days of a petition's filing was 87.6%, 89.9%, 88.8%, and 90.7%. In the four full fiscal years that preceded the 2014 rule taking effect, the percentage of representation cases fully resolved within 100 days of a petition's filing was 88.1%, 87.4%, 84.5%, and 84.7%. See NLRB Performance and Accountability Reports, FYs 2013–2014, 2016–2019, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

⁹ See 79 FR at 74311.

¹ The Board's binding rules of procedure are found primarily in 29 CFR part 102, subpart D. Additional rules created by adjudication are found throughout the corpus of Board decisional law.

² NLRB Casehandling Manual (Part Two) Representation Proceedings (Sept. 2020).

³ The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

consideration of irrelevant factors—including speed—by the Board in implementing the 2014 rule; *UPS Ground Freight v. NLRB*, 921 F.3d 251, 255–257 (D.C. Cir. 2019) (rejecting a challenge to the application of various 2014 rule provisions including scheduling of the pre-election hearing, the timing of the employer's statement of position, and the pre-election deferral of the voting eligibility of two employees in disputed classifications). In sum, the 2014 rule furthered the Board's statutory mission and withstood legal challenge.

In 2017, about two-and-a-half years after the effective date of the 2014 rule, a newly composed Board majority issued a Request for Information (RFI) to evaluate whether the 2014 rule should be retained, retained with modifications, or rescinded.¹⁰ In issuing the RFI, the new Board majority noted only that the 2014 rule had “been in effect for more than 2 years,” that the Board's composition had changed, and that various applications of the rule had been litigated in Board cases.¹¹ The new Board majority did not refer to any facts, data, expertise, or experience suggesting a problem with the 2014 rule's implementation or functioning.

In 2019, the Board issued a final rule that substantially frustrated the 2014 rule's amendments that were responsible for the improvements in the Board's ability to fairly and expeditiously resolve questions of representation.¹² It did so without relying on any information received from the public in response to the 2017 RFI; indeed, the 2019 Board expressly disclaimed reliance on any of those responses.¹³ It also did so without notice and comment. In that 2019 rule, the Board consciously chose to add additional time to the representation case process.¹⁴ The 2019 rule imposed

delay between the filing of the petition and the pre-election hearing, between the opening of the pre-election hearing and issuance of a decision and direction of election, between the issuance of the decision and direction of election and the election, and between the election and certification of the results.¹⁵ Those choices were made despite the Supreme Court's observation that the Board is required to adopt and enforce rules to process representation cases “efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. Although the 2019 Board repeatedly stated that the 2019 rule would promote fairness, accuracy, transparency, uniformity, certainty, and finality,¹⁶ the 2019 Board did not cite data or any other tangible evidence demonstrating that the 2014 rule impaired those interests or that the 2019 rule would promote them. The 2019 rule was, in short, premised on a series of abstract policy justifications.

After a notable decline in representation case processing times that followed the enactment of the 2014 rule, there has been an increase in case processing times following the enactment of the 2019 rule. In fiscal years 2018 and 2019—the last full two years that the 2014 rule was in effect—88.8% and 90.7%, respectively, of representation cases were resolved within 100 days.¹⁷ In fiscal years 2021 and 2022—the first full two years that the 2019 rule was in effect—82.3% and 85.4%, respectively, of representation cases were resolved within 100 days.¹⁸ Some of that recent delay is likely attributable to the effects of the COVID-19 pandemic, which, for instance, necessitated increased reliance on mail ballot, as opposed to in-person, voting. Even so, given the 2019 Board's admission that its rule would lengthen the representation case process, we are

confident that any pandemic-related delay in the processing of representation cases has been compounded by the effects of the 2019 rule. Moreover, the delay would have been even greater had certain of its provisions not been enjoined.

The 2019 rule was challenged in court. The district court vacated five of its provisions before they could take effect. Those provisions had (1) extended the time for an employer to furnish the voter list following issuance of a decision and direction of an election or the approval of an election agreement;¹⁹ (2) expanded the scope of the pre-election hearing and provided that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit normally will be litigated at the pre-election hearing and resolved by the Regional Director before the election; (3) delayed certification of election results until any request for review has been decided by the Board or until the deadline for filing such a request has passed; (4) imposed restrictions regarding whom parties can choose as their election observers; and (5) imposed a mandatory delay of at least 20 business days between the issuance of a direction of election and the election itself. The district court found that promulgation of those specific provisions violated the APA because the Board issued them without notice and comment.²⁰ The district court rejected the challenger's claim that the 2019 rule was arbitrary and capricious when considered as a whole.²¹ The district court also rejected the challenger's claims that a provision of the 2019 rule that imposed an automatic impoundment of ballots under certain circumstances when a request for review is pending with the

¹⁰ *Representation-Case Procedures*, 82 FR 58783, 58784 (Dec. 14, 2017).

¹¹ *Id.*

¹² See generally *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019).

¹³ *Id.* at 69528 fn.12 (“None of the procedural changes . . . are premised on the responses to the Request for Information; indeed, we would make each of these changes irrespective of the existence of the Request for Information.”).

¹⁴ The Board at the time acknowledged as much. See, e.g., *id.* at 69528 (“For contested cases, several provisions of the final rule will, both individually and taken together, result in a lengthening of the median time from the filing of a petition to the conduct of an election.”). Moreover, when the United States Court of Appeals for the District of Columbia Circuit reviewed the 2019 rule, see *infra* fns.23–26 and corresponding text, that court recognized the same conscious decision to add delay that we have recognized: “In the extensive preamble to the 2019 Rule . . . the Board repeatedly acknowledges that its changes will result in longer waits before elections relative to the 2014

Rule.” *AFL-CIO v. NLRB*, 57 F.4th 1023, 1047 (D.C. Cir. 2023).

¹⁵ As noted below, some of the 2019 amendments imposing delay were enjoined in subsequent litigation.

¹⁶ See, e.g., 84 FR at 69530 (“In sum, the final rules will likely result in some lengthening of the pre-election period, but the sacrifice of some speed will advance fairness, accuracy, transparency, uniformity, efficiency, and finality. This is, in our considered judgment, a more than worthwhile tradeoff.”).

¹⁷ NLRB Performance and Accountability Report, FY 2018, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>; NLRB Performance and Accountability Report, FY 2019, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

¹⁸ NLRB Performance and Accountability Report, FY 2021, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>. Information produced from searches in the Board's NxGen case processing software shows 85.4% of representation cases were resolved within 100 days in fiscal year 2022.

¹⁹ Following issuance of a decision and direction of election or approval of an election agreement, the employer is required to furnish the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters, and, in separate sections of that list, the same information for those individuals who will be permitted to vote subject to challenge. The 2014 rule granted the employer 2 business days to file and serve the list; the 2019 rule extended the period to 5 business days. Compare 29 CFR 102.62(d), 102.67(l) (Dec. 15, 2014), with 29 CFR 102.62(d), 102.67(l) (Dec. 18, 2019).

²⁰ *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68, 87–100 (D.D.C. June 7, 2020) (severing, deeming invalid, and vacating the five provisions); see *AFL-CIO v. NLRB*, 471 F. Supp. 3d 228, 237–246 (D.D.C. July 1, 2020) (rejecting additional challenges to the 2019 rule).

²¹ 471 F. Supp. 3d at 240–242.

Board was arbitrary and capricious and contrary to law.²²

The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling in part and reversed it in part. Specifically, it affirmed the district court's vacatur of the provisions regarding the extended time for furnishing the voter list, the delayed certification of election results, and the restrictions on choice of election observers.²³ It also affirmed the district court's conclusion that the 2019 rule was not arbitrary and capricious when considered as a whole.²⁴ But it reversed the district court's invalidation of the provisions regarding the expansion of pre-election litigation and the imposition of a mandatory delay between the direction of election and the election itself.²⁵ In addition, it reversed the district court and vacated the impoundment provision on the ground that automatic impoundment is contrary to Section 3(b) of the Act.²⁶

In a final rule issued on March 10, 2023, the Board, in compliance with the D.C. Circuit's decision, rescinded the four provisions of the 2019 rule that the court had vacated.²⁷ In another final rule issued on March 10, 2023, the Board extended to September 10, 2023 the effective date for the two provisions as to which the D.C. Circuit reversed the district court's vacatur.²⁸ The Board did so in view of the D.C. Circuit's remand of certain remaining challenges to those provisions to the district court and also to facilitate its reconsideration of those provisions.²⁹

Having now carefully reconsidered the two provisions yet to take effect as well as the other provisions in effect from the 2019 rule, the Board has decided to substantially rescind those provisions in order to return the Board's representation case procedures substantially to those in effect following the implementation of the 2014 rule.³⁰ The Board has determined that it can do so by direct final rule because the provisions that we address concern

agency procedure and therefore are exempt from notice and comment.³¹ Moreover, although notice and comment is often preferable to direct rulemaking even when it is not strictly required, in this instance we are merely rescinding provisions from one direct rulemaking (the 2019 rule) to return to provisions that resulted from notice and comment (the 2014 rule). Further, this rule, unlike the 2019 rule, is grounded in analysis of the Board's own data concerning representation case procedures.³² This rule, by substantially returning the Board's representation case procedures to those resulting from the 2014 rule, will enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.

II. List of Amendments

This list provides a concise statement of the ways in which this final rule changes or codifies current practice and the general reasoning in support of those steps. It is not "an elaborate analysis of [the] rules or of the detailed

³¹ See 5 U.S.C. 553(b)(A).

³² Much of the statistical analysis is based on data produced from searches in the Board's NxGen case processing database. For provisions of the 2019 rule that took effect, the analysis often involves a comparison of the last two full fiscal years of data before the 2019 rule's implementation with the first two fiscal years of data after the 2019 rule's implementation (i.e., a comparison of data from fiscal years 2018 and 2019 with data from fiscal years 2021 and 2022). This is so because the 2019 rule was implemented in the middle of fiscal year 2020, making it difficult to untangle pre-2019 rule data from post-2019 rule data for that year and so we have opted not to assess data from that year. Additionally, because there are only two full fiscal years of data following implementation of the 2019 rule, we deemed it most rational to compare the data from those two years to the data from the two fiscal years immediately preceding implementation of the 2019 rule.

For provisions of the 2019 rule that have not yet taken effect because of the district court's order and the Board's subsequent decision to extend the effective date, there is obviously no relevant data following implementation of the 2019 rule. Accordingly, to assess the likely impact that letting those provisions take effect would have, the most relevant data for the analysis is that from the period preceding implementation of the 2014 rule as compared to the data from the period following implementation of the 2014 rule. That is because allowing those provisions from the 2019 to take effect would return the Board's procedures essentially to the pre-2014 status quo. And because the Board's NxGen case processing database does not include full fiscal year data for years more distant than 2013, the pre-2014 rule data is mostly limited to fiscal years 2013 and 2014. As there is only complete data for those two years prior to the implementation of the 2014 rule, we deemed it most rational to compare the data from those two years to the data from the two fiscal years (2016 and 2017) immediately following implementation of the 2014 rule. Also, because the 2014 rule was implemented in the middle of fiscal year 2015, making it difficult to untangle pre-2014 rule data from post-2014 rule data for that year, we have not included data from that year in the analysis.

considerations upon which they are based"; rather, it "is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules."³³ As this list shows, the amendments provide targeted solutions to discrete problems. All of the matters addressed by each of the amendments listed are discussed in greater detail below. Moreover, in accordance with the discrete character of these matters, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made. For this reason, the amendments are severable.

1. The pre-election hearing will generally be scheduled to open 8 calendar days from service of the Notice of Hearing. Under the 2019 rule, the pre-election hearing would generally be scheduled to open 14 business days from service of the Notice of Hearing. Restoring the 8 calendar days timeline established by the 2014 rule (which represented an effort to codify and make uniform preexisting best practices) will help the Board to more expeditiously resolve questions of representation while still allowing adequate time for a nonpetitioning party to prepare a Statement of Position and otherwise prepare and make arrangements before the pre-election hearing.

2. Regional directors have discretion to postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional directors could postpone a pre-election hearing for an unlimited amount of time upon request of a party showing good cause. Restoring the extension provisions established by the 2014 rule ensures that the pre-election hearing will not be unnecessarily delayed.

3. A nonpetitioning party's Statement of Position responding to the petition generally will be due to be filed by noon the business day before the opening of the pre-election hearing. Because the pre-election hearing will normally open 8 calendar days after service of the Notice of Hearing, the Statement of Position is normally due 7 calendar days after service of the Notice of Hearing. Under the 2019 rule, a nonpetitioning party's Statement of Position was due to be filed 8 business days (or 10 calendar days) after service

³³ Administrative Procedure Act, Legislative History, 79th Congress, 1944–46, Sen. Doc. No. 248, S. Rep. No. 752, at 225 (1945).

²² Id. at 242–245.

²³ *AFL-CIO*, 57 F.4th at 1027, 1035–1043.

²⁴ Id. at 1046–1048.

²⁵ Id. at 1035, 1043–1046.

²⁶ Id. at 1048–1050.

²⁷ *Representation Case Procedures*, 88 FR 14908, 14908–14909 (Mar. 10, 2023).

²⁸ *Representation Case Procedures*, 88 FR 14913, 14913–14914 (Mar. 10, 2023).

²⁹ Id. at 14914.

³⁰ To avoid the possible waste of administrative resources and public uncertainty if the two provisions that have yet to take effect were to go into effect for only a short period of time before their repeal, in a separate final rule issued in this issue of the *Federal Register*, the Board has stayed the effective date of those two provisions from September 10, 2023 to December 26, 2023, the date on which the instant rule is effective.

of the Notice of Hearing. Restoring the timeline for production of the Statement of Position to the timeline established by the 2014 rule is consistent with the restored shorter timeline between service of the Notice of Hearing and opening of the pre-election hearing, and preserves adequate time for a nonpetitioning party to prepare a Statement of Position.

4. Regional directors have discretion to postpone the due date for the filing of a Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional directors could postpone the due date for an unlimited amount of time upon request of a party showing good cause. Restoring the extension provisions established by the 2014 rule ensures that the Statement of Position (and the pre-election hearing) will not be unnecessarily delayed.

5. A petitioner shall respond orally to the nonpetitioning party's Statement of Position at the start of the pre-election hearing. Under the 2019 rule, a petitioner was required to file and serve a responsive written Statement of Position 3 business days prior to the pre-election hearing. Restoring the 2014 rule's requirement that the petitioner respond orally at the hearing—rather than in writing 3 business days in advance of the hearing—to the nonpetitioning party's Statement of Position eliminates an unnecessary barrier to the fair and expeditious resolution of representation cases and preserves for the petitioner an adequate opportunity to respond to the nonpetitioning party's Statement of Position, thus continuing to facilitate orderly litigation.

6. An employer has 2 business days after service of the Notice of Hearing to post the Notice of Petition for Election in conspicuous places in the workplace and to electronically distribute it to employees if the employer customarily communicates with its employees electronically. Under the 2019 rule, an employer had 5 business days for the requisite posting and electronic distribution. The restored shorter time frame ensures that the important information contained in the notice will be disseminated earlier to employees and employers alike, while preserving adequate time for employers to achieve posting and distribution.

7. The purpose of the pre-election hearing is to determine whether a question of representation exists. Accordingly, disputes concerning individuals' eligibility to vote or

inclusion in an appropriate unit ordinarily do not need to be litigated or resolved prior to an election, and regional directors have authority to exclude evidence that is not relevant to determining whether there is a question of representation and thereby avoid unnecessary litigation on collateral issues that can result in substantial waste of resources. Under the 2019 rule, individual eligibility and inclusion issues were “normally” to be litigated at the pre-election hearing and resolved by the regional director prior to the election. Restoring the 2014 rule language more efficiently avoids litigating and resolving issues that are often mooted by the election results or amicably resolved following an election and permits fairer and more expeditious resolution of representation cases.

8. Parties may file post-hearing briefs with the regional director only with the regional director's special permission (following *pre*-election hearings) or hearing officer only with the officer's special permission (following *post*-election hearings) and within the time and addressing only the subjects permitted by the regional director or hearing officer, respectively. Under the 2019 rule, parties were entitled to file briefs up to 5 business days following the close of a pre- or post-election hearing, with an extension of an additional 10 business days available upon a showing of good cause. Restoring only permissive post-hearing briefing permits regional directors and hearing officers adequate flexibility to request briefing in the rare complex case and eliminates redundant and repetitive briefing, and consequent delay, in the more commonplace straightforward cases.

9. Regional directors ordinarily should specify the election details—the type, date(s), time(s), and location(s) of the election and the eligibility period—in the decision and direction of election and should ordinarily simultaneously transmit the Notice of Election with the decision and direction of election. The parties will have already taken positions with respect to the election details in writing prior to the hearing and on the record at the hearing. Under the 2019 rule, regional directors were allowed to convey election details in the decision and direction of election (and to simultaneously transmit the Notice of Election with the decision and direction of election), but emphasis was placed on their discretion to convey them in a later-issued Notice of Election. By leaving no doubt that the ordinary course is to convey election details in the decision and direction of election and to simultaneously transmit the

Notice of Election, the restored standard eliminates redundant and wasteful post-decision consultation regarding election details and, in turn, furthers the expeditious resolution of representation cases, while leaving regional directors free to engage in additional consultation where necessary.

10. Regional directors shall schedule elections for “the earliest date practicable” after issuance of a decision and direction of election. While the 2019 rule contained the same language, it also imposed a 20-business day waiting period between the decision and direction of election and the election that the 2014 rule had eliminated. The elimination of the mandatory waiting period language will reduce delay and eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation.

III. General Matters

Before explaining the specific provisions of the final rule, we address the general issues of the Board's rulemaking authority; the shortcomings of the 2019 rule; and the desirability of this final rule to substantially rescind the 2019 rule and reinstitute the 2014 rule.

A. The Board's Authority To Promulgate Representation Case Procedures

Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the Act, 29 U.S.C. 156, provides that the Board “shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act . . . such rules and regulations as may be necessary to carry out the provisions of this Act.” Specifically, Section 9(c), 29 U.S.C. 159(c)(1), contemplates rules concerning representation case procedures, stating that elections will be held “in accordance with such regulations as may be prescribed by the Board.”

The Supreme Court unanimously held in *American Hospital Association v. NLRB*, 499 U.S. 606, 609–610 (1991), that the Act authorizes the Board to adopt rules governing representation case proceedings. The Board's rules are entitled to judicial deference. *A.J. Tower*, 329 U.S. at 330. Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 fn.21 (1974); *AFL v. NLRB*, 308 U.S. 401, 409 (1940). “The control of the election

proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *Waterman Steamship Corp.*, 309 U.S. at 226; see also *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

In *A.J. Tower*, 329 U.S. at 330, the Supreme Court recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” The Act enshrines a democratic framework for employee choice and, within that framework, charges the Board to “promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *Id.* at 331. As the Eleventh Circuit stated:

We draw two lessons from *A.J. Tower*: (1) The Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and, (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower*, the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainteed Corp. v. NLRB, 714 F.2d 1042, 1053 (11th Cir. 1983). As explained above and below, the final rule is based upon just such concerns. The Act delegated to the Board the authority to craft its procedures in a manner that, in the Board’s expert judgment, will best serve the purposes of the Act. Here, the Board is acting pursuant to its clear regulatory authority to change its own representation case procedures in a manner that will better serve the purposes of the Act.

B. The 2019 Rule and the Desirability of This Final Rule

The 2019 rule was promulgated without notice and comment, in contrast to the 2014 rule. We believe that the process that culminated in the 2014 rule was superior, even if, aside from the provisions vacated by the D.C. Circuit, notice and comment was not legally required. In any case, in our policy judgment, the 2014 rule was superior to the 2019 rule. The shortcomings that mark the 2019 rule and the improvements made by reverting to the 2014 rule are largely addressed in the provision-specific discussion below but are previewed here.

1. The 2019 Board’s Process

As explained, the Board’s 2014 rule, to which we return in this rulemaking, was the product of extensive notice and comment. The 2019 rule, which significantly altered the 2014 rule, was not. Even if notice and comment was not required by the APA for most provisions addressed in the 2014 and 2019 rules, it provided useful guidance in crafting of the 2014 rule. In our view, because the 2019 Board was contemplating substantially altering important representation case procedures that were the product of notice and comment, it may have been preferable if the Board had sought and relied on the input of relevant stakeholders, including workers, unions, employers, and legal practitioners, as the Board did in 2014.

The 2019 Board seemed to recognize the value of gathering the perspectives of stakeholders in at least some instances. Indeed, the same majority invited notice and comment in four other rulemaking proceedings.³⁴ And with respect to the 2014 rule specifically, in 2017—immediately after the Board’s composition had changed—the Board issued its RFI seeking public input as to whether it should retain, rescind, or change the 2014 rule. In issuing the RFI, the Board seemingly recognized the merit of inviting public input from the stakeholders whose perspectives were considered in the process that yielded the 2014 rule.³⁵ But when the responses to the RFI did not provide data, reliable evidence, or sound policy rationales to justify departure from the 2014 rule, the 2019 Board decided to expressly disclaim reliance on the responses to the RFI and proceed with implementing its own rule “without notice and comment.”³⁶

The 2019 Board also did not assess empirical data that the agency maintains. The 2019 Board conducted no analysis of more than four years of available agency data and records that provide insight into the impact of the 2014 rule, and it did not invoke its own experience administering the 2014 rule.

³⁴ See *Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave*, 85 FR 45553 (July 29, 2020); *Students Working in Connection With Their Studies*, 84 FR 49691 (Nov. 22, 2019); *Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 FR 39930 (Oct. 11, 2019); *The Standard for Determining Joint-Employer Status*, 83 FR 46681 (Sept. 14, 2018).

³⁵ However, the RFI was not the equivalent of notice and comment rulemaking.

³⁶ 84 FR at 69528 fn.12 (“[W]e are not treating the responses to the 2017 Request For Information as notice-and-comment rulemaking.”).

Instead, the 2019 Board simply asserted that it was making changes to promote “fairness, accuracy, transparency, uniformity, efficiency, certainty, and finality” even though there was no data—empirical, anecdotal, experiential, or otherwise—substantiating its conclusion that the 2014 rule impaired those interests or that its rule would promote them.

2. The 2019 Rule’s Impact and the Desirability of This Final Rule

Section 9 of the Act is animated by the principle that representation cases should be resolved quickly and fairly. As the Supreme Court has recognized, the Board “must” adopt policies and promulgate rules and regulations in order that “employees’ votes may be recorded accurately, efficiently and speedily.”³⁷ The Supreme Court noted, in discussing Section 9(d), that the policy in favor of speedy representation procedures “was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration,” and that Senator Taft stated that the Act should not “permit dilatory tactics in representation proceedings.”³⁸ In addition, the purpose of Congress in 1959 in permitting delegation of representation case proceedings to regional directors under Section 3(b) was to “‘speed the work of the Board.’”³⁹

There is no precedent for the deliberate decision of the 2019 Board to lengthen, rather than shorten, the representation case process. Even with certain of the 2019 rule’s delay-causing provisions enjoined by court order, the data tends to show that it still has caused substantial delay. For instance, in the last two full years that the 2014 rule was fully in effect, 88.8% and 90.7% of representation cases were resolved within 100 days,⁴⁰ whereas in the first two full years that the 2019 rule was in effect, only 82.3% and 85.4% of representation cases were resolved within 100 days.⁴¹ Similarly,

³⁷ *A.J. Tower*, 329 U.S. at 331.

³⁸ *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964). Because of the “exceptional need for expedition,” Congress exempted representation cases from the requirements of the APA. See Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945); see also 5 U.S.C. 554(a)(6).

³⁹ *Magnesium Casting Co.*, 401 U.S. at 141–142 (quoting legislative history).

⁴⁰ NLRB Performance and Accountability Report, FY 2018, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>; NLRB Performance and Accountability Report, FY 2019, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

⁴¹ NLRB Performance and Accountability Report, FY 2021, <https://www.nlr.gov/reports/agency-performance/performance-and-accountability>.

information produced from searches in the Board's NxGen case processing software show that in each of the last two full years that the 2014 rule was fully in effect there was a median of 23 days from the filing of the petition to the holding of the election; whereas in the first two full years that the 2019 rule was in effect, there was a median of 34 and 37 days from the filing of the petition to the holding of the election. Even if some increased delay was caused by the COVID-19 pandemic, we are confident that the 2019 rule's delay-causing provisions—which the 2019 Board acknowledged would cause delay—contributed to the increased delay.

The 2019 Board was willing to accept the delay that it knew its amendments would cause because it said those amendments would “advance fairness, accuracy, transparency, uniformity, efficiency, and finality,” which it characterized as a “worthwhile tradeoff.”⁴² But, as explained, the Board did not cite any evidence for its claims; instead, it just speculated that its amendments would advance those interests. Nor does there seem to be evidence that increased delay apparently attributable to the 2019 rule has been offset by meaningful improvements in furthering the interests cited by the Board. Rather, the evidence would seem to be to the contrary. For instance, if the representation case process were meaningfully more certain, final, fair, accurate, transparent, and uniform, then arguably a substantially smaller portion of representation cases should involve Board reversals of regional director decisions, post-election objections and challenges, and rerun elections. But that is not what has happened since the 2019 rule took effect. The portion of representation cases involving Board reversals of regional directors' decisions and directions of elections,⁴³ post-election

objections and determinative challenges,⁴⁴ and rerun elections⁴⁵ has remained largely stable. Those outcomes would seem to support the conclusion that representation cases are, at best, no more fair, accurate, transparent, uniform, certain, and final than they were under the 2014 rule.

The 2019 rule, by design, contemplated a slower representation case process, notwithstanding the Board's statutory mission to speedily and efficiently process representation cases. In the absence of any evidence that the 2019 rule has had, or might reasonably be expected to have, countervailing policy benefits that outweighed the clear potential for increased delay, and based on our determination that the policies of the Act are better served by the 2014 rule, the Board has decided to promulgate the instant rule that substantially rescinds the 2019 rule and reinstates the 2014 rule. Doing so will enhance the speed and efficiency with which the Board processes representation cases with, as noted in the previous paragraph, no discernible diminishment of fairness, accuracy, transparency, uniformity, and finality. The Board makes this change, “conscious” of its “change of course,” because “there are good reasons” for returning to the 2014 rule, and based on those reasons, we believe that that rule does a better job of advancing the purposes of the Act than the 2019 rule. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The provisions of the Board's representation case procedures that we address in this rule are all procedural as defined in 5 U.S.C. 553(b)(A) and so this

rule is exempt from notice and comment.⁴⁶ Moreover, the benefit of notice and comment is reduced under these circumstances because the Board is returning its representation case procedures essentially to those that applied immediately prior to the 2019 rule, and those pre-2019 final rule procedures were themselves the product of notice and comment rulemaking. The substantial delay, cost, and inefficiency that would result from another round of notice and comment is not sensible given that this rulemaking is grounded in the same fundamental perspectives and viewpoints gathered and considered in formulation of the 2014 rule to which the Board now substantially returns. Moreover, this rule, unlike the 2019 rule, is further grounded in analysis of the Board's own representation case processing data and experience that support a return in substantial part to the 2014 rule.⁴⁷ We see no compelling reason to take the 2019 rule—issued without notice and comment—as the starting point for a new notice and comment process instead of proceeding as we do here: returning to the 2014 rule.

IV. Explanation of Changes to Particular Sections

Part 102, Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Notice of Petition for Election; Statement of Position; Withdrawal of Notice of Hearing

A. Scheduling of Pre-Election Hearing

Unless the parties enter into an election agreement, the Board may not conduct an election without first holding a pre-election hearing to

performance/performance-and-accountability. Information produced from searches in the Board's NxGen case processing software shows 85.4% of representation cases were resolved within 100 days in fiscal year 2022.

⁴² 84 FR at 69530.

⁴³ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019, which are the last two full years the 2014 rule was in effect, there were 2 reversals of regional directors' decisions and directions of elections as compared to 2,574 total elections, amounting to a reversal in 0.07% of all elections. In fiscal years 2021 and 2022, which are the first two full years the 2019 rule was in effect, there were 5 reversals of regional directors' decisions and directions of election as compared to 2,838 total elections, amounting to a reversal in 0.18% of all elections. Accordingly, under both the 2014 rule and the 2019 rule, a regional director's decision and direction of election was reversed in about 0.1% to 0.2% of cases that have an election.

⁴⁴ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019, which are the last two full years the 2014 rule was in effect, there were 172 cases involving election objections or determinative challenges as compared to 2,574 total elections, amounting to election objections or determinative challenges in 6.68% of all elections. In fiscal years 2021 and 2022, which are the first two full years the 2019 rule was in effect, there were 177 cases involving election objections or determinative challenges as compared to 2,838 total elections, amounting to election objections or determinative challenges in 6.24% of all elections. Accordingly, under both the 2014 rule and the 2019 rule, objections or determinative challenges were filed in about 6.5% of cases that have an election.

⁴⁵ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019, which are the last two full years the 2014 rule was in effect, there were 59 cases with a rerun election, as compared to 2,574 total elections, amounting to rerun elections in 2.29% of all elections. In fiscal years 2021 and 2022, which are the first two full years the 2019 rule was in effect, there were 49 cases with a rerun election as compared to 2,838 total elections, amounting to rerun elections in 1.73% of all elections. Accordingly, under both the 2014 rule and the 2019 rule, there was a rerun election in about 2% of cases that have an election.

⁴⁶ See also *AFL-CIO*, 57 F.4th at 1034–1046.

⁴⁷ This rule does not rescind a small number of technical amendments made by the 2019 rule that are not inconsistent with the policy objectives of this rule. Those amendments included standardized formatting requirements for requests for review; explicit authorization for oppositions in response to requests for review; explicit authorization for replies in support of requests for review only upon special leave of the Board; prohibition of piecemeal requests for review; clarification of final disposition for the purposes of filing a request for review; incidental changes in terminology; and updates to internal cross-references in the Board's regulations. Those amendments also included conversion of all time periods in subpart D to business days; this rule largely retains that conversion, with the exception of the 8 calendar day timeline from the filing of the petition to the pre-election hearing discussed immediately below.

determine whether a question of representation exists. See 29 U.S.C. 159(c)(1), (4). Thus, the timing of the pre-election hearing affects the timing of the election. The longer it takes to open the pre-election hearing, the longer it takes to determine whether a question of representation exists, and, ultimately, the longer it takes to conduct the election.

The 2014 rule provided that a pre-election hearing would commence 8 calendar days from the date of the service of the Notice of Hearing, except in cases presenting unusually complex issues.⁴⁸ That timeline was consistent with *Croft Metals, Inc.*, 337 NLRB 688 (2002), where the Board had concluded that 5 business days' notice of pre-election hearings was sufficient.⁴⁹ It also codified best practices in some regions, where hearings were routinely scheduled to open in 7 days to 10 days.⁵⁰ The 2014 rule's hearing timeline helped to expeditiously resolve questions of representation, while allowing adequate time for a nonpetitioning party to prepare for the hearing and to file a Statement of Position.⁵¹

The 2019 rule, however, more than doubled the applicable time frame,

delaying the opening of the pre-election hearing from 8 calendar days to 14 business days from service of the Notice of Hearing.⁵² In our considered judgment, the reasons offered by the 2019 Board do not justify delaying the opening of the pre-election hearing, which necessarily delays resolution of the question of representation.

The 2019 Board provided no empirical basis for concluding that the 2014 rule time frame for the opening of the pre-election hearing needed changing. Rather, the 2019 Board principally asserted that revision of the timeline was "essentially dictated" by the other changes that the 2019 Board had voluntarily decided to make to the Statement of Position provisions of the 2014 rule.⁵³ But because those changes to the Statement of Position provisions are rescinded for the reasons explained in detail elsewhere,⁵⁴ the principal rationale for the extended hearing timeline no longer exists. Accordingly, this final rule reverts to the 8-calendar day time frame for the opening of the pre-election hearing to further expedite the resolution of questions concerning representation.⁵⁵

The 2019 Board's secondary rationales for extending the timeline are not compelling. The assertion that a longer timeline would allow parties to better deal with "preliminary arrangements," like retaining counsel, identifying and preparing witnesses, gathering information, and arranging any travel, and other "procedural obligations,"⁵⁶ was not grounded in evidence that parties were having trouble addressing these issues within 8 calendar days' notice of the opening of the pre-election hearing. Part of the reason the 2019 Board could not point

to evidence of an actual problem is likely because employers have the necessary information to prepare for pre-election hearings before notices of hearings ever issue⁵⁷ and are regularly aware of union organizing campaigns even before the filing of petitions.⁵⁸ So the 8-calendar day timeline is adequate for parties to retain counsel and make arrangements and prepare for hearings. Even assuming the 8-calendar day time frame causes some inconvenience, we believe that the statutory interest in expeditiously resolving questions of representation outweighs the non-statutory interest in facilitating parties' hearing preparation.⁵⁹

The 2019 Board also speculated that additional time would give parties "better opportunity to reach election agreements."⁶⁰ The Board cited no evidence for this view, and since the 2019 rule took effect there is no evidence that parties are more frequently reaching election agreements than under the 2014 rule. Prior to 2014, when hearings were scheduled to open in more than 8 calendar days in some regions, parties consistently entered into election agreements in about 90% of representation cases. When the 2014 rule's 8-calendar day timeline was in effect, parties still consistently entered into election agreements in about 90% of representation cases. In the two full fiscal years since the 2019 rule's 14-business day timeline has taken effect, however, parties entered into election agreements in only 80.7% and 83.7% of representation cases.⁶¹ It may be that the current downward trend is partly

⁴⁸ 29 CFR 102.63(a)(1) (Dec. 15, 2014). Prior to the 2014 rule, the Board's regulations did not specify when pre-election hearings would open. Instead, the regulations merely indicated that hearings would open at a time and place designated by the regional director. See 29 CFR 102.63(a) (2011).

⁴⁹ 79 FR at 74309, 74370–74379, 74424 (explaining why hearing time frame provides due notice). Although our dissenting colleague casts aspersions on *Croft Metals* as persuasive precedent, he ultimately relies on it himself—as he must in the absence of a subsequent decision overruling it—in concluding that "the 2019 Rule is consistent with *Croft Metals*." We agree. But so is this rule in returning to the default 8-day timeline for noticing pre-election hearings.

⁵⁰ Our dissenting colleague takes issue with our reference to "best practices." His criticisms are misguided. As explained in the 2014 rule, a "1997 Report of the Best Practices Committee provided that hearings should open between 10 to 14 days of the petition's filing." 79 FR at 74373. If, in 1997, it took several days for the Notice of Hearing to be served after the petition's filing, then scheduling a pre-election hearing for 8 calendar days after the service of the Notice of Hearing would render the contemporary timing roughly equivalent to the timing described by the Best Practices Committee's 1997 Report. Moreover, a "model opening letter in 1999"—and a *model* letter is an attempt to convey best practices—"indicated that the hearing should open no later than 7 days after service of the notice." Id.

⁵¹ 79 FR at 74309, 74370–74376, 74424. Reviewing courts rejected every challenge to the hearing scheduling provisions contained in the 2014 rule. See *UPS*, 921 F.3d at 256 ("[A]n eight-day notice accords with both the Due Process Clause and [the employer's] statutory right to an 'appropriate' hearing[.]"); *ABC of Texas*, 826 F.3d at 220, 222–223 ("[T]he rule changes to the pre-election hearing did not exceed the bounds of the Board's statutory authority[.]"); *Chamber*, 118 F. Supp. 3d at 177, 205–206 (rejecting due process challenge to hearing scheduling provision).

⁵² 29 CFR 102.63(a)(1) (Dec. 18, 2019).

⁵³ 84 FR at 69533; see also id. at 69534 (acknowledging that "modifications" to the Statement of Position requirements "account for the 14-business-day timeline between the notice of hearing and the start of the pre-election hearing").

⁵⁴ See *infra* C. Due Date for Nonpetitioning Party's Statement of Position; E. Responsive Statement of Position.

⁵⁵ Our dissenting colleague admits that it is "obvious" that reverting to the 8-calendar day time frame would expedite the representation case process, but he then says that relying on that factor instead of "weighing carefully the other important interests at stake [is hardly a reasoned basis]" for the reversion. That contention ignores the relative importance of the statutory interest in the quick resolution of representation cases. See *A.J. Tower Co.*, 329 U.S. at 331 ("[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily."). It further ignores the balance of our discussion, which carefully considers and discounts the various other non-statutory interests identified by the 2019 Board in setting a lengthy time period for opening the pre-election hearing.

⁵⁶ 84 FR at 69533.

⁵⁷ See 79 FR at 74372, 74378–74379.

⁵⁸ See id. at 74320–74321, 74372, 74378–74379.

⁵⁹ Further, the timeline enables the regional director to grant postponements in appropriate cases. See id. at 74371, 74424; 29 CFR 102.63(a)(1) (Dec. 15, 2014).

We reject our dissenting colleague's contention that our assessment of policy priorities in setting the time frame for opening of the pre-election hearing amounts to a denial of due process. He quotes one generalized statement of due process requirements but then does not explain why the time frame we set does not satisfy those requirements. He also fails to meaningfully engage with the relevant legal discussion on this issue in the 2014 rule. See 79 FR at 74371–74373. Moreover, as noted in fn.51, the courts have uniformly rejected due process challenges to the 2014 hearing scheduling provisions.

⁶⁰ 84 FR at 69533.

⁶¹ Information reported in the Agency's NxGen case processing software shows: election agreement rates of 91.1% in each of fiscal years 2013 and 2014, the full fiscal years immediately preceding the implementation of the 2014 rule; election agreement rates of 91.7%, 91.7%, 90.6%, and 91.3% in fiscal years 2016, 2017, 2018, and 2019, the full fiscal years immediately following the implementation of the 2014 rule; and election agreement rates of 80.7% and 83.7% in fiscal years 2021 and 2022, the full fiscal years immediately following the implementation of the 2019 rule.

attributable to issues arising from the COVID-19 pandemic; if so, the increased timeline that purported to give parties a “better opportunity to reach election agreements” clearly has not functioned as intended in that context and we accordingly cannot be confident that the extended timeline does, in fact, better encourage election agreements. Regardless, the available data show a decline, rather than an increase, in the rate at which parties reach election agreements since the 2019 rule took effect.

The 2019 Board also asserted that a 14-business day timeline “may” ease “logistical burdens” on the agency’s regional personnel.⁶² Though we are sensitive to the demands on regional personnel, we make the policy judgment that the regions are better served shifting their resources to accomplish the statutory goal of more expeditiously resolving questions of representation. In any event, the significant drop in election agreement rates following the implementation of the 2019 rule—regardless of the specific reason for the drop—itself represents a significant drain on regional resources by adding many more representation cases to the regions’ hearing dockets. If a return to the 2014 rule allows election agreement rates to rebound, this should more effectively ease the logistical burdens on regional personnel from processing representation cases.

The 2019 Board’s final justification—that a 14-business day timeline brings the pre-election hearing schedule “into closer alignment” with the post-election hearing schedule⁶³—is also not compelling. We do not discern a good reason to make the pre-election hearing timeline correspond to the post-election hearing timeline just to achieve symmetry. Instead, making pre-election hearing scheduling more uniform with post-election hearing scheduling simply imposes unnecessary delay in conducting pre-election hearings.

B. Postponement of Pre-Election Hearing

To further expedite the resolution of representation cases and promote uniformity and transparency, this final rule also reinstates the 2014 rule’s standard for postponement of a pre-election hearing. Accordingly, a regional director can postpone a pre-election hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party

showing extraordinary circumstances.⁶⁴ Reimposing a higher standard of postponement than the comparatively unbounded good cause standard that the 2019 rule imposed makes clear to the parties that the statutory mission of the expeditious processing of representation cases will not give way unless the parties have truly special or extraordinary circumstances that make postponement appropriate.⁶⁵ The 2019 Board justified its imposition of a more permissive good cause standard by referring to regional director discretion.⁶⁶ But the regional directors—the career officials who do an admirable job administering representation cases—already had adequate discretion in this regard. Specifically, the 8-calendar day time frame is inapplicable when, in the regional director’s discretion, the case presents unusually complex issues because in those cases, the regional director may set the hearing to open in a longer time frame.⁶⁷ Thus, requests to extend the opening of pre-election hearings beyond 8 days are unnecessary in cases presenting sufficient complexity and, in all other cases, delay is reasonably only warranted when a party has a truly special or extraordinary circumstance. Moreover, by concretely defining the standard postponement as up to 2 business days where the “special circumstances” criterion is satisfied, the representation case process in this respect becomes more transparent, as the parties are aware ahead of time what sort of postponement they might encounter. The process also becomes more uniform, as similarly situated parties in diverse regions of the country will likely have postponements of similar length.

C. Due Date for Nonpetitioning Party’s Statement of Position

The final rule also reinstitutes the 2014 rule’s requirement that the nonpetitioning party’s Statement of Position is due to be filed by noon the business day before the opening of the pre-election hearing.⁶⁸ Thus, because the pre-election hearing will normally open 8 calendar days after service of the Notice of Hearing, the Statement of Position will be due about 7 calendar days after service of the Notice of Hearing.

This 7-day time frame is sufficient for completion of the Statement of

Position.⁶⁹ The 2019 Board labeled the Statement of Position “complicated,” but it is not. It requires the nonpetitioning party to briefly specify its positions on the appropriateness of the petitioned-for unit, jurisdiction, the existence of any bar to an election, and the type, dates, times, and locations of the election.⁷⁰ Specifically, an employer simply needs to disclose little more than: whether an election involving its own employees has been held in the preceding 12 months, and whether the petitioned-for employees are covered by a contract (election bar issues); whether the employer is engaged in interstate commerce (jurisdiction); and whether employees in the petitioned-for unit share similar working conditions (unit appropriateness). This is the sort of information that a typical employer knows before a petition is ever filed,⁷¹ and, even if it did not, it is the sort of information an employer would usually determine when it becomes aware of a union organizing drive, which is typically before the filing of a petition.⁷² Giving the nonpetitioning party 7 additional days to compile the information after service of the Notice of Hearing is enough. To the extent that a small minority of employers may feel rushed when compiling the relevant information, that tradeoff is again consistent with our mission: the statutory interest in expeditiously resolving questions of representation outweighs the non-statutory interest in maximizing employer convenience.⁷³

The 2019 Board did not rely on empirical evidence or other data to extend the due date for the nonpetitioning party’s Statement of Position to 8 business days after service of the Notice of Hearing. The 2019 Board speculated that giving parties

⁶⁹ 79 FR at 74371–74379.

⁷⁰ 29 CFR 102.63(b)(1)(i)(A).

⁷¹ See *supra* fn.57.

⁷² See *supra* fn.58.

⁷³ Moreover, the rule provides for extensions where appropriate. 29 CFR 102.63(b) (Dec. 15, 2014). We further note that the courts rejected every challenge to the 2014 rule’s 7-day time frame for completion of the statement of position. See *Chamber*, 118 F. Supp. 3d at 205 & fn.24 (rejecting plaintiff’s argument that “the burdensome requirement of the Statement of Position violates [its] due process rights by not providing it sufficient time to respond”); *UPS*, 921 F.3d at 255–257 (rejecting a challenge to the application of various 2014 rule provisions including the timing of the employer’s Statement of Position).

Our dissenting colleague is no more persuasive in contending that “due process demands” more than 7 calendar days for a nonpetitioning party to prepare a Statement of Position. He fails to engage with due process case law or to explain how the 3-day difference between our 7-day provision of preparation time and his preferred 10-day standard crosses over to a standard that falls short of constitutional guarantees.

⁶⁴ 79 FR at 74371; 29 CFR 102.63(a)(1) (Dec. 15, 2014).

⁶⁵ 29 CFR 102.63(a)(1) (Dec. 18, 2019).

⁶⁶ 84 FR at 69534.

⁶⁷ 79 FR at 74371.

⁶⁸ 29 CFR 102.63(b) (Dec. 15, 2014).

⁶² 84 FR at 69533.

⁶³ *Id.* at 69533 & fn.45.

more time may help the parties “better balance” their other pre-hearing tasks, “including retaining counsel, researching the facts and relevant law, identifying and preparing potential witnesses, making travel arrangements, coordinating with regional personnel, and exploring the possibility of an election agreement.”⁷⁴ Even assuming that the 2019 Board had cited data suggesting that these tasks are particularly time-consuming in the context of a pre-election hearing (which it did not), they are tasks that are in synergy with the requirement of the Statement of Position. Specifically, researching the facts and relevant law, identifying and preparing potential witnesses, and exploring the possibility of an election agreement are all tasks that will reveal the information that is required to be compiled and disclosed in the Statement of Position. In other words, gathering the information required by the Statement of Position is not an additional task that will add time to a nonpetitioning party’s pre-hearing work; instead, it is a task that a nonpetitioning party will already be performing. Acknowledging this reality undercuts another of the 2019 Board’s assertions—that giving more time for preparation of the Statement of Position would promote more election agreements.⁷⁵ It is the compiling of the relevant information—again, something that an employer will already be doing in the run up to a pre-election hearing—that facilitates entry into election agreements, and the instant rule, by preserving approximately one business day after the filing and service of the Statement of Position before the hearing opens, just as readily facilitates agreements. Indeed, since the 2019 rule’s 8-business day time frame has taken effect, there has been no increase in election agreements.⁷⁶ Even assuming the 7-calendar day time frame for completion of the Statement of Position causes some inconvenience, we believe that the statutory interest in expeditiously resolving questions of representation outweighs the non-statutory interest in maximizing the convenience of the nonpetitioning parties. Accordingly, to further expedite the resolution of representation cases, the nonpetitioning party’s Statement of Position ordinarily will now be due 7 calendar days after service of the Notice of Hearing, just as it was under the 2014 rule.

D. Postponement of the Statement of Position

To further expedite the resolution of representation cases and promote uniformity and transparency, this rule also reinstitutes the 2014 rule’s standard for an extension of time for the filing of a Statement of Position. Accordingly, a regional director may postpone the due date for the filing of a Statement of Position up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.⁷⁷ This amendment is justified for substantially the same reasons as the amendment to the standard for postponement of the opening of the pre-election hearing—namely, this standard makes clear to the parties that the statutory mission of the expeditious processing of representation cases will not give way unless the parties have truly special or extraordinary circumstances justifying the delay and provides a more concrete guidepost in the interests of uniformity and transparency.⁷⁸

E. Responsive Statement of Position

This rule also rescinds the 2019 rule’s requirement that a petitioner file a written responsive Statement of Position by noon 3 business days after the nonpetitioning party’s filing of its Statement of Position and 3 business days before the opening of the pre-election hearing.⁷⁹ In its place, this rule reinstates the 2014 rule’s requirement that, if the parties are unable to enter into an election agreement, the petitioner shall respond orally on the record at the pre-election hearing to the issues raised in the nonpetitioning party’s Statement of Position.⁸⁰ Like many of the other amendments made by this rule, this particular amendment will further the agency’s statutory mandate to more expeditiously resolve questions of representation.

The gains in terms of expedition are substantial. By eliminating the 3 business days that a petitioning party has to formulate a written response to a nonpetitioning party’s Statement of Position and further eliminating the

additional 3 business days of mandated waiting that follows, the Board has eliminated 6 business days from the representation case process. This delay—and the responsive Statement of Position that the 2019 Board used to justify it—was unnecessary.

As the 2019 Board itself admitted, the petitioner already takes a written position on certain key issues to be resolved at the pre-election hearing in its petition.⁸¹ Requiring a responsive Statement of Position is largely redundant and does not “serve the purpose of uniformity” by ensuring that each side makes a written filing prior to the pre-election hearing,⁸² as each side already puts its positions in writing. As to the other issues that the nonpetitioning party’s Statement of Position addresses for the first time—like jurisdiction (which turns on the employer’s dealings in interstate commerce) and the names and job titles of the employer’s own employees—that depends on information that is usually under the exclusive control of the nonpetitioning employer and, if necessary, can be responded to by the petitioner orally at the hearing without a written response. The 2019 Board was of the view that a responsive Statement of Position would help “clarify” positions and provide “notice” of the issues that remain in dispute to be worked out at the hearing.⁸³ But the 2019 Board pointed to no evidence that a petitioner’s oral statement on the record at the opening of the pre-election hearing did not already provide the needed clarification and notice that would guide the resolution of outstanding issues throughout the remainder of the hearing.

The 2019 Board also asserted that the “[m]ost important[]” feature of requiring a written responsive Statement of Position was “greater efficiency.”⁸⁴ But requiring the petitioning party to prepare and file a statement that is largely redundant to its already-filed written petition and that deals with a few additional issues that can be readily addressed orally at the pre-election hearing adds inefficiency to the representation case process. And by giving the petitioning party 3 business days to prepare its responsive Statement of Position and then adding 3 additional business days after its filing before the pre-election hearing can open, the 2019 rule’s requirement further guaranteed that 6 additional business days are added to every representation case that

⁷⁷ 79 FR at 74371, 74374; 29 CFR 102.63(b) (Dec. 15, 2014).

⁷⁸ See *supra* B. *Postponement of Pre-Election Hearing*. Of course, any extension of time granted for the filing of the Statement of Position will typically result in a corresponding delay in the hearing date and the petitioner’s oral response to the Statement of Position.

⁷⁹ 84 FR at 69536; 29 CFR 102.63(b)(1)(ii) (Dec. 18, 2019).

⁸⁰ 79 FR at 74309, 74393; 29 CFR 102.66(b) (Dec. 15, 2014).

⁷⁴ 84 FR at 69535.

⁷⁵ *Id.*

⁷⁶ See *supra* fn.61.

⁸¹ 84 FR at 69536.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 69537.

goes to a pre-election hearing. Requiring an additional and unnecessary written filing and then stopping the representation case process for 6 days is inefficient. The 2019 Board also said that the additional written filing and mandated delay might “facilitate better preparation for the hearing” by the parties and agency personnel⁸⁵ and “additional opportunity and incentive for parties to reach election agreements.”⁸⁶ As to the former rationale, there is no evidence that the conduct of hearings has demonstrably improved as a result of this device (or that the 2014 rule’s requirement had impaired hearing efficiency). As to the 2019 Board’s latter rationale of promoting election agreements, there is no indication that the speculation has come to pass. The evidence is that stipulation rates have not improved since the 2019 rule took effect, but have in fact decreased.⁸⁷

In sum, the 2019 rule’s requirement of a written responsive Statement of Position plus delay of 6 additional business days has hindered the expeditious resolution of representation cases. Accordingly, this rule—to further the agency’s statutory mission of expeditious and efficient resolution of representation cases—eliminates the responsive Statement of Position requirement and its attendant 6-business day delay.

F. Posting and Distribution of Notice of Petition for Election

The posting and electronic distribution of the Notice of Petition for Election serves the important purpose of quickly and clearly communicating to employees and employers alike important information about the representation case process. This effective mechanism for accurate information sharing—which the 2019 Board admitted serves a “laudatory purpose”⁸⁸—is essential to strengthening workplace democracy. The Notice specifies that a petition has been filed, the type of petition, the proposed unit, the name of the petitioner, briefly describes the procedures that will follow, lists employee rights and sets forth in understandable terms the central rules governing organizational campaign conduct, and provides the Board’s website address, where more information about the representation case process is available.⁸⁹

Given the straightforward but essentially important information conveyed by this Notice of Petition for Election, the 2014 rule provided for the employer to post it within 2 business days after service of the Notice of Hearing in conspicuous places in the workplace and to electronically distribute it to employees if the employer customarily communicates with its employees electronically. That timeline is warranted.⁹⁰ An employer is provided with the Notice of Petition for Election by the regional director at the same time it receives the Notice of Hearing; it is not a document for which the employer needs to compile any information or draft itself.⁹¹ The employer’s task involves no more than printing copies of the Notice it is provided, affixing them to the wall of the workplace, and sending digital copies of the document to employees in an email or some similar electronic service. Given that an employer can promptly complete this task, the provision of 2 business days to complete it is sufficient, particularly when weighed against the vital information that the Notice disseminates.

Accordingly, this rule rescinds and replaces the 5-business day time frame that the 2019 rule gave employers to post the Notice of Petition for Election after service of the Notice of Hearing.⁹² Instead, we replace it with the 2-business day timeline set forth in the 2014 rule, because in our view the 2019 Board provided no good reason for providing the additional time. The 2019 Board speculated that employers, particularly “large multi-location employers,” “may” face “logistical difficulties” in complying with the 2-business day timeline.⁹³ However, the 2019 Board cited no evidence for this rationale. That is because large multi-location employers, with large centralized human resource departments and sophisticated electronic infrastructure, are particularly able to execute this task quickly. Smaller employers can also complete this task within 2 business days given the simplicity of the posting requirement and the relatively smaller audience to whom a small employer must distribute the Notice.⁹⁴

⁹⁰ 79 FR at 74379–74380; 29 CFR 102.63(a)(2) (Dec. 15, 2014).

⁹¹ The employer is also provided with instructions on how to post and distribute it. See 79 FR 74463; 29 CFR 102.63(a)(1), (2) (Dec. 15, 2014).

⁹² 84 FR at 69538; 29 CFR 102.63(a)(2) (Dec. 18, 2019).

⁹³ 84 FR at 69538.

⁹⁴ Our dissenting colleague does little more than repeat the 2019 speculation that both large and

The 2019 Board’s other rationale for a 5-business day time frame was that quick dissemination of the Notice was “less urgent” because of the delay its rule had imposed in the opening of the pre-election hearing.⁹⁵ That rationale shows the 2019 Board’s misunderstanding of key aspects of the representation case process and the reality of organizational campaigns. The purpose of the Notice is not to inform employees of the pre-election hearing; rather, as noted, it serves the important purpose of informing employees and the employer alike about the filing of the petition, the process that will follow, employee rights, and the rules governing campaign conduct. Accordingly, by requiring posting within 2 business days, we promote greater transparency concerning the representation case process. Additionally, because, for the reasons explained elsewhere, we have reinstated the 2014 rule’s 8-calendar day timeline for the opening of the pre-election hearing, even if it made sense to link the posting of the Notice and the opening of that hearing, shortening the time frame for posting of the Notice from 5 to 2 business days approximates the equivalent reduction in the time it will take for the pre-election hearing to open.

102.64 Conduct of Hearing

Section 9(c)(1) of the Act establishes the purpose of a pre-election hearing: to determine whether a question of representation exists.⁹⁶ Even so, prior to the 2014 rule, the Board’s rules and regulations entitled parties to litigate, at the pre-election hearing, issues like individual eligibility to vote or inclusion in an appropriate unit (including supervisory status questions) that were not necessary to determine whether a question of representation exists. The 2014 rule expressly stated the purpose of the pre-election hearing—to determine whether a question of representation exists—and established that individual eligibility and inclusion issues “ordinarily need not be litigated or resolved before an election is conducted” and ensured that

small employers will have difficulty complying with notice-posting within 2 business days. Yet, he cites no evidence that any such issues proved problematic in the five years that the 2014 rule’s standard was in effect.

⁹⁵ 84 FR at 69538.

⁹⁶ Section 9(c)(1) of the Act provides, in relevant part: “Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ See *supra* fn.61.

⁸⁸ 84 FR at 69538.

⁸⁹ 79 FR at 74309, 74379.

regional directors could limit the evidence offered at the pre-election hearing to that which is necessary for a determination of whether a question of representation exists. The 2019 rule provided that individual eligibility and inclusion issues should “normally” be resolved at the pre-election hearing. This rule reinstitutes the 2014 amendments and rescinds the 2019 amendments.⁹⁷

It is inefficient to encourage parties to litigate individual eligibility and inclusion issues at the pre-election hearing. By not addressing these individual eligibility and inclusion issues in the ordinary course at the pre-election hearing, unnecessary litigation is eliminated. Specifically, if a majority of employees votes against representation in the election, even assuming all the disputed votes were cast in favor of representation, then the disputed eligibility and inclusion questions become moot and therefore never have to be litigated or decided. If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, then the Board’s experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election.⁹⁸ Thus, here too the disputed eligibility or inclusion issues never need to be litigated or decided by the Board. Even if the parties cannot work out the remaining individual issues in bargaining, there is no need for another election to resolve the matter; rather, the unit placement of a small number of employees can be resolved through a unit clarification procedure.⁹⁹

The gains in efficiency and expedition are not just accrued in the minority of representation cases that require a pre-election hearing. Bargaining between the parties always takes place in the shadow of the law—that is, against the backdrop of what *would* happen if the parties failed to enter into an election agreement and proceeded to a pre-election hearing. Accordingly, if there is

leeway to regularly litigate individual eligibility or inclusion issues at the pre-election hearing, then, even if there are no disputes as to facts relevant to the existence of a question of representation, parties may have an incentive to insist on raising individual issues and proposing to present evidence related to those issues to trigger the threat of the delay occasioned by the hearing process and the time it will take the regional director to review the transcript and write a decision in order to extract concessions from the opposing side.¹⁰⁰

The 2019 rule’s directive that individual eligibility and inclusion issues ordinarily should be litigated at the pre-election hearing and decided prior to the election has never taken effect because of the district court’s order enjoining it,¹⁰¹ and, following the D.C. Circuit’s reversal of the district court’s ruling in that regard,¹⁰² the Board’s order extending its effective date.¹⁰³ The relevant evidence since enactment of the 2014 amendments show the gains in efficiency referenced above. After the 2014 rule took effect, with the pre-election hearing focused on the existence of a question of representation rather than on extraneous issues that can be resolved, if necessary, later in the representation case process, there was a significant reduction in the time it took regional directors to issue their decisions and directions of elections.¹⁰⁴

Further, the 2019 Board ignored the 2014 Board’s explanation of why permitting regional directors to deny litigating a small number of individual eligibility or inclusion issues was unlikely to increase the number of determinative challenge cases requiring post-election litigation of those issues.¹⁰⁵ As the Fifth Circuit explained in upholding the provision, “[t]he Board considered evidence that more than 70% of elections in 2013 were decided by a margin greater than 20% of all unit employees, ‘suggesting that deferral of up to 20% of potential voters . . . would not have compromised the

Board’s ability to immediately determine election results in the vast majority of cases.’” *ABC of Texas*, 826 F.3d at 228.¹⁰⁶

Significantly, the Board’s experience since the 2014 rule provisions went into effect confirms the validity of the 2014 Board’s judgment in this regard and undermines the 2019 Board’s conclusion that the 2014 rule’s benefits of avoiding unnecessary litigation that also delays elections comes at the expense of certainty, finality, and efficiency. After the 2014 rule went into effect, the number of elections resulting in determinative challenges remained stable, despite a significant increase in regional directors approving election agreements in which certain individuals vote subject to challenge.¹⁰⁷ That fact supports the conclusion that when regional directors deny pre-election litigation of a small number of individual eligibility and inclusion issues, they avoid unnecessary litigation that is often ultimately mooted by the results of the election. The statistics also show that there was stability in the

¹⁰⁶ While the 2014 Board set forth its view that “regional directors’ discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election [litigation and resolution of] eligibility and inclusion issues amounting to less than 20 percent of the proposed unit,” and if regional directors typically chose to approve parties’ stipulated election agreements in which up to 20% of the unit is to be voted under challenge, 79 FR at 74388 fn.373, the 2014 Board also stated, as the Fifth Circuit noted, that it “‘expect[ed] regional directors to permit litigation of, and to resolve, such [individual eligibility or inclusion] questions when they might significantly change the size or character of the unit.’” See *ABC of Texas*, 826 F.3d at 222; 79 FR at 74390.

¹⁰⁷ For the 2-year period immediately following the implementation of the 2014 rule there were 191 election agreements that permitted individuals to vote subject to challenge. See February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross at p.5. For the 2-year period prior to the implementation of the 2014 rule there were only 47 election agreements that permitted individuals to vote subject to challenge. See February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross at p.5. Accordingly, the 2014 rule caused an uptick in agreements to defer litigation. Nevertheless, information produced from searches in the Board’s NxGen case processing software shows that in fiscal years 2016 and 2017, the first two full fiscal years after implementation of the 2014 rule, there were only 56 cases requiring a post-election regional director decision on determinative challenges across 3,203 cases with an election (1.75% of cases with an election), and in fiscal years 2013 and 2014, the last two full fiscal years before implementation of the 2014 rule, there were 53 such cases across 3,240 cases with an election (1.64% of cases with an election). Accordingly, even with the uptick in the proportion of cases involving agreements to defer, the proportion of cases requiring a post-election decision to resolve those challenges remained stable at about 1.7%.

⁹⁷ 79 FR at 74380–74393. These 2014 rule provisions were uniformly upheld by the courts. Indeed, every court to have considered the matter has rejected the claim that the statute entitles parties to litigate at the pre-election hearing (and requires the regional director or the Board to decide prior to the election) all individual eligibility or unit inclusion issues. See *RadNet*, 992 F.3d at 1122; *UPS*, 921 F.3d at 257; *ABC of Texas*, 826 F.3d at 222–223; *Chamber*, 118 F. Supp. 3d at 195–203.

⁹⁸ 79 FR at 74391; see *New York Law Publishing Co.*, 336 NLRB No. 93, slip op. at 1 (2001) (“The parties may agree through the course of collective bargaining on whether the classification should be included or excluded.”).

⁹⁹ 79 FR at 74391.

¹⁰⁰ *Id.* at 74386–74387.

¹⁰¹ *AFL–CIO*, 466 F. Supp. 3d at 100.

¹⁰² *AFL–CIO*, 57 F.4th at 1043–1045.

¹⁰³ 88 FR at 14913, 14914.

¹⁰⁴ *E.g.*, February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross (Summary Table) (reporting a 24-day median for regional directors to issue a decision and direction of election following the close of the pre-election hearing in the year immediately preceding the 2014 rule’s effective date as compared to a 12-day median in the year immediately following the 2014 rule’s effective date).

¹⁰⁵ See 79 FR at 74387–74388.

number of unit clarification petitions,¹⁰⁸ demonstrating that the increased pre-election deferral of individual eligibility decisions did not cause a spike in parties coming back before the Board to resolve individuals' placement inside or outside the relevant bargaining units. In short, the 2014 amendments that we reinstate have not shifted litigation from before the election to after the election. Rather, the amendments have eliminated pre-election litigation that was unnecessary, as proven by the absence of a corresponding increase in post-election litigation. Thus, by continuing to encourage the deferral of individual eligibility decisions, the rule we adopt demonstrates a substantial gain in agency efficiency.

The 2019 Board provided several justifications for its expansion of litigation at the pre-election hearing but none of them is compelling. Its justification articulated in terms of enhanced finality and certainty¹⁰⁹ is not supported by the data, cited above, showing the stabilizing effect of the 2014 rule on both post-election litigation concerning determinative challenges and the need for unit clarification petitions. Elections thus remain just as final and certain under the 2014 amendments as they were under the pre-2014 status quo to which the 2019 rule would largely return.

The 2019 Board's concern that individual questions of supervisory status, if not decided pre-election, would prevent employers from knowing who they can use to campaign against a union in the pre-election campaign and would increase the possibility of post-election objections based on conduct attributable to an individual whose eligibility and/or supervisory status was not resolved prior to an election is similarly unpersuasive.¹¹⁰

¹⁰⁸ Comparing information reported on the agency's website concerning total representation elections won by unions with information reported in the NLRB Performance and Accountability Reports concerning total unit clarification petitions filed in the following fiscal year (to take into account time for bargaining to resolve any deferred unit placement issues) shows that in fiscal years 2016 and 2017, which again were the first two full fiscal years after the implementation of the 2014 rule, unit clarification petitions constituted 8.2% and 7.2% of all representation elections won by unions in the previous fiscal year, and in fiscal years 2013 and 2014, which again were the last two full fiscal years prior to the implementation of the 2014 rule, the corresponding figures were 7.3% and 8.7%.

¹⁰⁹ 84 FR at 69539–69540.

¹¹⁰ Contrary to the unfounded speculation of the 2019 Board majority, see 84 FR at 69525, 69529, 69530, 69540, as well as the predictions of the 2014 dissenting Board Members, see 79 FR at 74438 fn.581, 74445, the relevant data indicate no increase in post-election objections litigation arising after the deferral of supervisory status questions under the

Supervisory status issues exist only at the margin because in most cases where there is uncertainty concerning the supervisory status of one or more individuals, the employer nevertheless has in its employ managers and supervisors whose status is not in dispute.¹¹¹ The importance of expedition in the election process simply outweighs employers' interest in certainty that a particular individual or individuals may or may not be utilized in a pre-election campaign against a union. The employer is not hindered in its efforts to mount its pre-election campaign if it chooses to avoid utilizing individuals on its behalf whose statutory supervisory status is uncertain, a determination that employers are best situated to determine.¹¹² On the other hand, the 2019 rule's requirement that the marginal supervisor's status be resolved before the election creates the possibility, if not the probability, of extensive and detail-oriented litigation of the supervisory status of one or more individuals, which would, in turn,

2014 rule. Comparing the periods before and after implementation of the 2014 rule (which approximates the change that would result from the 2019 rule's litigation changes going into effect), there was stability in the number of cases necessitating post-election decisions on objections by regional personnel and in the number of rerun elections ordered by regional directors.

Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2016 and 2017, which were the first two full fiscal years after the implementation of the 2014 rule, there were 114 cases requiring a regional decision on objections following an election and 61 cases in which regional directors directed rerun elections, as compared to 3,203 total elections, amounting to objections in 3.56% of all elections and reruns in 1.9% of all elections. For fiscal years 2013 and 2014, which were the last two full fiscal years prior to the implementation of the 2014 rule, there were 118 objections cases and 59 reruns as compared to 3,240 total elections, amounting to objections in 3.64% of all elections and reruns in 1.82% of all elections. Thus, the implementation of the 2014 rule did not cause a spike in either post-election objections or in elections needing to be rerun.

¹¹¹ 79 FR at 74389.

¹¹² Our dissenting colleague contends that "this issue is not simply about an employer disseminating its message to employees, it is about 'post-election complications where the putative supervisors engage in conduct during the critical period that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by nonparty employees.'" But, as noted in fn.110, supra, the relevant data show no overall increase in election objections that would have resulted from more objectionable conduct by individuals later determined to be supervisors following implementation of the 2014 rule. And our dissenting colleague makes no attempt to support his abstract prediction with cases or data showing otherwise. This is especially notable since the 2014 rule to which we return and which made it so that individual eligibility and inclusion issues were ordinarily not litigated at the pre-election hearing was in effect for *five years*, surely sufficient time for "complications" to have arisen, if in fact they were real.

inevitably slow down the election process. In other words, it creates incentives that are the exact opposite of the goals of a speedy and efficient election process. Moreover, even if supervisory status issues had to be litigated and resolved pre-election, the issues would still remain unresolved between the time the petition was filed and the holding of a hearing and the subsequent rendering of the regional director's decision. Thus, there would always inevitably be a period of time during a campaign when supervisory status issues, to the extent they exist, are unresolved.¹¹³ Then, even if the regional director resolved the issues before an election, that resolution would still remain subject to review by the Board, and any Board decision, in turn, would potentially be subject to review in a court of appeals. Moreover, because we separately rescind the 2019 rule's mandatory 20-business day waiting period before an election can be held following issuance of a decision and direction of election,¹¹⁴ there is a shorter window between any decision and direction of election and the election itself. That, in turn, reduces any benefit of having a regional director decide, for the employer's campaign purposes, who the supervisors are in the decision and direction of election. Thus the 2019 Board's approach sacrificed efficiency and expeditiousness with a negligible countervailing benefit in terms of finality and certainty.

The 2019 Board's justification grounded in fair and accurate voting and transparency—namely, that resolving individual eligibility or inclusion issues before the election would permit employees to know the "precise contours" of the unit in which they are voting¹¹⁵—also is unconvincing. As noted above, even if individual eligibility and inclusion issues were decided before an election, there is always some uncertainty such that the "precise contours" of the unit are rarely defined prior to an election. For another, as the D.C. Circuit has explained, permitting employees "to vote under challenge" does not "imperil the bargaining unit's right to make an informed choice, so long as the notice of election . . . alert[s] employees to the possibility of change to the definition of the bargaining unit,"¹¹⁶ as occurs under

¹¹³ This would also include a substantial part of the "critical period" between the filing of the petition and the election. 79 FR at 74389.

¹¹⁴ See *infra* B. *Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election.*

¹¹⁵ 84 FR at 69540–69541.

¹¹⁶ *UPS*, 921 F.3d at 257 (internal quotation marks omitted).

the rules. The 2019 Board's view that this notice would confuse employees and so "runs the risk of being a disincentive for some employees to vote"¹¹⁷ was based on no evidence of reduced voter turnout.¹¹⁸

In sum, by rescinding the 2019 amendments and restoring the 2014 rule language, we reduce unnecessary litigation and eliminate an unnecessary barrier to the fair and expeditious resolution of questions concerning representation.¹¹⁹

102.66 Introduction of Evidence: Rights of Parties at Hearing; Preclusion; Subpoenas; Oral Argument and Briefs

A. Introduction of Evidence; Offers of Proof

Consistent with the modifications to Section 102.64 explained immediately above and for the reasons discussed there, this reinstated rule reverts Section 102.66(a) to the version that resulted from the 2014 rule to clarify that the evidence admissible at a pre-election hearing is normally limited to the existence of a question of representation and is not admissible as to other issues.

¹¹⁷ 84 FR at 69541.

¹¹⁸ As the 2014 rule noted, there was no evidence that voter turnout was depressed prior to the 2014 rule, when employees were likewise permitted to vote subject to challenge. 79 FR at 74390.

¹¹⁹ In arguing that the Board should maintain the 2019 rule's directive that individual eligibility and inclusion issues should ordinarily be resolved prior to the election, our dissenting colleague attempts to rely on the Supreme Court's decision in *A.J. Tower*. He misconstrues that case. In *A.J. Tower*, the Supreme Court, in addition to directing that "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily," 329 U.S. at 331, upheld the Board's decision in that case to prohibit the employer's post-election challenge to the eligibility of one of the voters in the election, *id.* at 332–333. The employer had attempted to challenge the eligibility of one of the voters 4 days after the election took place. *Id.* at 327–328. In upholding the Board's decision not to consider that untimely challenge, the Court agreed that "challenges to the eligibility of voters" must "be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality." *Id.* at 331. The case thus stands for the proposition that challenges to voters' eligibility in union elections must be made prior to the election—not that all such challenges need to be resolved prior to the election. Indeed, post-election resolution of challenged ballots has been a feature of the Board's election procedures since the earliest days of the Act (and has continued under both the 2014 and 2019 rules). See, e.g., 79 FR at 74386 and fn.364, 74391 (citing *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994) ("The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue.")); 84 FR at 69540 fn.66, 69541 ("[W]e are not imposing a requirement that, absent agreement of the parties to the contrary, all eligibility issues must be resolved prior to an election. Section 102.64(a) as modified by the final rule states only that disputes concerning unit scope, voter eligibility, and supervisor status will 'normally' be litigated and resolved by the regional director.").

Further consistent with that and for the same reasons, this rule modifies Section 102.66(c) to eliminate the introduction of evidence that is not consistent with the offer of proof procedure for the receipt of evidence concerning the existence of a question of representation.

B. Briefing Following Pre-Election Hearing

Generally, in formal agency adjudication, parties are entitled to briefing.¹²⁰ But Congress expressly excluded adjudications involving "the certification of worker representatives" from that requirement.¹²¹ It did so because "these determinations rest so largely upon an election or the availability of an election"¹²² and "because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition."¹²³ The 2019 Board acknowledged this.¹²⁴ Even so, the 2019 Board decided to grant parties an absolute right to file briefs up to 5 business days following the close of the pre-election hearing, with an extension of an additional 10 business days available upon a showing of good cause. This rule rescinds that decision and reverts to the 2014 rule's standard that parties are entitled to present oral argument at the close of the pre-election hearing, but they may file post-hearing briefs only upon special permission of the regional director and within the time and addressing only the subjects permitted by the regional director.¹²⁵

Rescission of the blanket entitlement to post-hearing briefing is warranted given the recurring and uncomplicated legal and factual issues arising in pre-election hearings. There is a relatively contained body of law applicable in the repeated factual contexts that present issues at pre-election hearings, and, accordingly, in the vast majority of cases, regional directors can properly resolve the issues without briefing.¹²⁶

¹²⁰ 5 U.S.C. 557(c).

¹²¹ 5 U.S.C. 554(a)(6); see also 79 FR at 74402.

¹²² S. Rep. No. 752, at 202 (1945); see also 79 FR at 74402.

¹²³ Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945); see also 79 FR at 74402.

¹²⁴ See 84 FR at 69542 ("[W]e do not take issue with the proposition that the Board is not required to permit post-hearing briefs after pre-election hearings[.]").

¹²⁵ 79 FR at 74401–74403, 74426–74427; 29 CFR 102.66(h) (Dec. 15, 2014). We agree with the 2014 Board's conclusion that given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions.

¹²⁶ *Id.*

Moreover, regional directors retain the discretion to order briefing when they are confronted with the rare case that poses a truly complex issue.¹²⁷

The Board thus has no reason to believe that the quality of regional director decisions will decline. Regional directors infrequently make incorrect decisions in the pre-election context. Since the 2019 rule took effect, there has been no decline in the proportion of cases in which the Board grants review or reverses regional director pre-election decisions, which tends to show that the default entitlement to post-hearing briefing has not helped regional directors reach the right results or avoid prejudicial errors to an even greater degree.¹²⁸ Eliminating the default entitlement to post-hearing briefing thus comes with no clearly discernible cost, and the primary benefit is enhancing the Board's ability to expeditiously process representation cases.¹²⁹ By eliminating a

¹²⁷ Our dissenting colleague points to cases involving independent contractor status as exemplars of situations in which briefing would assist regional directors with the application of multi-factor legal tests. However, under the 2014 rule, regional directors exercised their discretion to permit briefing in many independent contractor cases. See 84 FR at 69578 fn.230 (then-Member McFerran, dissenting) (listing independent contractor cases in which regional directors allowed briefing under the 2014 rule). We also find it significant that in some independent contractor cases, parties waived filing briefs in lieu of presenting oral argument, thereby evidencing that parties themselves recognize that post-hearing briefing to regional directors is not necessary in all cases involving independent contractors. *Id.*

We also note that, just as was the case under the 2014 rule, parties remain entitled to file a brief with the Board in support of any request for review of the regional director's decision and direction of election. 79 FR at 74402.

¹²⁸ Information produced from searches in the Board's NxGen case processing software shows that in fiscal years 2018 and 2019—the last two full years the 2014 rule was in effect—the Board granted review in 9 of the 82 cases in which a party filed a request for review and reversed the regional director's decision in 2 of those cases. Accordingly, across those years, a request for review was granted in 10.98% of cases with an election in which a request for review was filed, and a request for review caused a reversal in 2.44% of cases with an election in which a request for review was filed. In fiscal years 2021 and 2022—the first two full years the 2019 rule was in effect—the Board granted review in 19 of the 119 cases in which a party filed a request for review and reversed the regional director's decision in 5 of those cases. Accordingly, across those years, a request for review was granted in 15.97% of cases with an election in which a request for review was filed, and a request for review caused a reversal in 4.2% of cases with an election in which a request for review was filed. Accordingly, the data do not tend to show that regional director decision making has improved with the benefit of default briefing under the 2019 rule. This is consistent with prior data showing that regional director decision making did not suffer following the implementation of the 2014 rule. See 84 FR at 69578 fn.231 (then-Member McFerran, dissenting).

¹²⁹ Our dissenting colleague contends that permitting briefing in all cases would "promot[e]

mandated 5-business day briefing period (with the possibility of 10 additional business days upon an extension), the issuance of a decision and direction of election and any subsequent election can occur sooner. Moreover, giving no entitlement to post-hearing briefing following a pre-election hearing and permitting it only if deemed helpful by the decisionmaker is a uniform and transparent standard and, by eliminating a redundant round of briefing, the rule promotes finality.

102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Appeals From Actions of the Regional Director; Statement in Opposition; Requests for Extraordinary Relief; Notice of Election; Voter List

A. Specification of Election Details in Decision and Direction of Election; Notice of Election

An election cannot be conducted until the details of the election are set and the Notice of Election advises the employees of when, where, and how they may vote. Prior to the 2014 rule, these details were resolved after the decision and direction of election issued in sometimes lengthy telephone consultations and negotiations with the various parties.¹³⁰ To eliminate one of the “choke points” in getting to the election, the 2014 rule required that the parties state their preferences on the election details in their petitions and Statement of Position, and further provided that the hearing officer would solicit the parties’ positions on the election details again, prior to the close of the hearing.¹³¹ Because the parties will already have twice stated their positions on the election details, this rule directs that election directions will ordinarily specify the type, date(s), time(s), and location(s) of the election and the eligibility period and that the regional director will ordinarily transmit the Notice of Election simultaneously with the direction of election. By consolidating the decision and direction of election with the specification of the election details in the ordinary course, the Board eliminates the need for wasteful post-decision consultation and, in turn, can more expeditiously resolve questions of representation. Additionally, providing

more *efficient* case processing without unduly delaying resolution of the case.” (Emphasis in original.) We have provided reasons and analyzed data to show why briefing as a matter of right is, among other things, *inefficient*.

¹³⁰ 79 FR at 74404.

¹³¹ *Id.*; see also 29 CFR 102.61(a)(12), (b)(9), (c)(11); 102.63(b)(1)(i), (2)(i), (iii), (3)(i); 102.66(g) (Dec. 15, 2014).

this information with the direction of election promotes greater transparency and certainty than if dissemination of this important information is delayed. If necessary, regional directors remain free to consult with the parties again about election details after directing an election.

This amendment thus reverts to the standard of the 2014 rule¹³² and rescinds the 2019 rule’s amendment that merely provided that the regional director “may” specify the election details in the decision and direction of election and effected a “shift in emphasis” by providing that the regional director “retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election.”¹³³ The Board does not doubt the discretion of the regional director to work out election details, if necessary, after directing an election, but there is no compelling reason to “shift” the ordinary course from how the 2014 rule established it. The 2019 Board admitted that “the regional director should ordinarily be able to provide election details in the direction of election.”¹³⁴ Determining election details as an entirely separate process after directing the election is, ordinarily, a step that adds unnecessary delay and inefficiency to the representation case process. Accordingly, like other aspects of this rule, this is another instance where we amend the rule to make it responsive to the ordinary course scenario, with a safety valve responsive to the exception. Doing so causes no discernible detriment and furthers the goals of expeditiously and efficiently processing representation cases and promoting transparency and certainty.

B. Elimination of the 20-Business Day Waiting Period Between Issuance of the Decision and Direction of Election and the Election

Both the 2014 rule and the 2019 rule provided that regional directors shall schedule elections for the earliest date practicable.¹³⁵ However, the 2019 rule imposed a 20-business day (or 28-calendar day) waiting period before an election can be held following issuance of a decision and direction of election to permit the Board to rule on any request for review that may be filed.¹³⁶ The instant rule rescinds this

amendment that, by definition, substantially delays the election that is designed to answer the question of representation.

The scheduling of an election for the earliest date practicable furthers the Board’s statutory mission to expeditiously process representation cases. A mandated waiting period—which effectively stays the election in every contested case for a set period of time—is, as a threshold statutory matter, in tension with Congress’s instruction in Section 3(b) of the Act that the grant of review of a regional director’s action “shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.”¹³⁷ Moreover, as a policy matter, a waiting period necessarily delays the election, which is designed to answer the question of representation. Thus, by eliminating it, the Board eliminates an unnecessary barrier to the fair and expeditious resolution of questions concerning representation and thereby furthers a statutory goal. And because, as the Board has noted elsewhere, bargaining takes place in the shadow of the law such that some parties use the threat of a pre-election hearing and the result of a waiting period to extract concessions concerning election details, the impact of the earliest date practicable standard is also felt in the more common context of a stipulated election.

Rescinding the mandatory waiting period—which, on its terms, exists solely to permit the Board to rule on any request for review that may be filed with 10 business days of a direction of election¹³⁸—is also responsive to the fact that requests for review of a decision and direction of election are filed in only a small percentage of cases, are granted in only a small percentage of the cases in which they are filed, and result in orders staying elections in hardly any cases at all.¹³⁹ And, as a result of another amendment from the

¹³⁷ 29 U.S.C. 153(b).

¹³⁸ 84 FR at 69544–69547.

¹³⁹ For instance, information produced from searches in the Board’s NxGen case processing software shows that in fiscal year 2019—the last full year that all provisions of the 2014 rule were in effect—there were 1,179 total elections and 128 cases with a decision and direction of election but only 47 with a request for review. So a request for review was filed in only 36.72% of cases with a directed election and in only 3.99% of cases with an election. Among those 47 cases with a request for review, only 2 requests for review were granted and neither resulted in an order staying an election, so a request for review was granted in only 0.17% of cases with an election and in only 1.56% of directed election cases. Neither of the cases granting the request for review resulted in an order staying an election, so there was a stay of the election in 0% of elections (directed or otherwise).

¹³² 79 FR at 74404–74405.

¹³³ 84 FR at 69544; 29 CFR 102.67(b) (Dec. 18, 2019).

¹³⁴ 84 FR at 69544.

¹³⁵ See 29 CFR 102.67(b) (Dec. 15, 2014); 29 CFR 102.67(b) (Dec. 18, 2019).

¹³⁶ 84 FR at 69544–69547; 29 CFR 102.67(b) (Dec. 18, 2019).

2014 rule that the 2019 rule did not change, parties are free to file requests for review even after completion of an election. Accordingly, even if a waiting period could, in some instances, enable the Board to resolve requests for review prior to elections taking place, there is no meaningful benefit to doing so and certainly no benefit large enough to outweigh the cost of added delay in every other case. And a standard that directs a regional director to schedule an election on the earliest date practicable gives sufficient flexibility to allow for an extended delay between the direction and conduct of election in the rare case when such delay is necessary.

The 2019 Board admitted that its mandated waiting period would run counter to the statutory goal of expeditious resolution of representation cases.¹⁴⁰ Yet it imposed the change anyway, again speculating that imposing this substantial delay would promote other interests. There is no evidence that it would have done so, and even if such evidence existed, we make a different judgment of policy priorities. After enactment of the 2014 rule, which eliminated a similar 25-calendar day waiting period that had been mandated previously,¹⁴¹ the data show that elections have been no less final, certain, fair, accurate, transparent, or uniform.¹⁴² The 2014 rule's elimination of the waiting period between issuance of the direction of the election and the election was upheld by the courts¹⁴³ and enabled the Board to hold elections more quickly after the decision and direction of election issued than it was prior to the 2014 rule.¹⁴⁴ Thus, eliminating the mandated waiting period expedites the processing of representation cases with no meaningful drawback in any other important policy interest.

We further note that the 2019 Board conceded that “[i]n many respects,” its

waiting period amendment “goes hand-in-hand with [its] amendment permitting litigation of eligibility and inclusion issues at the pre-election hearing and serves the same policy interests.”¹⁴⁵ Thus, the 2019 Board argued that “providing a period before the election during which parties can file and the Board can rule on requests for review permits [those eligibility and inclusion] issues to be definitively resolved prior to the election (or at least prior to the counting of the votes), thereby promoting finality and certainty.”¹⁴⁶ But this rule rescinds the 2019 amendment that provided that individual eligibility or inclusion issues normally will be litigated at the pre-election hearing and resolved by the regional director prior to the election, making the corresponding waiting period superfluous.

The 2019 Board's speculations that a mandated month-long waiting period would promote finality, certainty, uniformity, transparency, and fairness and accuracy are unavailing for additional reasons. First, in the vast majority of representation cases, the parties are able to reach an election agreement that necessarily precludes the possibility of a pre-election request for review. In the majority of the comparatively small percentage of contested cases, parties choose not to file a request for review.¹⁴⁷ In all those cases, the mandated month-long waiting period serves no purpose other than to add needless delay to the process.¹⁴⁸ And even in the minority of cases where a party files a request for review prior to the election, there is no guarantee that the Board, given resource constraints and other responsibilities, will be able to rule on the request within the waiting period, which, again, means that a waiting period may cause needless delay. And then, even assuming the Board can resolve the pre-election request within the waiting period, historical practice shows that the Board rarely reverses a regional

director's pre-election decisions,¹⁴⁹ and so, once again, the mandated delay will have served little beneficial purpose.

In sum, there is a very small number of cases where: (1) a party files a request for review before the election; (2) the Board rules on the request for review prior to the election; and (3) the Board's ruling reverses the regional director's decision. That means that the 2019 rule's waiting period would cause delay in every contested case (and every stipulated election case—comprising the vast majority of the Board's representation case docket—whose terms are impacted by parties' estimations of how much time would transpire before the election if the nonpetitioning party insisted on a pre-election hearing) in order to claim a nebulous and unproven enhancement of finality, certainty, uniformity, transparency, and fairness and accuracy in the tiny number of cases that meet these three uncommon conditions. We do not judge that tradeoff to be worthwhile. Delay for no benefit in the vast majority of cases would not be offset by improved finality, certainty, uniformity, transparency, and fairness and accuracy in a tiny number of cases.

Accordingly, to eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation, with the necessary flexibility for regional director adjustment to the circumstances of any particular case, this rule rescinds the month-long waiting period and directs regional directors to schedule an election for as soon as practicable after the direction of an election.¹⁵⁰

¹⁴⁹ For instance, information produced from searches in the Board's NxGen case processing software shows that in fiscal year 2019—the last full year that all provisions of the 2014 rule were in effect—among the 47 cases with a request for review, only 2 requests for review were granted and neither resulted in a reversal, so a request for review was granted in only 1.56% of directed election cases and warranted reversal in 0% of directed election cases.

¹⁵⁰ Rather than defend the 2019 Board's contemporaneous justifications for its waiting period provision, our dissenting colleague espouses a new rationale: that the 20-business day waiting period is “critical” to provide an adequate “period of time during which employees can become ‘fully informed’ voters.” The 2019 Board did not offer this “fully informed voters” justification for imposing a 20-business day waiting period and instead explained that “this period is designed ‘to permit the Board to rule on any request for review which may be filed[.]’” See 84 FR at 69545. In any event, the 2014 Board comprehensively explained why all of the changes made in that rule to which we return, including preventing the 20-business day waiting period from taking effect, do not prevent employees from becoming fully informed about their decision whether to unionize. See *infra* Part V (summarizing the 2014 rule's explanation, 79 FR at 74318–74326, 74423–74424, that the changes in the aggregate would continue to provide a

¹⁴⁰ 84 FR at 69546 (“We acknowledge here that the 20-business-day period will detract from how promptly elections were—or at least could be—conducted under the 2014 amendments.”).

¹⁴¹ 79 FR at 74410.

¹⁴² See 84 FR at 69582 & fns.244–247 (then-Member McFerran, dissenting) (citing data showing stability in relevant indicia of finality, certainty, fairness, accuracy, transparency, and uniformity).

¹⁴³ See, e.g., *ABC of Texas*, 826 F.3d at 226–227 (noting that the Act does not mandate a specified waiting period prior to the election).

¹⁴⁴ Information produced from searches in the Board's NxGen case processing software shows post-2014 rule medians of 11 to 12 calendar days from issuance of a decision and direction of election to the election itself in FYs 2016–2017. This shows that elimination of the waiting period enabled the Board to conduct elections more quickly because the waiting period would have prevented the Board from conducting elections so soon after issuance of the decision and direction of election.

¹⁴⁵ 84 FR at 69545.

¹⁴⁶ *Id.*

¹⁴⁷ For instance, information produced from searches in the Board's NxGen case processing software shows that in fiscal year 2019—the last full year the 2014 rule was in effect—there were 1,179 total elections and 128 cases with a decision and direction of election but only 47 with a request for review. So a request for review was filed in only 36.72% of cases with a directed election and in only 3.99% of cases with an election.

¹⁴⁸ Moreover, as noted above, although the waiting period, on its terms, applies only to directed elections, the threat of a directed election and the attendant waiting period may also be used to extract concessions concerning election details in an election agreement.

102.69 Election Procedure; Tally of Ballots; Objections; Certification by the Regional Director; Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Regional Director Decisions on Objections and Challenges

A. Briefing Following Post-Election Hearing

To further enhance the expeditious resolution of questions concerning representation without any countervailing decline in other policy interests, this rule also rescinds the 2019 rule's blanket entitlement for parties to file post-hearing briefs with the hearing officer in all cases.¹⁵¹ Accordingly, this rule reverts to what the 2019 Board conceded was the Board's "historical[]" practice of permitting briefing only at the discretion of the hearing officer.¹⁵²

Certification of the results of a Board-conducted election cannot issue until any determinative challenges or election objections are resolved. Thus, by giving parties an entitlement of 5 business days—and up to an additional 10 business days upon a showing of good cause—to file briefs following the close of the post-election hearing, the 2019 rule built in another layer of delay. Rescinding this blanket entitlement for briefing thus further reduces delay and thereby promotes finality and, by avoiding another round of briefing, saves the Board and the parties resources expended on repetitive argument. The parties will already have had a chance to present argument on the challenges and objections at the hearing itself. Many of these challenges and objections issues are straightforward and frequently reoccurring. Hearing officers thus gain expertise in resolving them and only rarely need to resort to briefing to do so. When such briefing would be helpful, they can allow it.¹⁵³ Additionally, under the 2014 rule provisions which we reinstate, parties still have a right to file briefs with the regional director when they file exceptions to the hearing officer's recommended disposition of post-election objections and determinative challenges, and parties also have a right to file briefs with the Board in support of any request for review of the regional

director decision on objections and determinative challenges. Accordingly, another round of briefing following the close of the post-election hearing is not necessary.

V. Response to the Dissent

Our dissenting colleague makes a number of provision-specific arguments that we have rebutted in the discussion above. Generally, these arguments assert that our reinstatement of some aspect of the 2014 rule will have various negative consequences. But those arguments suffer from the same defect as the rationale for the 2019 rule itself: They lack factual support, notwithstanding that the 2014 rule was in effect for five years. If there were negative consequences arising from it, our dissenting colleague should be able to demonstrate as much.

The balance of the dissent makes two broader arguments, each claiming that we have failed to engage in reasoned decision making. Thus, our colleague argues (1) that we have improperly prioritized expedition in the representation case process at the supposed expense of employees being fully informed and (2) that we have improperly considered representation case data that was likely impacted by the COVID-19 pandemic. As we explain below, each of these arguments misses the mark.

The Board has a statutory duty to ensure that representation cases are resolved expeditiously. As we have noted, Congress has described "the exceptional need for expedition" in representation cases,¹⁵⁴ and the Supreme Court has said that we "must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily."¹⁵⁵ By effectively returning the Board's representation case procedures to those that were in effect for five years under the 2014 rule, we enhance the speed with which representation cases will be resolved and, in doing so, we act consistent with the policy of Congress, as recognized by the Supreme Court.

In fulfilling that statutory duty, we have not sacrificed employees' ability to become fully informed voters. As extensively explained in the 2014 rule's preamble, the changes to the Board's election procedures will continue to provide a meaningful opportunity for campaign speech before the election, and thus a sufficient opportunity for

employees to become fully informed voters.¹⁵⁶ Several factors mitigate any arguable problems introduced by a shortened campaign period flowing from the 2014 rule's expedited case processing. First, union organizing campaigns typically start well before the representation case process is ever triggered by the filing of a petition with the Board, so employees typically start becoming informed about their decision whether to be represented by a union well before the representation case process is triggered. Moreover, as recognized by the Supreme Court, union organizing campaigns rarely catch employers by surprise and so employers too can begin informing employees about their union views before a petition is filed.¹⁵⁷ "[E]ven in the absence of an active organizing campaign, employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees" through materials like handbooks and orientation videos.¹⁵⁸ In addition, employers are able to rapidly disseminate their campaign message post-petition.¹⁵⁹ And, as recognized by reviewing courts turning back challenges to the 2014 rule, regional directors will take into account parties' "opportunity for meaningful speech about the election" in setting an election date.¹⁶⁰ Our dissenting colleague disregards this because he has a different policy preference, which, as explained, we reject.¹⁶¹

The dissent's other argument—questioning the data we have considered—is equally unfounded. Even putting aside the data which support our policy choice here, we would still choose to substantially rescind the 2019 rule and reinstate the 2014 rule. As we have explained above, the 2019 Board necessarily acknowledged it was adding time to the representation case process¹⁶² and justified this change

meaningful opportunity for campaign speech before the election).

¹⁵¹ 29 CFR 102.69(c)(1)(iii) (Dec. 18, 2019).

¹⁵² 84 FR at 69556.

¹⁵³ Our dissenting colleague contends that we "minimize the complexity of representation cases" by eliminating briefing as of right. He overlooks that in complex cases, in both the pre- and post-election hearing context, the regional director or hearing officer has discretion to allow briefing.

¹⁵⁴ Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

¹⁵⁵ *A.J. Tower*, 329 U.S. at 331.

¹⁵⁶ See 79 FR at 74318–74326, 74423–74424.

¹⁵⁷ See id. at 74320 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)).

¹⁵⁸ See id. at 74321–74322.

¹⁵⁹ See id. at 74322–74323.

¹⁶⁰ See *RadNet*, 992 F.3d at 1122 (quoting 79 FR at 74318); *ABC of Texas*, 826 F.3d at 227 (same).

¹⁶¹ Notably, our dissenting colleague fails to present any evidence of an election in which employees did not have adequate time to become informed about the decision they were making. Put simply, under the procedures to which we return, representation cases will clearly be resolved more expeditiously and there is no evidence that employees will be inadequately informed.

¹⁶² See, e.g., 84 FR at 69528 ("For contested cases, several provisions of the final rule will, both individually and taken together, result in a lengthening of the median time from the filing of a petition to the conduct of an election."); *AFL-CIO*, 57 F.4th at 1047 ("In the extensive preamble to the

with speculation that that cost of this added time would be offset by policy benefits like increased fairness, accuracy, transparency, uniformity, and finality. We make a different policy calculation, concluding that the cost of the added delay in the 2019 rule is not offset by benefits related to other values. There was no evidence, pre-COVID–19, supporting the claimed benefits of the 2019 rule, and that absence of evidence supports our decision to substantially rescind the 2019 rule and return to the 2014 rule. Our dissenting colleague's charge that the data from the period of the COVID–19 pandemic is tainted is entirely irrelevant to this aspect of our analysis.

Our dissenting colleague's argument also disregards the fact that, in addition to the more recent data we cite, our policy choice is supported by a substantial amount of data from both the period immediately prior to the effective date of the 2014 rule and the period when the 2014 rule was in effect.¹⁶³ None of this data was impacted by the effects of the pandemic, and it supports the view that the 2014 rule, to which we substantially return, allows for the expeditious processing of representation cases while ensuring fairness, accuracy, transparency, uniformity, and finality.

As for the more recent data from fiscal years during the COVID–19 pandemic, that data only provides further confirmatory support for our policy judgment. We have fully acknowledged that some of the recent delay in representation cases is likely attributable to the effects of the COVID–19 pandemic, but, as we have explained, we believe that some of the delay, as borne out in the data, is also due to the 2019 rule, given the 2019 Board's concession that its rule would lengthen the representation case process. Moreover, as we have demonstrated above, the recent data also provides confirmatory support for the conclusion that the 2019 rule has not demonstrably improved fairness, accuracy, transparency, uniformity, and finality.

2019 Rule . . . the Board repeatedly acknowledges that its changes will result in longer waits before elections relative to the 2014 Rule.”)

¹⁶³ See, e.g., supra fn.7, fn.8, fn.17, fn.43, fn.44, fn.45, fn.61, fn.104, fn.107, fn.108, fn.110, fn.128, fn.139, fn.144, fn.147, fn.149.

Indeed, we note that, because some of the 2019 rule provisions—regarding the scope of the pre-election hearing and the waiting period between issuance of the decision and direction of election and the election itself—did not go into effect and because the 2019 rule stated that those provisions largely restored the pre-2014 rule status quo (84 FR at 69525, 69539–69542, 69544–69545), the relevant comparison with respect to those provisions is not between the pre-2019 rule and the post-2019 rule COVID–19 periods, but between the periods before and after the implementation of the 2014 rule.

As we have explained, the 2019 Board never provided any evidence that there was a problem related to these policy values under the 2014 rule. Nor, examining pre-COVID–19 data, have we found such evidence. That the recent data is consistent with those prior conclusions simply confirms that our policy judgment is more than amply supported.¹⁶⁴

VI. Dissenting View of Member Kaplan

Member Marvin E. Kaplan, dissenting.

A. Introduction

My colleagues reinstate the *Representation—Case Procedures* Rule that the Board promulgated in 2014¹⁶⁵ and revoke the remaining aspects of the *Representation-Case Procedures* Rule promulgated by the Board in 2019.¹⁶⁶ In doing so, my colleagues echo the rationale in the 2014 Rule with significant emphasis on an “observation” made by the Supreme Court in *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), that “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently, and speedily.” My colleagues’ emphasis, however, is based on a fundamentally flawed premise—that speed is more important than any other consideration in determining whether the Board is fulfilling its duty to protect one of the fundamental rights protected by the Act: the right of employees to choose whether or not to be represented by a union. Further, nothing in the *A.J. Tower* decision suggests that the Court was urging the Board to place expediency over all other considerations in determining whether the Board’s rules met the statutory goal of Section 9(b).

As just one example, the Board has expressly recognized that “ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights” is an

¹⁶⁴ Notably, the 2019 Board promulgated its rule without relying on any data at all. See 84 FR at 69557 (“[O]ur reasons for revising or rescinding some of the 2014 amendments are [] based on non-statistical policy choices.”). If those choices (endorsed by our dissenting colleague then and now) were not arbitrary and capricious, then our reasoned decision to give some weight to recent data cannot be infirm. See *AFL-CIO*, 57 F.4th at 1046–1048 (rejecting challenge that the 2019 rule was arbitrary and capricious as a whole due to the Board’s ignoring data and not even citing anecdotal evidence of problems with the 2014 rule).

¹⁶⁵ Hereinafter, the “2014 Rule.”

¹⁶⁶ Hereinafter, the “2019 Rule.” For ease of reference, I will refer to the revocation of the 2019 Rule, even though my colleagues are only revoking those provisions that remain in effect following the decision in *AFL-CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. 2023).

important statutory right. Mod Interiors, 324 NLRB 164, 164 (1997) (emphasis added); accord *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966) (finding that “an employee who has had an effective opportunity to hear the arguments concerning choice is in a better position to make a more fully informed and reasonable choice”). Yet, my colleagues’ reinstatement of the 2014 Rule unquestionably values quick elections over fully informed voters. For example, by delaying the determination of questions of eligibility, supervisory status, and unit scope until after the election, the 2014 Rule deprives employees of the ability to understand which coworkers would be included in the unit they are voting on, and which would not.¹⁶⁷ Similarly, by revoking the 2019 Rule’s *reinstatement* of the 20-business day waiting period between the issuance of the decision and direction of election and the election and replacing it with the mandate in the 2014 Rule that regional directors must schedule elections for “the earliest date practicable,” the majority has drastically limited the period of time during which employees can become “fully informed” voters.¹⁶⁸ By placing an inordinate emphasis on speedy elections, my colleagues have failed to consider the extent to which these rules will have a negative effect on the very individuals the Act was meant to protect in representation elections—the voters. One is left to wonder how much the voters will actually benefit from the requirements that elections be held as quickly as possible when they find themselves exercising this right without fully understanding the arguments concerning representation and the ways in which their vote may affect them.

Further, my colleagues are revoking the 2019 Rule before there has been any opportunity to obtain relevant data pertaining to the effects of that rule. In *State Farm*¹⁶⁹ the Supreme Court held that, in order for a rulemaking to survive the “arbitrary and capricious” standard,

¹⁶⁷ As will be discussed infra, the Supreme Court has already recognized that pre-election determination of these issues *supports* the Act’s interest in efficient and timely elections, in part because parties that are unhappy with the results of elections will not have the opportunity to delay the finalization of results by litigating these issues later.

¹⁶⁸ The majority characterizes the 2019 Rule as “impos[ing]” a 20-business day waiting period. If that is so, then the Board had been “imposing” a 20-business day waiting period on parties to elections for a long time prior to the 2014 Rule, which for the first time prohibited regional directors from establishing any waiting period whatsoever.

¹⁶⁹ *Motor Vehicles Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

an agency must “examine the *relevant* data and articulate a satisfactory explanation for its action” *Id.* at 43 (emphasis added). Given the extraordinary effects of the COVID–19 pandemic on the Board’s election processes for the short period of time in which the 2019 Rule has been in effect, however, relevant data—*i.e.*, data based on elections not conducted under extraordinary circumstances—is not available. Therefore, no one is in a position as of yet to make any data-driven conclusions regarding the efficacy of the Rule. Simply put, any attempt to challenge the 2019 Rule based on data is premature. Because my colleagues cannot identify any relevant data that would enable the effects of the 2019 to be compared with data from the years following the 2014 Rule, I do not believe that my colleagues’ re-promulgation of the 2014 Rule can survive the “arbitrary and capricious” standard.¹⁷⁰

B. The Majority’s Decision To Revoke the 2019 Rule and Repromulgate Corresponding Sections From the 2014 Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act Because the Decision Is Not Based on Representative Data

My colleagues repeatedly state that the Board’s internal data regarding the processing of representation petitions after the implementation of the 2019 Rule demonstrate that the rule lengthened election times without any appreciable improvement in the other interests upon which the Board relied in promulgating that rule. In doing so, my colleagues chiefly rely on data taken from the first two years that the 2019 Rule was effective. However, the COVID–19 pandemic began shortly after the Board implemented the 2019 Rule. It cannot reasonably be disputed that the pandemic caused the Board to conduct elections in a manner so different from the norm that any data derived therefrom, especially with regard to the time that it took to hold elections, is not representative data. Accordingly, because that data does not exist, my colleagues fail to establish that their decision to revoke the 2019 Rule is based on any relevant data, as required by the Supreme Court.

¹⁷⁰ My colleagues contend that their “reasoned decision to give some weight to recent data cannot be infirm” because “the 2019 Board promulgated its rule without relying on *any* data at all.” The 2019 Rule relied on a reasoned balancing of competing statutory and policy interests—interests not adequately considered by the 2014 Rule. To state the obvious, relying on flawed data as justification for overturning the 2019 Rule is not the same thing.

“Due to the extraordinary circumstances related to the pandemic,” the Board was forced to temporarily suspend elections in March 2020 in order to “ensure the health and safety of Board employees as well as members of the public involved in the election process.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 3 (2020) (internal quotations omitted). When elections resumed, the Board flipped existing election standards on their head. Longstanding Board law favors conducting manual Board elections, and that preference is reflected in the percentage of mail ballot elections conducted during the years immediately following the 2014 Rule.¹⁷¹ During those years, mail-ballot elections represented less than 13% of all elections. In the fiscal years following the 2019 Rule, however, mail-ballot elections represented an unprecedented percentage of Board elections: in fiscal year 2020, 45% of elections were held by mail ballot; in 2021, the percentage was a staggering 83.9%; and in 2022, 77.6% of elections were conducted by mail-ballot election. My colleagues attempt to downplay the dramatic effect that this had on the time frames within which elections took place under the 2019 Rule, but they are ignoring undisputed facts. Not only do mail-ballot elections take longer than manual elections as a general rule, but the regional offices also had to factor additional mailing time into the election deadlines due to the reliability issues plaguing the United States Postal Service.¹⁷²

Despite the truly unprecedented circumstances faced by the Board in conducting elections after the implementation of the 2019 Rule, my colleagues attempt to rely on data from that period, acknowledging only that the effects of the COVID–19 pandemic *may* have affected the results. For example, the majority notes that 88.8% and 90.7% of representation cases were resolved within 100 days during the last 2 full years, respectively, of the 2014 Rule while only 82.3% and 85.4% were resolved within that time period during the first 2 years of the 2019 Rule. Again, any increase in processing times is easily, and indeed logically, attributable to the effects of the pandemic on the

¹⁷¹ In fiscal years 2015 through 2019, the percentage of mail-ballot elections ranged from 10.3% to 12.8%.

¹⁷² See, e.g., Quinn Klinefelter, *U.S. Postal Service Struggles To Deliver Mail After Holidays Amid Pandemic*, NPR (Jan. 22, 2021, 7:01 p.m.), <https://www.npr.org/2021/01/22/959273022/theres-no-end-in-sight-mail-delivery-delays-continue-across-the-country>.

Board’s election processes.¹⁷³ They further observe, among other things, that the reversal of regional director decisions and directions of elections, the number of election objections and determinative challenges, and the number of rerun elections all remained relatively unchanged under the 2019 Rule. Even assuming that this data could be considered representative data, the fact that the effects of the 2019 Rule were consistent with the effects of the 2014 Rule does not establish a reasonable justification for revoking the 2019 Rule.

Because no representative data yet exists with regard to the effect on the 2019 Rule on election processes, there is no data to support my colleagues’ conclusion that the 2019 Rule is a “failure.” Nor is there evidence to suggest that the “increased delay apparently attributable to the 2019 [R]ule has [not] been offset by meaningful improvements in furthering the interests cited by the Board.” Accordingly, my colleagues have failed to establish that data justifies their decision to revoke the 2019 Rule.

C. The Decision To Revoke the 2019 Rule and Repromulgate Corresponding Sections From the 2014 Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act Because the Majority Fails To Provide a Reasoned Basis for Its Amendments

As a participant in the promulgation of the 2019 Rule, I have already explained, at length, why the revocation of the 2014 Rule was necessary and why the 2019 better effectuated the purposes of the Act. See 84 FR at 69526–69587. My additional comments in this dissent are not meant to replace those explanations but rather to supplement them.¹⁷⁴

1. Scheduling of Pre-Election Hearing

My colleagues reinstate the 2014 Rule’s significant contraction of the time period between the filing of a petition

¹⁷³ Remarkably, my colleagues assert that even though some delay is “likely attributable to the effects of the COVID–19,” they “are confident that any pandemic-related delay in the processing of representation cases has been compounded by the effects of the 2019 Rule.” They further assert that “the delay would have been even greater had certain of its provisions not been enjoined.” With due respect to my colleagues, pure speculation of what the data might have been had the pandemic not drastically changed the landscape in which elections were held does not constitute a reasoned basis for revoking the 2019 Rule.

¹⁷⁴ Accordingly, my colleagues’ assertion that I am not “defend[ing] the 2019 Board’s contemporaneous justifications for its waiting period provision” is simply false. I am choosing not to repeat all the analytical justifications set forth in the 2019 Rule because, in my view, doing so here serves no purpose other than redundancy.

to the pre-election hearing. Specifically, the pre-election hearing will now generally be scheduled to open eight calendar days—which, as my colleagues note, could result in a period of only five business days should a holiday fall within that period—from service of the notice of hearing compared to the fourteen business days¹⁷⁵ provided for in the 2019 Rule. I have already addressed the rationale for replacing the eight-calendar day period with the fourteen-day period in the 2019 Rule, so I will not repeat those reasons here. However, I note that my colleagues have utterly failed to establish a reasoned basis for revoking the 2019 Rule and reinstating the somewhat draconian time limitations put in place by the 2014 Rule.

Their explanation for reimposing such a strict limitation on the time available to parties to prepare for the hearing and file a statement of position¹⁷⁶ is limited to three rationales. First, they state that the eight-day period is necessary because a longer time period would result in elections taking longer. In addition to being obvious, relying on that factor alone—as opposed to weighing carefully the other important interests at stake—is hardly a reasoned basis for revoking the 2019 Rule. As mentioned above, conducting elections as soon as possible is neither mandated by the Act nor by the Supreme Court. Second, my colleagues cite *Croft Metals, Inc.*, 337 NLRB 688 (2002) as a reasoned basis for reinstating the 2014 Rule. In that case, after finding that the three days of notice provided prior to the Employer was insufficient, the Board opined that “a minimum of five [business] days notice was sufficient.” Id. at 688. What my colleagues fail to note, however, is that *Croft Metals*, a case that issued more than twenty years ago, has never been cited in another Board case. In my view, a single Board case hardly provides a reasoned basis for establishing five business days as the mandatory—not minimum—period of notice. For that matter, that case does not provide a reasoned basis for revoking the 2019 Rule because the 2019 Rule is consistent with *Croft Metals*. Finally, my colleagues adopt the rationale set forth in the 2014 Rule—that the eight-day period “codified *best practices* in some regions.” (Emphasis added.) In addition to being misleading, this rationale does not provide sufficient

justification for limiting the notice provided to parties before the hearing to eight days.

Throughout the 2014 Rule, the Board justifies its significant overhaul of the Board’s representation rules by saying that the amendments reflect “best practices.” In fact, the 2014 Rule uses this phrase at least ten times without providing any basis whatsoever for concluding that the amendments being proposed have been found to be “best practices” by anyone other than the Board in writing its rules. See, e.g., 79 FR at 74308, 74309, 74315, 74353, 72363, 74367. After all these mentions, the 2014 Rule finally introduces a source for determining “best practices”—a “1997 Report of Best Practices Committee.”¹⁷⁷ Id. at 74373.

Thereafter, the 2014 Rule cites to that Report frequently as evidence that aspects of the rule are consistent with what was considered a “best practice.” See id. at 74401 n.434; 74415 n.470; 74416; 74427 n.528. Unlike other aspects of the 2014 Rule, however, the Board did not adopt the “best practice” set forth in the Report in establishing the deadline for scheduling the pre-election hearing. The 1997 Report indicated that, as a best practice, hearings should open between ten and fourteen days after the filing of the petitions.¹⁷⁸ 79 FR at 44373. The Board, however, arbitrarily came up with its own “best practice.” Specifically, the Board stated:

The pre-election hearing will generally be scheduled to open 8 days from notice of the hearing. This largely codifies *best practices* in some regions, where hearings were regularly scheduled to open in 7 days to 10 days. However, practice was not uniform among regions, with some scheduling hearings for 10 to 12 days, and actually opening hearings in 13 to 15 days, or even longer. The rule brings all regions in line with best practices.

79 FR at 74309 (emphasis added).¹⁷⁹ There are many problems with this

¹⁷⁷ The 2014 Rule later refers to a “1997 Report of Best Practices Committee—Representation Cases.” See, e.g., 79 FR at 74427 n.528. I am assuming that the references are to the same report.

¹⁷⁸ In asserting that the 2014 Rule’s failure to adopt the Report’s “best practice” in this area was not arbitrary, my colleagues rely on post-hoc speculation. The 2014 Rule, however, did not rely upon my colleagues’ explanation for its decision to depart from the “best practice” set forth in the Report. Accordingly, such post-hoc speculation hardly establishes that the 2014 Rule’s selection of eight days from notice of the hearing—which was not the “best practice” cited in the Report—was not arbitrary.

¹⁷⁹ Quoting the 2014 Rule, my colleagues also observe that a “‘model opening letter in 1999’—and a model letter is an attempt to convey best practices—‘indicated that the hearing should open no later than seven days after service of the notice.’” Again, this does not answer the question

reasoning, including the obvious question why the selection of “eight days” as a maximum, when the alleged “best practices” range was between seven and ten, was not arbitrary. But there is an even more fundamental problem. The 2014 Rule does not explain why it was a “best practice” to open hearings at eight days rather than seven days, ten days, twelve days, or “even longer.” In justifying the eight-day period, my colleagues fare little better. In finding it a “best practice,” they beg the question: they assume that shorter time periods between the filing of the petition and the opening of the hearing are “best practices” for no other reason than that they are shorter. Unfortunately, reasoned decision-making requires more analysis than “we think shorter is better,” and justifying a specific outcome by declaring that examples consistent with that outcome were “best practices,” while examples inconsistent with that outcome were not, does not come close to constituting reasoned analysis.

It is also worth noting that my colleagues fail to give significant weight to the negative effects that their rules will have on employers in general, and small businesses in particular. My colleagues attempt to minimize these effects, accusing the 2019 Rule of unnecessarily sacrificing “the statutory interest in expeditiously resolving questions of representation” to, among other things, the “non-statutory interest in maximizing employer convenience.” Among these “non-statutory interests” that the 2019 Rule sought to protect are the “convenience” of retaining legal counsel, the “convenience” of adequately gathering the facts, the “convenience” of fully researching the applicable law, the “convenience” of securing witnesses; the “convenience” of adequately coordinating with regional personnel; and the “convenience” of having sufficient time to secure an election agreement with the other parties. What my colleagues characterize as “conveniences,” I characterize as basic fairness and due process.¹⁸⁰ They guarantee that “parties

of why the 2014 Rule determined that eight days after the notice of the hearing was the proper limit.

¹⁸⁰ Contrary to the majority’s representation, only one court has considered the issue of whether the notice provided to employers before the pre-hearing election satisfied due process. *UPS Ground Freight v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019) (finding that employer’s due process rights were not violated by receiving 11 days notice before the pre-election hearing). The other two cases cited by the majority involved facial challenges to the 2014 Rule. In both of those cases, the courts found that they could not strike down the 2014 Rule on due process grounds because there was no showing “that an employer

Continued

¹⁷⁵ The 2019 Rule used business days instead of calendar days to reduce confusion and promote uniformity and transparency.

¹⁷⁶ As discussed later, these time limitations could result in an employer being required to undertake all the work necessary to file a Statement of Position in three and a half business days.

[have] the opportunity to present evidence and advance arguments concerning” issues fundamental to resolving questions concerning representation. *Bennett Industries*, 313 NLRB 1363, 1363 (1994). Such protections are critical to ensuring that employees in the prospective unit have the opportunity to make a fully informed decision about their representational status in the absence of objectionable conduct.¹⁸¹

2. Conduct of Hearing

As mentioned above, my colleagues place significant emphasis on an “observation” made by the Supreme Court in *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), that “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently, and speedily.” 329 U.S. at 331. And further, as discussed above, this statement by the Court did not require the Board to promulgate rules so that employees’ votes would be recorded as speedily as possible. Rather, the Court indicated that any such rules must “insure the fair and free choice of bargaining representatives by employees.” *Id.* at 330.

But more importantly, my colleagues completely disregard the actual holding in *A.J. Tower*. The issue before the Court was whether the Board had erred in denying the employer’s *post-election* challenge to the eligibility of one of the voters. The employer asserted that, at the time of the election, it had not realized that the employee had abandoned her position prior to the election. The U.S. Court of Appeals for

the Fifth Circuit had found that the Board erred by denying this challenge, reasoning that for jurisdictional reasons the Board could not certify a unit where less than a majority of *employees* who voted had voted for unionization. In overruling the Fifth Circuit’s decision, the Court expressly disapproved of the employer’s attempt to challenge the employee’s eligibility *post-election*:

The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted, and the election may fail to reflect the will of the majority of the electorate. *One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality.* In political elections, this device often involves registration lists which are closed some time prior to election day; all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. *To permit such [post-election] challenges, . . . would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and “keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls.”* Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1416.

Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost; its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. *The Board’s adoption of the rule in elections under the National Labor Relations Act is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.*

Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, *post-election* challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter, giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the

majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by *post-election* challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

Id. at 327–329 (emphasis added).

Accordingly, my colleagues ignore the inconvenient fact that the Supreme Court found—in *the very same case* where it observed the need to record employee votes accurately, efficiently, and speedily—that resolving issues of employee eligibility to vote before the election not only satisfies that goal but is “peculiarly appropriate” in Board elections and “is in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.” Accordingly, any assertion that the Court’s decision in *A.J. Tower* supports a revocation of Section 102.64(a) of the 2019 Rule, which states that “[d]isputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed,” is without merit.¹⁸²

Finally, my colleagues argue that “[s]upervisory status issues exist only at the margin because in most cases where there is uncertainty concerning the supervisory status of one or more individuals, the employer nevertheless has in its employ managers and supervisors whose status is not in dispute . . . [and who] may . . . be utilized in a pre-election campaign against a union.” As the 2019 Rule observed, however, this issue is not simply about an employer disseminating its message to employees, it is about “*post-election* complications where the putative supervisors engage in conduct during the critical period

will necessarily be deprived of its due process rights in every set of circumstances.” *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 206 (D.D.C. 2015); see also *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016). Finding that the 2014 Rule does not necessarily preclude due process in all instances is entirely different from finding that the 2014 Rule satisfies due process in all instances.

¹⁸¹ My colleagues contend that I “fail[] to meaningfully engage with the relevant legal discussion on [the due process] issue in the 2014 [R]ule.” Yet, the 2014 Rule’s analysis is little more than a recapitulation of its earlier findings. For instance, on one side of the due process scale, the 2014 Rule found that the shorter timeframes “pose little risk of error” because issues resolved in representation cases are “typically . . . not all that complex to litigate.” 79 FR at 74372. On the other, it found that the tighter timeframes “serve very important public interests” because “each delay in resolving the question concerning representation causes public harm.” *Id.* Based on this relative weighting, the 2014 Rule concluded that its many changes did not deprive parties of their due process rights. It was this flawed analysis that the Board thoroughly and appropriately rejected in the 2019 Rule, in which I participated. Once again, I do not believe it is necessary to redundantly explain the reasons for that rejection in this dissent.

¹⁸² My colleagues argue that *A.J. Tower* “stands for the proposition that challenges to voters’ eligibility in union elections must be made prior to the election—not that all such challenges need to be resolved prior to the election.” However, the reasoning behind the Court’s decision is undeniable. The Court concluded that resolving questions of voter eligibility promotes the bedrock democratic ideal of the fully informed voter and the substantial interest in election finality. Certainly, the 2019 Rule’s preference for resolving such questions prior to the election better advances these interests than did the 2014 Rule to which my colleagues return.

Because my colleagues would limit the scope of the pre-election hearing consistent with the 2014 Rule, they would also rescind the 2019 Rule’s provisions pertaining to the parties’ right to introduce relevant facts into the record and call, examine, and cross-examine witnesses at the pre-election hearing. For the reasons summarized above and more fully stated in the 2019 Rule, I would retain these additional provisions as well. 84 FR at 69542.

that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by nonparty employees.” 84 FR at 69540.¹⁸³

3. Due Date for Non-Petitioning Party's Statement of Position

As discussed above, my colleagues have failed to establish that the 2014 Rule met the requirement under the Administrative Procedures Act by providing a non-arbitrary, reasoned basis for requiring regional directors to schedule pre-election hearings no more than eight calendar days from the service of the Notice of Hearing.¹⁸⁴ The arbitrary nature of this unreasonably short time frame results in an even more problematic result insofar as the 2014 Rule requires that the Statement of Position is due by noon the day before the opening of the pre-election hearing. Based on the scheduling of the pre-election hearing, this will normally be due about seven calendar days after service of the notice of hearing.

As explained in the 2019 Rule, I disagree with this provision of the 2014 Rule. See 84 FR at 69534–69538. The 2019 Board determined that the statement of position is an effective tool in narrowing the issues to be litigated and even in facilitating election agreements. However, the statement of position can only be effective if the parties have adequate time to prepare it. Parties must craft a statement of position while simultaneously retaining counsel, researching facts and law, identifying potential witness, and possibly negotiating election agreements. But even if my colleagues are, in effect, deciding that it is not important that parties have sufficient

time to prepare statements of position, it is then arbitrary and capricious for them also to preclude parties from later raising an argument that did not appear in its statement of position. Either statements of position play an important role in representation case procedures or they do not. If the latter is true, then I'm not sure why my colleagues continue to require parties to file them at all. If the former is true, then due process demands that parties have an adequate time to consider all possible concerns that they might wish to raise with regard to the election, given that those concerns will be deemed waived if they are not set forth in the Statement of Position.¹⁸⁵

4. Responsive Statement of Position

My colleagues also rescind the 2019 Rule provision requiring the petitioner to file a written responsive statement of position, instead requiring the petitioner to respond orally at the pre-election hearing, as was done under the 2014 Rule. For the reasons stated in the 2019 Rule, retention of the right to file a written responsive statement of position better supports the interests of timeliness, efficiency, transparency, and uniformity in elections. 84 FR at 69536–69538

5. Notice of Petition for Election

My colleagues rescind the 2019 Rule's requirement that employers post and distribute the notice of petition for election within five business days after service of the notice of hearing and return to the 2014 Rule, which required the posting and distribution of the notice to be done within two business days. The majority argues that because the information contained in the notice is “straightforward,” an employer should have no problem promptly completing this task.

Although the majority views the posting and distribution as a simple task, this ignores the realities of the modern workplace. As more fully explained in the 2019 Rule, employers can easily encounter logistical

difficulties in posting and distributing the notice. 84 FR at 69538. Large employers, especially large multi-location employers, need time to determine all of the places where the notice will need to be posted and all of the employees to whom it must be electronically distributed. Such information cannot always be easily ascertained by a few keystrokes at some far-off centralized human resources department, as my colleagues so readily believe. Smaller employers, who may not be well versed in the intricacies of the Board's election rules, too will need time to consult with legal counsel to fully understand their obligations to post and distribute the notice in addition to securing the information necessary to satisfy that obligation. Getting these decisions right is critical because failure to properly post and distribute the notice of petition for election in a timely manner may result in setting aside the election. Moreover, with the expanded timeframe under the 2019 Rule, the notice will be posted for longer than under the 2014 Rule, thereby better informing employees of their rights and the election procedures. As a result, the few extra days to comply with this important requirement better serves the purposes of the Act.

6. Elimination of the 20-Day Waiting Period

Prior to the 2014 Rule, the Board's statements of procedure provided that the regional director would not normally schedule an election until a date between the 25th and 30th day after the date of the decision and direction of election, which allowed the Board time to act on any requests for review. The 2019 Rule slightly modified this traditional timeline, requiring regional directors to schedule elections no sooner than twenty business days after issuance of the decision and direction. As mentioned above, this period following the issuance of the decision and direction of election is critical to protect employees' rights under the Act to freely choose whether or not to be represented by a union. Again, the Board has expressly recognized that “ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights” is an *important statutory right*. *Mod Interiors*, 324 NLRB 164, 164 (1997) (emphasis added); accord *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966) (finding that “an employee who has had an effective opportunity to hear the arguments concerning choice is in a better position to make a more fully informed and

¹⁸³ The majority contends that, if this were indeed a “real” problem, the relevant data should show an increase in election objections. Of course, that argument ignores the much more likely outcome of this ambiguity—that a putative supervisor will not voice any opinion about unionization because they do not want to risk engaging in objectionable conduct.

¹⁸⁴ My colleagues reinstate the same standards set forth in the 2014 Rule for postponement of the hearing: a party must establish either “special circumstances” or “extraordinary circumstances” to obtain a postponement of the hearing. (They also set these standards for obtaining an extension for the Statement of Position, but given that the Statement of Position is due the day before the hearing at noon, it is hard to imagine that a party would be able to obtain a meaningful extension unless the hearing is postponed.) For the reasons set forth in the 2019 Rule, I do not believe that there is a compelling reason for jettisoning the Board's standard “good cause” standard for providing postponements and extensions, which was reinstated by the 2019 Rule. Most parties, as well as Regional Directors and courts, have no difficulty interpreting what is required to establish good cause. I do not believe that the same can be said for determining what is required to establish “special circumstances” or “extraordinary circumstances.”

¹⁸⁵ In *UPS Ground Freight*, the D.C. Circuit concluded that the “Statement of Position is not binding” because, under the 2014 Rule, the regional director has the discretion to “permit the employer to amend its Statement of Position in a timely manner for good cause.” 921 F.3d at 256. With due respect to the court, I am not sure how that follows. The Statement of Position *is* binding; the employer is limited to the issues raised in that document. The fact that the regional director *has the discretion* to amend the Statement of Position does not mean that the employer *has the right* to amend the Statement of Position. If the regional director opts not to permit an amendment, then the Statement of Position, which employers must file as little as three and a half days following service of the Notice of Hearing, *is* binding.

reasonable choice”). Yet, it is not clear how the majority reconciles this critical statutory right with its revocation of the 2019 Rule’s *reinstatement* of the 20-business day waiting period and its restoration of the 2014 Rule’s mandate that regional directors must schedule elections for “the earliest date practicable.” It is clear to me that this revision in the Board’s rules drastically limits the period of time during which employees can become “fully informed” voters.¹⁸⁶

Simply put, no one can say for certain how much time is sufficient time to allow an electorate to become fully informed voters. However, I think it is fair to say that it is difficult to imagine a rule that would more directly infringe on employees’ rights in this regard than requiring that elections be scheduled “as soon as practicable.” For the reasons set forth in the 2019 Rule, 84 FR at 69538–69542, 69544–69547, and summarized in my dissent to the final rule staying the implementation of these provisions, 88 FR at 14915, I believe that the majority has failed to adequately consider the important statutory interest in allowing employees to become “fully informed” voters in reinstating the unprecedented requirement that regional directors schedule elections as soon as possible.¹⁸⁷

¹⁸⁶ The majority characterizes the 2019 Rule as “impos[ing]” a 20-business day waiting period. If that is so, then the Board had been “imposing” a 20-business day waiting period on parties to elections for a long time prior to the 2014 Rule, which for the first time prohibited regional directors from establishing any waiting period whatsoever.

¹⁸⁷ I also note that my colleagues’ complaint about the 2019 Rule’s 20-day waiting period reflects some inconsistency in their position. When tasking the Board’s Regions with quickly processing representation matters, my colleagues characterize these cases as mainly presenting “straightforward and frequently reoccurring” issues governed by a “contained body of law.” However, when it comes to the Board’s processing of the inevitable requests for review, my colleagues are quick to plead that “resource constraints and other responsibilities” prevent expedited action.

Because my colleagues would limit the scope of the pre-election hearing consistent with the 2014 Rule, they would also rescind the 2019 Rule’s provisions pertaining to the parties’ right to introduce relevant facts into the record and call, examine, and cross-examine witnesses at the pre-election hearing. For the reasons summarized above and more fully stated in the 2019 Rule, I would retain these additional provisions as well. 84 FR at 69542.

My colleagues simply echo the arguments advanced in the 2014 Rule to support their conclusion that employees will have the opportunity to become fully informed even under their shortened timeframe. However, the dissenters to the 2014 Rule ably discussed the flawed evidence and analysis on which the 2014 majority relied. 79 FR at 74439–74440.

7. Post-Hearing Briefs

My colleagues also rescind provisions of the 2019 Rule that reinstated the parties’ right to file briefs after close of the pre-election hearings and extended that right to post-election hearings.¹⁸⁸ They return to the 2014 Rule, under which parties were entitled to present oral argument at the close of the hearings and could only file briefs upon special permission of the regional director in the case of pre-election hearings or the hearing officer in the case of post-election hearings. In doing so, they minimize the complexity of representation cases, as did the 2014 Rule. In 2019, the Board recognized that error of the 2014 Rule’s approach, observing that many of the issues that are litigated in hearings are anything but straightforward. 84 FR at 69542–69543, 69556. For instance, issues such as supervisory or independent contractor status frequently require detailed factual analyses in the context of multi-factor legal tests. Permitting parties a few days to file post-hearing briefs allows the parties time to review the transcript, to engage in legal research, and, thereby, to refine, moderate, or even abandon arguments on these difficult questions. Such efforts assist the Board and the parties in resolving matters in dispute, thereby promoting more *efficient* case processing without unduly delaying resolution of the case.¹⁸⁹

8. Notice of Election

Finally, my colleagues rescind the 2019 Rule provision that clarified the regional directors’ discretion to issue the direction of election separately from the notice of election by expressly stating that they “may” do so and return to the 2014 Rule, which stated that regional directors will “ordinarily” do so. As the 2019 Rule correctly observed, by clarifying the regional directors’

¹⁸⁸ Under the 2019 Rule, parties were entitled to submit post-hearing briefs within 5 business days after the close of the hearing. For good cause, the hearing officer could grant an extension of time not to exceed an additional 10 business days.

¹⁸⁹ Supervisory status and independent contractor status are just two issues that require a detailed factual analysis where briefing can be used to best make sense of fact intensive arguments. Indeed, some cases may raise many unique issues that together create a complex case in which the regional director or hearing officer would greatly benefit from briefing.

My colleagues attempt to downplay the significance of the elimination of parties’ opportunity to file post-hearing briefs by asserting that, the regional directors and hearing officers can grant “special permission” in the “rare complex case” in which they deem such briefing is needed. With due respect, it is cold comfort to parties to learn that their ability to advocate for their position in writing is only available should the regional director or hearing officer grant them permission to do so.

discretion to issue a direction of election and resolve election details later without having to justify a bifurcated action based on the existence of “unusual circumstances,” the 2019 Rule made the process more *transparent*. The 2019 Rule also made the process more *efficient* because it afforded regional directors greater leeway to engage the parties in post-hearing discussions about the conduct of the election and, thereby, created space with which to achieve agreement. 84 FR at 69544.

D. Conclusion

My colleagues’ efforts are, at best, unnecessary and premature and, at worst, arbitrary and capricious. The Final Rule forces regional directors to run elections as quickly as possible, without providing adequate safeguards to preserve the rights of all parties involved. My colleagues have failed to provide a reasoned basis for concluding that speedy elections protect employees’ right to fully exercise their statutory rights under the Act. Nor have my colleagues established any representative data to support their view that the 2019 Rule must be revoked. For the reasons discussed in this dissent, as well as the analyses set forth in the Board’s 2019 Rule and the cited portions of the dissent to the 2014 Rule, I cannot join my colleagues in promulgating the amendments set forth in this Rule.

VII. Other Statutory Requirements

Regulatory Flexibility Act

The Board is not required to prepare a final regulatory flexibility analysis for this final rule under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601, *et seq.*, because the Agency has not issued a Notice of Proposed Rulemaking prior to this action.

Paperwork Reduction Act

The amended regulations are exempt from the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* See 44 U.S.C. 3518(c). Accordingly, the final rule does not contain information collection requirements necessitating the approval of the Office of Management and Budget under the Paperwork Reduction Act.

Final Rule

This rule is published as a final rule. As discussed above in the preamble, and consistent with the decision in *AFL-CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. Jan. 17, 2023), this rule has been deemed a procedural rule exempt from

notice and comment, pursuant to 5 U.S.C. 553(b)(A), as a rule of “agency organization, procedure, or practice.”

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 102 as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

■ 1. The authority citation for part 102 continues to read as follows:

Authority: 29 U.S.C. 151, 156. Section 102.117 also issued under 5 U.S.C. 552(a)(4)(A), and Section 102.119 also issued under 5 U.S.C. 552a(j) and (k). Sections 102.143 through 102.155 also issued under 5 U.S.C. 504(c)(1).

Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

■ 2. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by Regional Director; Notice of Hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of Notice of Hearing.

(a) *Investigation; Notice of Hearing; notice of petition for election.* (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 8 days from the date of service of the notice excluding intervening Federal holidays, but if the 8th day is a weekend or Federal holiday, the Regional Director shall set the hearing for the following business day. The Regional Director may postpone the hearing for up to 2

business days upon request of a party showing special circumstances. The Regional Director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances. A copy of the petition, a description of procedures in representation cases, a Notice of Petition for Election, and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion.

(2) Within 2 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b) *Statements of Position*—(1) *Statement of Position in RC cases.* If a petition has been filed under § 102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the

event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) *Employer's Statement of Position.* (A) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(B) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(C) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those

individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(2) *Statement of Position in RM cases.*

If a petition has been filed under § 102.61(b) and the Regional Director has issued a Notice of Hearing, each individual or labor organization named in the petition shall file with the Regional Director and serve on the other parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe

all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* Within the time permitted for filing the Statement of Position, the employer shall file with the Regional Director and serve on the parties named in the petition a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases—(i) Employer's and Representative's Statements of Position.*

(A) If a petition has been filed under § 102.61(c) and the Regional Director has issued a Notice of Hearing, the employer and the certified or recognized representative of employees shall file with the Regional Director and serve on the parties named in the petition their respective Statements of Position such that they are received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice. The Regional Director may set the date and time for filing and serving

the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(B) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(C) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(D) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The

employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein; or take other appropriate action. If a Notice of Hearing is served, it shall be accompanied by a copy of the petition. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion. All hearing and post-hearing procedure under this paragraph (c) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the Regional Director's action shall be final, and the provisions for review of Regional Director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

■ 3. Amend § 102.64 by revising paragraph (a) to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is

being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

* * * * *

■ 4. Amend § 102.66 by revising paragraphs (a), (c), and (h) to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The Hearing Officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

* * * * *

(c) *Offers of proof.* The Regional Director shall direct the Hearing Officer concerning the issues to be litigated at the hearing. The Hearing Officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

* * * * *

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the Regional Director and within the time and addressing the subjects permitted by the Regional Director.

Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.

* * * * *

■ 5. Amend § 102.67 by revising paragraph (b) to read as follows:

§ 102.67 Proceedings before the Regional Director; further hearing; action by the Regional Director; appeals from actions of the Regional Director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

* * * * *

(b) *Directions of elections.* If the Regional Director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period. The Regional Director shall schedule the election for the earliest date practicable consistent with these Rules. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The Regional Director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), and it will ordinarily be transmitted simultaneously with the direction of election. If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as they have been permitted to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

* * * * *

■ 6. Amend § 102.69 by revising paragraph (c)(1)(iii) to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the Regional Director; hearings; Hearing Officer reports on objections and challenges; exceptions to Hearing Officer reports; Regional Director decisions on objections and challenges.

* * * * *

(c) * * * (1) * * *
(iii) *Hearings; Hearing Officer reports; exceptions to Regional Director. The*

hearing on objections and challenges shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The Hearing Officer may rule on offers of proof. Post-hearing briefs shall be filed only upon special permission of the Hearing Officer and within the time and addressing the subjects permitted by the Hearing Officer. Upon the close of such hearing, the Hearing Officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 10 business days from the date of issuance of such report, file with the Regional Director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director. Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. Extra copies of electronically-filed papers need not be filed. The Regional Director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

* * * * *

Dated: August 18, 2023.

Roxanne L. Rothschild,
Executive Secretary.

[FR Doc. 2023-18129 Filed 8-24-23; 8:45 am]

BILLING CODE 7545-01-P

DEPARTMENT OF THE TREASURY

31 CFR Part 515

Cuban Assets Control Regulations

CFR Correction

This rule is being published by the Office of the Federal Register to correct an editorial or technical error that appeared in the most recent annual revision of the Code of Federal Regulations.

■ In Title 31 of the Code of Federal Regulations, Part 500 to End, revised as of July 1, 2022, in section 515.570, in paragraph (d), remove “§ 515.565(d)” in both places where it appears and add in its place “§ 515.565(f)”.

[FR Doc. 2023-18455 Filed 8-24-23; 8:45 am]

BILLING CODE 0099-10-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG-2023-0682]

Special Local Regulation; Olympia Harbor Days Tug Boat Races, Budd Inlet, WA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce special local regulations for the Olympia Harbor Days Tug Boat Races, Budd Inlet, WA, from 11 a.m. until 4 p.m. on September 2, 2023. This action is necessary to prevent injury and to protect life and property of the maritime public from the hazards associated with the tug boat races. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: The regulations in 33 CFR 100.1309 will be enforced from 11 a.m. until 4 p.m. on September 2, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Peter McAndrew, Sector Puget Sound Waterways Management Division, U.S. Coast Guard; telephone 206-217-6045, email SectorPugetSoundWWM@uscg.mil.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce special local regulations in 33 CFR 100.1309 for the

Olympia Harbor Days Tug Boat Races, Budd Inlet, WA, regulated area from 11 a.m. until 4 p.m. on September 2, 2023. This action is being taken to provide for the safety of life on navigable waterways during this event. District Thirteen regulation 33 CFR 100.1309(a) specifies the location of the regulated area which encompasses approximately 2 nautical miles of the navigable waters in Budd Inlet. During the enforcement periods, if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign. All persons or vessels who desire to enter the race area while it is enforced must obtain permission from the on-scene patrol craft on VHF-FM channel 16.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard will provide notification of this enforcement period via the Local Notice to Mariners. If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notification, he may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: August 21, 2023.

Y Moon,

Captain, U.S. Coast Guard, Acting Captain of the Port, Sector Puget Sound.

[FR Doc. 2023-18327 Filed 8-24-23; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2022-0891]

RIN 1625-AA09

Drawbridge Operation Regulation; Mill Neck Creek, Bayville, NY

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the Bayville Highway Bridge across the Mill Neck Creek, mile 0.1, at Bayville, NY. This action is necessary to allow the bridge owner to complete the remaining replacements and repairs.

DATES: This temporary interim rule is effective from August 25, 2023, through January 31, 2024.

Comments and related material must reach the Coast Guard on or before September 25, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>. Type the docket number (USCG–2022–0891) in the “SEARCH” box and click “SEARCH”. In the Document Type column, select “Supporting & Related Material”.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Stephanie E. Lopez, Bridge Management Specialist, First Coast Guard District; telephone (212) 514–4335, email Stephanie.E.Lopez@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary interim rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. This bridge is operating under single leaf openings and will continue to operate in this way until rehabilitation work can be completed in January 2024.

On May 10, 2022, the Coast Guard issued a General Deviation which allowed the bridge owner, Nassau County, to deviate from the current operating schedule in 33 CFR 117.800 to conduct major mechanical rehabilitation of the bridge. Due to delays in procuring materials, the project has run past the end date of April 12, 2023, of the General Deviation. The bridge cannot be brought back to operating condition until the completion of the mechanical rehabilitation. Therefore, there is insufficient time to provide a reasonable comment period and then consider those comments before issuing the modification.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective in less than 30 days after publication in the **Federal Register**. For reasons presented above, delaying the effective date of this rule would be impracticable and contrary to the public interest because the bridge is currently incapable of normal operations and will not be back into full operation until the rehabilitation work can be completed.

We are soliciting comments on this rulemaking. If the Coast Guard determines that changes to the temporary interim rule are necessary, we will publish a temporary final rule or other appropriate document.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this temporary interim rule under authority in 33 U.S.C. 499. The Coast Guard is modifying the operating schedule that governs the Bayville Highway Bridge across the Mill Neck Creek, mile 0.1, Bayville, New York. The Bayville highway bridge has a vertical clearance, in the closed position, of 9 feet at mean high water and unlimited vertical clearance when opened.

The existing drawbridge regulation, 33 CFR 117.800, states that the draw of the Bayville highway bridge, mile 0.1, shall open on signal from May 1 through October 31 and at all other times at least two-hour advance notice. Nassau County, the bridge owner, has requested to operate under single leaf openings so they may continue rehabilitation on the bridge while providing minimal impact on marine traffic.

IV. Discussion of the Rule

The Coast Guard is issuing this rule, which permits a temporary deviation from the operating schedule that governs the Bayville Highway Bridge across the Mill Neck Creek, mile 0.1, Bayville, New York. The rule is necessary to accommodate the completion of the bridge mechanical repairs. This rule allows the bridge to operate under single leaf openings until January 31, 2024. Vessels that can transit under the bridge without an opening may do so.

V. Regulatory Analyses

We developed this temporary interim rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and

benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This temporary interim rule has not been designated a “significant regulatory action,” under Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the temporary interim rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can still transit the bridge through a single leaf operation as well as all vessels that do not require an opening may transit.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

This rule calls for no new collection of information under the Paperwork

Reduction Act of 1995 (44 U.S.C. 3501–3520.).

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

VI. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal Decision-Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG–2022–0891 in the search box and click “Search.” Next, look for this document in the “Search Results” column, and click on it. Then click on the “Comment” option. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

To view documents mentioned in this rule as being available in the docket, find the docket as described in the previous paragraph, and then select “Supporting & Related Material” in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you click on the “Dockets” tab and then the rule, you should see a “Subscribe” option for email alerts. Selecting this option will enable notifications when comments are posted, or if/when a final rule is published.

We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

§ 117.800 [Stayed]

■ 2. Stay § 117.800.

■ 3. Add § 117.T800 to read as follows:

§ 117.T800 Mill Neck Creek.

The draw shall operate on single leaf operations from August 25, 2023, to 11:59 p.m. on January 31, 2024.

Dated: August 20, 2023.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2023–18324 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG–2023–0572]

RIN 1625–AA00

Safety Zone; Lake of the Ozarks, Mile Marker 8, Lake Ozark, MO

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters within a 560-foot radius of a fireworks launch barge at Mile Marker (MM) 8 on Lake of the Ozarks. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the fireworks display. Entry of vessels or persons into the zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River or a designated representative.

DATES: This rule is effective from 9 p.m. on August 25, 2023, through 9:30 p.m. on August 26, 2023. This rule will be enforced from 9 p.m. to 9:30 p.m. on August 25, 2023, or, if necessary due to inclement weather, on August 25, from 9 p.m. to 9:30 p.m. on August 26, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>.

www.regulations.gov, type USCG–2023–0572 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Nathaniel Dibley, Sector Upper Mississippi River Waterways Management Division, U.S. Coast Guard; telephone 314–269–2550, email Nathaniel.D.Dibley@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because we must establish this safety zone by August 25, 2023, and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the fireworks display on the Lake of the Ozarks.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Upper Mississippi River (COTP) has determined that potential hazards associated with the Super Cat Fireworks Display, on August 25, 2023, will be a safety concern for anyone within the fallout zone. This rule is needed to protect personnel, vessels, and the marine environment in the navigable

waters within the safety zone during the fireworks display.

IV. Discussion of the Rule

This rule establishes a safety zone from 9 p.m. until 9:30 p.m. on August 25, 2023. The safety zone will cover all navigable waters within a 560-foot radius of a fireworks launch barge located at mile marker 8 on the Lake of the Ozarks. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the fireworks display. No vessel or person will be permitted to transit the safety zone without obtaining permission from the COTP or a designated representative. The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in the size of the safety zone through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB), as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, duration and location of the safety zone. The safety zone is for a fireworks display that impacts a 560 ft radius of a fireworks barge located at Lake of the Ozarks MM 8 on August 25, 2023 from 9 p.m. to 9:30 p.m. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the safety zone, mariners may seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone encompassing lasting from 9 p.m. to 9:30 p.m. that will prohibit entry around a 560 ft radius of a fireworks barge at Lake of the Ozarks MM 8. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the

person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security Measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0572 to read as follows:

§ 165.T08–0572 Safety Zone; Lake of the Ozarks, Mile Marker 8.

(a) *Location.* The following area is a safety zone: all navigable waters extending 560 feet in all directions around a firework launch barge at Mile Marker 8 in the main channel on the Lake of the Ozarks.

(b) *Regulations.* (1) In accordance with the general safety zone regulations in § 165.23, entry of persons or vessels into this safety zone described in paragraph (a) of this section is prohibited unless authorized by the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River.

(2) To seek permission to enter, contact the COTP or a designated representative via VHF–FM channel 16, or through USCG Sector Upper Mississippi River at 314–269–2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative.

(c) *Informational broadcasts.* The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in size or scope of the safety zone through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB) as appropriate.

(d) *Enforcement period:* This safety zone will be enforced from 9 p.m. to 9:30 p.m. on August 25, 2023, with a rain date of August 26, 2023.

Dated: August 22, 2023.

A.R. Bender,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2023–18372 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0640]

RIN 1625–AA00

Safety Zone; Lake Erie, Black River, Lorain, OH, South of East Erie Avenue Bridge Adjacent to Black River Landing

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard will be establishing a temporary safety zone for certain waters of Lake Erie. This action is necessary to provide for the safety of life on waters of the Black River, a tributary of Lake Erie, during the Cleveland Dragon Boat Festival. This rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Buffalo or a designated representative.

DATES: This rule is effective from 7:45 a.m. through 5:15 p.m. on September 10, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0640 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Jared Stevens, Waterways Management Division, MSU Cleveland, U.S. Coast Guard; telephone 216–937–0124, email Jared.M.Stevens@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking

§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because delaying the effective date of this rule to wait for a comment period to run would be contrary to the public interest by inhibiting the Coast Guard’s ability to protect participants in these navigable waters before, during, and after the boat festival.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule to wait for a comment period to run would be contrary to the public interest by inhibiting the Coast Guard’s ability to protect participants in these navigable waters before, during, and after the Cleveland Dragon Boat Festival.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port (COTP) has determined that a safety zone is needed to protect the participants during the Cleveland Dragon Boat Festival occurring on the Black River in Lorain, Ohio, on September 10, 2023.

IV. Discussion of the Rule

This rule establishes a safety zone from 7:45 a.m. until 5:15 p.m. on September 10, 2023. The safety zone will cover all navigable waters of the Black River, a tributary of Lake Erie in Lorain, Ohio, south of East Erie Avenue Bridge and adjacent to the Black River Landing. The duration of the zone is intended to ensure the safety of participants in these navigable waters before, during, and after the Cleveland Dragon Boat Festival. Dates and times of enforcement will be made public via broadcast notice to mariners prior to the event. No vessel or person will be permitted to enter the safety zone

without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on size, location, and duration of the rule. This safety zone will restrict navigation through the boat festival area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone that will prohibit entry in, out or through navigable waters south of the East Erie Avenue Bridge and adjacent to the Black River Landing, located on the Black River in Lorain, OH. It is categorically excluded from further review under paragraph L63(b) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

- 2. Add § 165.T09–0640 to read as follows:

§ 165.T09–0640 Safety Zone; Lake Erie, Black River, Lorain, OH, South of East Erie Avenue Bridge Adjacent to Black River Landing.

(a) *Location.* The safety zone will cover all navigable waters south of the

East Erie Avenue Bridge and adjacent to the Black River Landing, located on the Black River in Lorain, Ohio, a tributary of Lake Erie.

(b) *Enforcement period.* This section will be enforced from 7:45 a.m. through 5:15 p.m. on September 10, 2023.

(c) *Definitions.* *Official patrol vessel* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector Buffalo (COTP) in the enforcement of the regulations in this section. *Participant* means all persons and vessels attending the event.

(d) *Regulations.* (1) The Coast Guard may patrol the event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign “PATCOM.”

(2) All persons and vessels not registered with the sponsor as participants or official patrol vessels are considered spectators.

(3) Spectator vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by that officer and will be operated at a no wake speed in a manner which will not endanger participants in the event or any other craft.

(4) No spectator shall anchor, block, loiter, or impede the through transit of official patrol vessels in the regulated area during the enforcement period listed in paragraph (b) of this section unless cleared for entry by or through an official patrol vessel.

(5) The Patrol Commander may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(6) Any spectator vessel may anchor outside the regulated areas specified in this section, but may not anchor in, block, or loiter in a navigable channel.

(7) The Patrol Commander may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(8) The Patrol Commander will terminate enforcement of the special regulations in this section at the conclusion of the event.

Dated: August 17, 2023.

M.I. Kuperman,

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

[FR Doc. 2023–18326 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0660]

RIN 1625–AA00

Safety Zone; Ohio River Mile Markers 79.5–80, Wellsburg, WV

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Ohio River from September 12 through September 15, 2023, at mile marker 79.5 to mile marker 80 from 8 a.m. through 5 p.m. each day. This action is necessary to provide for the safety of life on the navigable waters during a helicopter operation. This rule prohibits persons and vessels from being in the safety zone unless authorized by the Captain of the Port Pittsburgh (COTP) or a designated representative.

DATES: This rule is effective from 8 a.m. on September 12, 2023 through 5 p.m. on September 15, 2023. This rule will be enforced from 8 a.m. through 5 p.m. each day it is effective.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0660 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LTJG Eyobe Mills, Marine Safety Unit Pittsburgh, U.S. Coast Guard, at telephone 412–221–0807, email Eyobe.D.Mills@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest. This safety zone must be established by September 12, 2023, to provide for the safety of life on the navigable waters during a helicopter operation, and we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay the establishment of the safety zone until after the date of the helicopter operation. Vessels inside of the safety zone have the potential of getting hit by debris from the helicopter.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because action is needed by September 12, 2023, to ensure the safety of the of life on the navigable waters during a helicopter operation.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Pittsburgh (COTP) has determined that potential hazards associated with a helicopter operation on September 12 through September 15, 2023, will be a safety concern for anyone on the Ohio River from mile markers 79.5 to mile marker 80 from 8 a.m. to 5 p.m. The purpose of this rule is to ensure safety of the participant, vessels, and the navigable waters in the safety zone before, during, and after the scheduled event.

IV. Discussion of the Rule

This rule establishes a temporary safety zone each day from 8 a.m. until 5 p.m. on September 12 through September 15, 2023. The safety zone will cover all navigable waters on the Ohio River from mile markers 79.5 to mile marker 80. The duration of the

zone is intended to protect personnel, vessels, and the marine environment in the navigable waters during an installation of nine aerial transverse wirelines using a helicopter.

No vessel or person is permitted to enter the safety zone without obtaining permission from the COTP or a designated representative of the COTP. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of the COTP. To seek permission to enter, contact the COTP or a designated representative via VHF-FM channel 16, or through Marine Safety Unit Pittsburgh at 412-221-0807. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative. The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on size, location, and duration of the temporary safety zone. This safety zone only impacts a 0.5 mile stretch on the Ohio River for 9 hours each day from September 12 through September 15, 2023. Moreover, the Coast Guard will issue Local Notice to Mariners and Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone and the rule allows vessels to seek permission from the COTP to transit the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of

power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary safety zone lasting 9 hours each day from September 12 through September 15, 2023, on the Ohio River. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your

message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Marine Safety, Navigation (water), Reporting, and recordkeeping requirements, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0660 to read as follows:

§ 165.T08–0660 Safety Zone; Ohio River, Wellsburg, WV.

(a) *Location.* The following area is a temporary safety zone on the Ohio River from mile marker 79.5 to mile marker 80.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Pittsburgh (COTP) in the enforcement of the safety zone. Designated representative include safety boat provided by the event organizers.

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

(2) To seek permission to enter, contact the COTP or the COTP's representative on Channel 16 or at 412–670–4288. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced each day from 8 a.m. through 5 p.m. from September 12, 2023, through September 15, 2023. The temporary safety zone will be enforced during the 9 hours helicopter operation on these days.

Eric J. Velez,

Commander, U.S. Coast Guard, Captain of the Port, MSU Pittsburgh.

[FR Doc. 2023–18347 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0707]

RIN 1625–AA00

Safety Zone; Ohio River, Mile Markers 322.5 to 323, Ashland, KY

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for a fireworks display occurring on September 12, 2023, on the Ohio River, Ashland, KY. The safety zone will cover all navigable waters between mile marker 322.5 and 323 to protect personnel, vessels, and the marine environment from potential hazards associated with a fireworks event. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Ohio Valley (COTP) or a designated representative.

DATES: This rule is effective from 7:30 p.m. through 8:15 p.m. on September 12, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0707 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Chelsea Zimmerman, Marine Safety Unit Huntington, U.S. Coast Guard, telephone 304–733–0198, email Chelsea.M.Zimmerman@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule

without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because publishing an NPRM would be impracticable. A safety zone is needed to alleviate safety concerns associated with a fireworks display that is being launched from two barges in the Ohio River. It is impracticable to publish an NPRM because we must establish this safety zone by September 12, 2023, and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because we must establish the safety zone by September 12, 2023, in order to protect personnel, vessels, and the marine environment from the potential safety hazards associated with a fireworks display that is being launched from two barges in the Ohio River.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Ohio Valley (COTP) has determined that safety needs associated with a fireworks display on September 12, 2023, present a safety concern. The purpose of this rulemaking is to ensure the safety of the public surrounding the regulated area before, during, and after the fireworks event.

IV. Discussion of the Rule

This rule establishes a safety zone that will be enforced from 7:30 p.m. until 8:15 p.m. on September 12, 2023. The safety zone will cover all navigable waters between mile markers 322.5 to 323 on the Ohio River. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the fireworks display. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer

designated by or assisting the COTP in the enforcement of the safety zone.

Persons or vessels seeking to enter the safety zone must request permission from the COTP on VHF–FM channel 16 or by telephone at 1–502–779–5424. If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the regulated area. This rule is limited to the Ohio River from mile 322.5 to 323 on September 12, 2023, and will be enforced only for a forty-five-minute duration. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the regulated area and the rule allows vessels to seek permission to enter the area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a

significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a temporary safety zone lasting only forty-five minutes on the Ohio River at mile 322.5 to 323 on September 12, 2023. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0707 to read as follows:

§ 165.T08–0707 Safety Zone; Ohio River, Mile Markers 322.5 to 323, Ashland, KY.

(a) *Location.* The following area is a safety zone: all navigable waters of the Ohio River from mile marker 317 to mile marker 317.5, extending the entire width of the river.

(b) *Definitions.* *Designated representative* means a Coast Guard Patrol Commander (PATCOM), including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Ohio Valley (COTP) in the enforcement of the regulations in this section.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. The Coast Guard may patrol the event area under the direction of a designated Coast Guard Patrol Commander.

(2) To seek permission to enter, the COTP or the COTP's representative may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign “PATCOM”, or phone at 1–606–923–4884. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(3) The Patrol Commander may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(4) The Patrol Commander may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(5) The COTP will provide notice of the regulated area through advanced notice via local notice to mariners and broadcast notice to mariners and by on-scene designated representatives.

(d) *Enforcement period.* This section will be enforced from 7:30 p.m. to 8:15 p.m. on September 12, 2023.

Dated: August 17, 2023.

H.R. Mattern,

Captain, U.S. Coast Guard, Captain of the Port Sector Ohio Valley.

[FR Doc. 2023–18374 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0695]

Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulations; correction.

SUMMARY: This document corrects dates in a notification of enforcement published June 27, 2023. The Coast Guard will enforce a safety zone that encompasses certain navigable waters of the Cleveland Inner Harbor East Basin on Lake Erie, for the 2023 Cleveland National Airshow in Cleveland, Ohio. This action is necessary and intended for the safety of life and property on the navigable waters during this event. During the enforcement periods, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo or a designated representative.

DATES: The regulations listed in 33 CFR 165.939, Table 165.939(d)(2) will be enforced from 8 a.m. through 6 p.m. on Wednesday August 30, 2023, through Monday September 4, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT Jared Stevens, Waterways Management Division, U.S. Coast Guard Marine Safety Unit Cleveland; telephone 216–937–0124, email *D09-SMB-MSUCLEVELAND-WWM@uscg.mil*.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce “Safety Zones; Annual Events in the Captain of the Port Buffalo Zone”, as listed in 33 CFR 165.939, Table 165.939(d)(2). This safety zone will be enforced for all U.S. waters of Lake Erie near Burke Lakefront Airport in Cleveland, Ohio from position 41°30′20″ N and 81°42′20″ W to 41°30′50″ N and 81°42′49″ W, to 41°32′09″ N and 81°39′49″ W, to 41°31′53″ N and 81°39′24″ W, then return to the original position (NAD 83).

Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within the safety zone during an enforcement

period is prohibited unless authorized by the Captain of the Port Buffalo or a designated representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Buffalo via channel 16, VHF-FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that the safety zone needs not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone.

Dated: August 17, 2023.

M.I. Kuperman,

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

[FR Doc. 2023-18273 Filed 8-24-23; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230810-0190]

RIN 0648-BL95

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 65

Correction

In rule document 2023-17592, beginning on page 56527 in the of

Friday, August 18, 2023, make the following correction:

§ 648.86 [Corrected]

■ 1. On page 56543, in the first column, in amendatory instruction number 3, in the seventh line, “In § 648.86, revise paragraph I to read as follows” should read “In § 648.86, revise paragraph (c) to read as follows”

§ 648.87 [Corrected]

■ 2. On page 56543, in the first column, in amendatory instruction number 4b, in the twenty-fifth line, “Remove paragraphs I(2)(i)(A) and (B)” should read “Remove paragraphs (c)(2)(i)(A) and (B)”

[FR Doc. C1-2023-17592 Filed 8-24-23; 8:45 am]

BILLING CODE 0099-10-D

Proposed Rules

Federal Register

Vol. 88, No. 164

Friday, August 25, 2023

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–2023–1640; Project Identifier AD–2022–00283–E]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Pratt & Whitney (PW) Model PW2037, PW2037M, and PW2040 engines with a certain high-pressure turbine (HPT) 2nd stage blade assembly installed. This proposed AD was prompted by an in-flight shutdown (IFSD) caused by the fracture of HPT 2nd stage turbine hub assembly lugs, which resulted in blade liberation and a titanium fire in the high-pressure compressor (HPC). This proposed AD would require a visual inspection of the HPT 2nd stage blade assemblies for missing contact marks, a dimensional shadowgraph inspection of the HPT 2nd stage blade assemblies for blade root profile dimensional inspection, and an eddy current inspection (ECI) of the HPT 2nd stage turbine hub assembly for conforming slot flatness. This proposed AD would also require removal and replacement of any HPT 2nd stage turbine hub assembly or HPT 2nd stage blade assembly that does not pass any inspection. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by September 25, 2023.

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

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.

- *Fax:* (202) 493–2251.

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

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–1640; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Pratt & Whitney, 400 Main Street, East Hartford, CT 06118; phone: (800) 565–0140; email: *help24@pw.utc.com*; website: *connect.prattwhitney.com*.

- You may view this service information at the FAA, Airworthiness Products Section, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT:

Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–1640; Project Identifier AD–2022–00283–E” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

The FAA has been informed that PW has done some outreach with affected operators regarding the proposed

corrective actions for this unsafe condition. As a result, affected operators are already aware of the proposed corrective actions and, in some cases, have already begun planning for replacement of certain HPT 2nd stage turbine hub assemblies and HPT 2nd stage blade assemblies. Therefore, the FAA has determined that a 30-day comment period is appropriate given the particular circumstances related to the proposed correction of this unsafe condition.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received a report of an IFSD of a Model PW2037 engine installed on a Boeing Model 757 airplane that occurred on September 8, 2020. Subsequent investigation by the manufacturer found that two turbine hub assembly lug fractures on the HPT 2nd stage turbine hub assembly caused

the release of four HPT 2nd stage blade assemblies part number (P/N) 1B7522, which caused damage upstream in the HPC, resulting in a titanium fire. Further investigation by the manufacturer revealed the blade root profile of certain HPT 2nd stage blade assemblies did not conform to the manufacturer's type design. The non-conforming blades installed in the HPT 2nd stage turbine hub assembly caused uneven contact on the HPT 2nd stage turbine hub assembly lug leading to increased attachment stress resulting in failure of the HPT 2nd stage turbine hub assembly lug and HPT 2nd stage turbine hub assembly. This condition, if not addressed, could result in the uncontained release of the HPT 2nd stage blade assemblies, damage to the engine, and damage to the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 14 CFR Part 51

The FAA reviewed PW Turbojet Engine Service Bulletin PW2000 A72-777, Revision 2, dated April 11, 2023 (PW2000 A72-777 Rev. 2). This service information specifies procedures for performing a visual inspection of the HPT 2nd stage blade assemblies, dimensional shadowgraph inspection of the HPT 2nd stage blade assemblies, and an ECI of the HPT 2nd stage turbine hub assembly. This service information is reasonably available because the

interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions identified as "RC" (required for compliance) in the Accomplishment Instructions of PW2000 A72-777 Rev. 2, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 425 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
ECI of the HPT 2nd stage turbine hub assembly	8 work-hours × \$85 per hour = \$680.	\$0	\$680	\$289,000
Visual inspection of HPT 2nd stage blade assembly	8 work-hours × 85 per hour = 680.	0	680	289,000
Dimensional shadowgraph inspection of HPT 2nd stage blade assemblies.	8 work-hours × 85 per hour = 680.	0	680	289,000

The FAA estimates the following costs to do any necessary replacements that would be required based on the

results of the proposed inspections. The agency has no way of determining the

number of aircraft that might need these replacements:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace HPT 2nd stage turbine hub assembly	0 work-hours × \$85 per hour = \$0 ..	\$456,000	\$456,000
Replace HPT 2nd stage blade assembly	0 work-hours × \$85 per hour = \$0 ..	17,000	17,000

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.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of

that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA 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) Would not affect intrastate aviation in Alaska, and

(3) Would 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 airworthiness directive:

Pratt & Whitney: Docket No. FAA–2023–1640; Project Identifier AD–2022–00283–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by September 25, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pratt & Whitney (PW) Model PW2037, PW2037M, and PW2040 engines with a high-pressure turbine (HPT) 2nd stage blade assembly, part number (P/N) 1B7522 installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by an in-flight shutdown caused by the fracture of HPT 2nd stage turbine hub assembly lugs. The FAA is issuing this AD to prevent failure of the HPT 2nd stage turbine hub assembly lug and HPT 2nd stage blade assemblies. The unsafe condition, if not addressed, could result in the uncontained release of the HPT 2nd stage blade assemblies, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

Before exceeding the applicable compliance times specified in Planning Information, Compliance, page 2, of PW Turbojet Engine Service Bulletin PW2000 A72–777, Revision 2, dated April 11, 2023 (PW2000 A72–777 Rev. 2), or before accumulating 500 cycles after the effective date of this AD, whichever occurs later, perform all applicable actions identified as “RC” (required for compliance) in, and in accordance with, the Accomplishment Instructions of PW2000 A72–777 Rev. 2.

(h) Credit for Previous Actions

You may take credit for the actions required by paragraph (g) of this AD if you performed these actions before the effective date of this AD in accordance with PW Turbojet Engine Service Bulletin PW2000 A72–777, Initial Issue, dated September 29, 2021, or PW Turbojet Engine Service Bulletin PW2000 A72–777, Revision 1, dated December 21, 2022.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD and email to: ANE-AD-AMOC@faa.gov.

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

(3) Except as required by paragraph (g) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the following provisions apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

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

(j) Related Information

For more information about this AD, contact Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: carol.nguyen@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) Pratt & Whitney Turbojet Engine Service Bulletin PW2000 A72–777, Revision 2, dated April 11, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Pratt & Whitney, 400 Main Street, East Hartford, CT 06118; phone: (800) 565–0140; email: help24@pw.utc.com; website: connect.prattwhitney.com.

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: fr.inspection@nara.gov, or go to:

www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on July 24, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–18259 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0009; Project Identifier MCAI–2022–00789–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) that would have applied to certain Airbus SAS Model A319–115 airplanes; Model A320–214, –216, –232, –251N, and –271N airplanes; and Model A321–211, –231, –251N, –251NX, –252NX, –253N, –253NX, –271N, –271NX, and –272N airplanes. This action revises the NPRM by adding Model A321–213 airplanes, which were inadvertently left out of the applicability. The FAA is proposing this airworthiness directive (AD) to address the unsafe condition on these products. Since these actions would impose an additional burden over those in the NPRM, the FAA is requesting comments on this SNPRM.

DATES: The FAA must receive comments on this SNPRM by October 10, 2023.

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

- **Federal eRulemaking Portal:** Go to regulations.gov. Follow the instructions for submitting comments.

- **Fax:** 202–493–2251.

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

- **Hand Delivery:** Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2023–0009; or in person at Docket Operations between 9 a.m. and

5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, this SNPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For European Union Aviation Safety Agency (EASA) material that is proposed for incorporation by reference (IBR) in this SNPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu. It is also available at regulations.gov under Docket No. FAA-2023-0009.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

FOR FURTHER INFORMATION CONTACT:

Timothy P. Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 206-231-3667; email timothy.p.dowling@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA-2023-0009; Project Identifier MCAI-2022-00789-T" at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to regulations.gov, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this SNPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner.

Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this SNPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this SNPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this SNPRM. Submissions containing CBI should be sent to Timothy P. Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 206-231-3667; email timothy.p.dowling@faa.gov. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2020-05-16, Amendment 39-19866 (85 FR 15938, March 20, 2020) (AD 2020-05-16) for certain Airbus SAS Model A319-115 airplanes; Model A320-214, -216, -232, -251N, and -271N airplanes; and Model A321-211, -231, -251N, -251NX, -253N, -271N, -271NX, and -272N airplanes. AD 2020-05-16 requires a one-time detailed inspection of certain attaching points on the left-hand and right-hand wings for the correct installation of certain hardware, and, depending on findings, accomplishment of applicable corrective actions. The FAA issued AD 2020-05-16 to address incomplete installations of the over wing panel lug attachments in the production assembly line, which, if not detected and corrected, could reduce the structural integrity of the wing.

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD to supersede AD 2020-05-16 that would apply to certain Airbus SAS Model A319-115 airplanes; Model A320-214, -216, -232, -251N, and -271N airplanes; and Model A321-211, -231, -251N, -251NX, -252NX, -253N, -253NX, -271N, -271NX, and -272N airplanes. The NPRM published in the **Federal Register** on January 13, 2023 (88 FR 2273). The NPRM was prompted by MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2022-0111, dated June 15, 2022 (EASA AD 2022-0111) (also referred to as the MCAI) to correct an unsafe condition identified as incomplete installations of the overwing

panel lug attachments. The NPRM proposed to continue to require the actions in AD 2020-05-16 and to revise the applicability by adding airplanes.

Actions Since the NPRM Was Issued

Since the FAA issued the NPRM, it was determined that although the serial numbers of the affected airplanes appear in Appendix 1 of EASA AD 2022-0111, Model A321-213 airplanes were inadvertently left out of the applicability of EASA AD 2022-0111. EASA has since revised AD 2022-0111. EASA AD 2022-0111R1, dated July 26, 2023 (EASA AD 2022-0111R1), was issued because some reports highlighted the omission in the Applicability of Model A321-213 airplanes, whereas the MSNs relevant to this model were correctly listed in Appendix 1 of EASA AD 2022-0111 (among Group 1 aeroplanes). Consequently, EASA AD 2022-0111R1 includes Model A321-213 airplanes in the Applicability. Paragraph (c) of this proposed AD was therefore revised to include Model A321-213 airplanes to match the applicability of EASA AD 2022-0111R1.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA-2023-0009.

Comments

The FAA received a comment from Air Line Pilots Association, International (ALPA) who supported the NPRM without change.

The FAA received additional comments from Delta Air Lines (DAL). The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Add Exception To Correct Reference to Required Procedure

DAL requested that an exception be added to the proposed AD to change the structural repair manual (SRM) reference specified in paragraphs C.(2)(b)3.a and C.(4)(b)3.a of the Accomplishment Instructions of Airbus Service Bulletin A320-57-1234, dated December 13, 2021, from SRM 51-11-13 to SRM 51-11-00. DAL stated that SRM task 51-11-13 details the process for damage reporting, while SRM task 51-11-00 details the process for classifying damage, which is the required task.

The FAA does not agree with the requested change because SRM 51-11-13 references SRM 51-11-00, which includes the damage assessment procedure. This proposed AD has not been changed regarding this request.

Request To Add Exception To Allow Compliance Based on Alternate Inspection for Certain Airplanes

DAL requested that an exception be added to allow compliance to be taken for any Group 2 airplanes that have already been inspected using Airbus Alert Operators Transmission (AOT) A57N012–19 Rev 01, dated April 18, 2019. DAL stated that the inspection specified in Airbus AOT A57N012–19 Rev 01, dated April 18, 2019, is identical to the inspection specified in Airbus Service Bulletin (SB) A320–57–1234, dated December 13, 2021.

The FAA does not agree with this request. If the inspection procedure provided in Airbus AOT A57N012–19 Rev 01, dated April 18, 2019, is the same as the required procedures in the Airbus SB A320–57–1234, dated December 13, 2021, then accomplishing its procedure would be the same as accomplishing procedures of the SB, therefore it meets the mandatory action requirements of the AD. This proposed AD has not been changed regarding this request.

Request To Add Compliance Time Grace Period for Certain Airplanes

DAL requested that the proposed AD include a compliance time grace period of 6 months for the required actions specified in paragraph (2) of EASA AD 2022–0111 because several airplanes will be immediately out of compliance on the effective date of the AD. DAL noted that EASA AD 2022–0111 does not include any grace period for Group 2 airplanes and that operators will require a grace period to update their documentation and process to show compliance with the FAA AD.

The FAA agrees with changing the requested grace period to prevent grounding of airplanes that have exceeded the maximum flight hours or flight cycles. Paragraph (h)(5) of the proposed AD (in the NPRM) included a 30-day grace period. However, a 6-month grace period would be necessary to prevent the grounding of the airplanes that have already exceeded 14,000 flight hours or 7,000 flight cycles, whichever occurs first. Paragraph (h)(5) of this proposed AD has been changed to specify a 6-month grace period. (Paragraph (2) of EASA AD 2022–0111R1 does not include a grace period.)

Request To Add a Certain Model to the Applicability

DAL requested that Airbus SAS Model A321–213 airplanes be added to the applicability of the proposed AD because some of the serial numbers listed in the appendix of the MCAI are Airbus SAS Model A321–213 airplanes, although that model does not appear in the Applicability section of the MCAI.

The FAA agrees to add Airbus SAS Model A321–213 airplanes to the applicability of this proposed AD. As stated previously, EASA AD 2022–0111R1 was issued to correct the Applicability to include Model A321–213 airplanes. Therefore, Airbus SAS Model A321–213 airplanes have been added to paragraph (c) of this proposed AD.

Related Service Information Under 1 CFR Part 51

EASA AD 2022–0111R1 specifies procedures for a one-time detailed inspection of certain attaching points on the left-hand and right-hand wings for the correct installation of certain hardware (bolt, nut, washer, and cotter pin), and, depending on findings, accomplishment of applicable corrective actions. Corrective actions include installing missing hardware, properly orienting hardware, and performing a damage assessment for cracks and deformed parts in the event of missing hardware, and repair. For certain airplanes, EASA AD 2022–0111R1 also specifies reporting the inspection results to Airbus. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this SNPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Certain changes described above expand the scope of the NPRM. As a

result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Proposed AD Requirements in This SNPRM

This proposed AD would retain all requirements of AD 2020–05–16. This proposed AD would require accomplishing the actions specified in EASA AD 2022–0111R1 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2022–0111R1 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2022–0111R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2022–0111R1 does not mean that operators need comply only with that section. For example, where the AD requirement refers to "all required actions and compliance times," compliance with this AD requirement is not limited to the section titled "Required Action(s) and Compliance Time(s)" in EASA AD 2022–0111R1. Service information required by EASA AD 2022–0111R1 for compliance will be available at [regulations.gov](https://www.faa.gov/regulations) under Docket No. FAA–2023–0009 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 131 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × \$85 per hour = \$170	\$0	\$170	\$22,700

* Table does not include estimated costs for reporting.

The FAA estimates that it would take about 1 work-hour per product to comply with the reporting requirement in this proposed AD. The average labor rate is \$85 per hour. Based on these

figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be up to \$11,135, or \$85 per product.

The FAA estimates the following costs to do any necessary on-condition

actions that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 20 work-hours × \$85 per hour = \$1,700	Up to \$77,850	Up to \$79,550.

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 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 take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177-1524.

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.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil

aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA 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) Would not affect intrastate aviation in Alaska, and
- (3) Would 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:
- a. Removing Airworthiness Directive (AD) 2020-05-16, Amendment 39-19866 (85 FR 15938, March 20, 2020); and
- b. Adding the following new AD:

Airbus SAS: Docket No. FAA-2023-0009; Project Identifier MCAI-2022-00789-T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 10, 2023.

(b) Affected ADs

This AD replaces AD 2020-05-16, Amendment 39-19866 (85 FR 15938, March 20, 2020) (AD 2020-05-16).

(c) Applicability

This AD applies to the Airbus SAS airplanes specified in paragraphs (c)(1) through (3) of this AD, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2022-0111R1, dated July 26, 2023 (EASA AD 2022-0111R1).

- (1) Model A319-115 airplanes.
- (2) Model A320-214, -216, -232, -251N, and -271N airplanes.
- (3) Model A321-211, -213, -231, -251N, -251NX, -252NX, -253N, -253NX, -271N, -271NX, and -272N airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of incomplete installations of the over wing panel lug attachments in the production

assembly line and a determination that additional airplanes are subject to the unsafe condition. The FAA is issuing this AD to address these incomplete installations. The unsafe condition, if not addressed, could result in reduced structural integrity of the wing.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0111R1.

(h) Exceptions to EASA AD 2022–0111R1

(1) Where EASA AD 2022–0111R1 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2022–0111R1 refers to October 2, 2019 (the effective date of EASA AD 2019–0233, dated September 18, 2019), this AD requires using April 24, 2022 (the effective date of AD 2020–05–16).

(3) Where paragraph (5) of EASA AD 2022–0111R1 specifies to “or contact Airbus for approved instructions, and within the compliance time identified therein, accomplish those instructions accordingly” this AD requires replacing those words with “or contact Airbus for approved instructions, and within the compliance time identified therein, accomplish those instructions accordingly, except if any cracking is detected, the cracking must be repaired before further flight using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus SAS’s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.”

(4) This AD does not adopt the “Remarks” section of EASA AD 2022–0111R1.

(5) Where paragraph (2) of EASA AD specifies a compliance time of “before exceeding 14,000 flight hours or 7,000 flight cycles, whichever occurs first since aeroplane first flight,” this AD requires replacing those words with “before exceeding 14,000 flight hours or 7,000 flight cycles, whichever occurs first since aeroplane first flight; or within 6 months after the effective date of this AD; whichever occurs later.”

(i) No Reporting Requirement for Certain Airplanes

For Group 1 airplanes, as identified in EASA AD 2022–0111R1, this AD does not require reporting.

(j) Additional AD Provisions

The following provisions also apply to this AD:

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

to the International Validation Branch, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov.

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(ii) AMOCs approved previously for AD 2020–05–16 are approved as AMOCs for the corresponding provisions of EASA AD 2022–0111R1 that are required by paragraph (g) of this AD.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus SAS’s EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC)*: Except as required by paragraph (j)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator’s maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Additional Information

For more information about this AD, contact Timothy P. Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 206–231–3667; email timothy.p.dowling@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2022–0111R1, dated July 26, 2023.

(ii) [Reserved]

(3) For EASA AD 2022–0111R1, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on

the availability of this material at NARA, email fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on August 11, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–17773 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1649; Project Identifier AD–2022–00905–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 747–8 and 747–8F series airplanes. This proposed AD was prompted by a report that all six Integrated Display Units (IDUs) became blank when new flight plan data was entered in the Flight Management System (FMS), and by a determination that indication of decaying airspeed in certain scenarios is required. This proposed AD would require installing updated software. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by October 10, 2023.

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

- *Federal eRulemaking Portal:* Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

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

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1649; or in person at Docket Operations between 9 a.m. and

5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

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

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available at regulations.gov by searching for and locating Docket No. FAA-2023-1649.

FOR FURTHER INFORMATION CONTACT:

Douglas Tsuji, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone: 206-231-3548; email: douglas.tsuji@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA-2023-1649; Project Identifier AD-2022-00905-T” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to regulations.gov, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your

comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Douglas Tsuji, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone: 206-231-3548; email: douglas.tsuji@faa.gov. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report indicating all six IDUs became blank when new flight plan data was entered in the FMS. It was determined that the Jeppesen airport map database (AMDB) had an error in the data structure tied to the Sydney airport (YSSY). The Electronic Flight Instrumentation System (EFIS)/Engine Indicating and Crew Alerting System (EICAS) Interface Units (EIUs) were unable to process the data structure, resulting in the displays blanking. Jeppesen subsequently fixed the AMDB to address the issue with YSSY and additional airport codes with an incorrect data structure. The current EIU software is unable to process incorrect data structures, which results in an EIU fault that cannot be cleared by the automated reset function of an EIU. After five resets the EIU defaults to shut down, resulting in all six IDUs, which are controlled by the EIUs, becoming blank. The EIU shut down can also result in an autothrottle disconnect and a degraded autopilot mode. The problem can occur on the ground when an airport code with an incorrect data structure in the AMDB is entered as an origin or destination and the flight plan is then put into operation by the FMS. In flight, the problem can occur when an airport code with an incorrect data structure in the AMDB is entered as the selected diversion airport.

Additionally, the existing software does not provide an earlier indication of decaying airspeed during the landing phase for flap settings 25 and 30. The revised software specified in this proposed AD provides an earlier

threshold for triggering the low airspeed alerting EICAS Caution message.

This condition, if not addressed, could result in loss of all flight deck displays (Primary Flight Display (PFD)/EICAS/Navigation Display (ND), not including standby displays) combined with potential impact to the autopilot and auto-throttle functionality and lack of crew visibility of any subsequent system failures, which can prevent continued safe flight and landing; it could also result in inadequate alerting of decaying airspeed, unacceptably low airspeed, and loss of control of the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 747-31A2544 RB, dated March 31, 2020. This service information specifies procedures for installing Integrated Display System (IDS) 804 software in each of the six LCD IDUs and in each of the three EIUs, if not already installed; followed by installing IDS 805 software, which includes EIU software part number COL3F-0034-E805 and Liquid Crystal Display (LCD) software part number 3177-COL-DL8-05.

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described except for any differences identified as exceptions in the regulatory text of this proposed AD. For information on the procedures and compliance times, see this service information at regulations.gov under Docket No. FAA-2023-1649.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 19 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Software Installation	Up to 6 work-hours × \$85 per hour = Up to \$510	Up to \$650	Up to \$1,160	Up to \$22,040.

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.

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

Regulatory Findings

The FAA 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) Would not affect intrastate aviation in Alaska, and

(3) Would 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 airworthiness directive:

The Boeing Company: Docket No. FAA–2023–1649; Project Identifier AD–2022–00905–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 10, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–8 and 747–8F series airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020.

(d) Subject

Air Transport Association (ATA) of America Code: 31, Instruments.

(e) Unsafe Condition

This AD was prompted by a report that all six Integrated Display Units (IDUs) became blank when new flight plan data was entered in the Flight Management System (FMS), and by a determination that indication of decaying airspeed in certain scenarios is required. The FAA is issuing this AD to address problems with the Electronic Flight Instrumentation System (EFIS)/Engine Indicating and Crew Alerting System (EICAS) Interface Units (EIUs), which control the IDUs. The unsafe condition, if not addressed, could result in loss of all flight deck displays (Primary Flight Display (PFD)/EICAS/Navigation Display (ND), not including standby displays) combined with potential impact to the autopilot and auto-throttle functionality and lack of crew visibility of any subsequent system failures, which can prevent continued safe flight and landing; it could also result in inadequate alerting of decaying airspeed, unacceptably low airspeed, and loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the

"Compliance" paragraph of Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 747–31A2544, dated March 31, 2020, which is referred to in Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time column of the table in the "Compliance" paragraph of Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020, uses the phrase "the original issue date of Requirements Bulletin 747–31A2544 RB," this AD requires using "the effective date of this AD."

(2) For Group 2 airplanes identified in Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020: The concurrent requirements specified in Action 1 of Table 1 of the Accomplishment Instructions of Boeing Alert Requirements Bulletin 747–31A2544 RB, dated March 31, 2020, do not apply.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: 9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520 Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

For more information about this AD, contact Douglas Tsuji, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; telephone: 206-231-3548; email: douglas.tsuji@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 747-31A2544 RB, dated March 31, 2020.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

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

Issued on July 26, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-17775 Filed 8-24-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****15 CFR Part 922**

[Docket No. 230807-0185]

RIN 0648-BL31

Proposed Chumash Heritage National Marine Sanctuary

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Proposed rule; notification of availability of draft environmental impact statement and draft management plan; request for public comment.

SUMMARY: NOAA proposes to designate Chumash Heritage National Marine

Sanctuary (CHNMS) in the waters along and offshore of the coast of central California to recognize the national significance of the area's ecological, historical, archaeological, and cultural resources and to manage this special place as part of the National Marine Sanctuary System. The sanctuary boundary would encompass 5,617 square miles (mi²) (4,242 nmi²) of submerged lands and marine waters from Montaña de Oro State Park in San Luis Obispo County to Naples along the Gaviota Coast in Santa Barbara County. NOAA proposes to establish the terms of designation for CHNMS and proposes regulations to implement the national marine sanctuary designation. NOAA is also publishing a draft environmental impact statement (draft EIS) and draft management plan, and soliciting public comment on the proposed rule, draft EIS, and draft management plan.

DATES:

Comments due: NOAA will consider all comments received by October 25, 2023.

Public comment meetings: NOAA will host two in-person public comment meetings and one virtual public comment meeting on the following dates and times:

- *Meeting #1:* Monday, September 25, 2023; *Time:* 5 p.m.; *Location:* San Luis Obispo, CA.
- *Meeting #2:* Wednesday, September 27, 2023; *Time:* 5 p.m.; *Location:* Lompoc, CA.
- *Meeting #3:* Thursday, October 12, 2023; *Time:* 1 p.m. Pacific Time; *Location:* Virtual.

ADDRESSES:

Comments: You may submit comments on this document, identified by NOAA-NOS-2021-0080, by any of the following methods:

- *Federal e-Rulemaking Portal:* <https://www.regulations.gov> and search for docket NOAA-NOS-2021-0080. Follow the instructions for sending comments.

- *Mail:* Send any hard copy public comments by mail to Paul Michel, Regional Policy Coordinator, 99 Pacific Street, Suite 100F, Monterey, CA 93940.

- *Public Meetings:* Provide oral comments during a public meeting, as described under **DATES**. Webinar registration details and additional information about how to participate in these public scoping meetings is available at: <https://sanctuaries.noaa.gov/chumash-heritage/>.

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 NOAA. 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. NOAA will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Copies of the proposed rule, draft EIS, and draft management plan can be downloaded or viewed on the internet at www.regulations.gov (search for docket # NOAA-NOS-2021-0080). Copies can also be obtained by contacting the person identified under **FOR FURTHER INFORMATION CONTACT**.

- *Meetings:* The meetings will be held in the following locations:

- *Meeting #1:* County of San Luis Obispo Board of Supervisors Hearing Room, 1055 Monterey Street, San Luis Obispo, CA 93408.

- *Meeting #2:* Dick DeWees Community Center, 1120 West Ocean Avenue, Lompoc, CA 93436.

- *Meeting #3:* Virtual, please see <https://sanctuaries.noaa.gov/chumash-heritage/> for details.

NOAA may substitute a virtual meeting platform rather than a public meeting if public safety concerns remain to prevent the spread of COVID-19. NOAA may take audio recordings of the public meetings, including the public comment portion of the meetings. Please check <https://sanctuaries.noaa.gov/chumash-heritage/> for updated information on public meetings.

FOR FURTHER INFORMATION CONTACT: Paul Michel, Regional Policy Coordinator, 99 Pacific Street, Suite 100F, Monterey, CA 93940, 831-647-6450, paul.michel@noaa.gov.

SUPPLEMENTARY INFORMATION:**I. Introduction****A. Background**

The National Marine Sanctuaries Act (NMSA; 16 U.S.C. 1431 *et seq.*) authorizes the Secretary of Commerce (Secretary) to designate and protect as national marine sanctuaries areas of the marine environment that are of special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities. Day-to-day management of national marine sanctuaries has been delegated by the Secretary to ONMS. The primary objective of the NMSA is to protect the resources of the National Marine Sanctuary System.

NOAA proposes to designate CHNMS in the waters along and offshore of the coast of central California to recognize the national significance of the area's ecological, historical, archaeological, and cultural resources and to manage this special place as part of the National Marine Sanctuary System. The proposed sanctuary boundary would encompass 5,617 mi² (4,242 nmi²) of submerged lands and marine waters from Montaña de Oro State Park in San Luis Obispo County to Naples along the Gaviota Coast in Santa Barbara County. This boundary reflects NOAA's preferred alternative, which is described in the draft environmental impact statement (draft EIS) as Alternative 2 (Cropped Bank to Coast) and Sub-alternative 5b (Gaviota Coast Extension). NOAA has also proposed in the draft management plan a framework to provide collaborative management with the Chumash and Salinan tribes in this area for CHNMS.

The specific area proposed for national marine sanctuary designation includes the coastline of central California from Hazard Canyon Reef at the north end of Montaña de Oro State Park, south along the San Luis Obispo County coast and a portion of Santa Barbara County to approximately two miles south of Dos Pueblos Creek near the township of Naples along the Gaviota Coast. Roughly 134 miles of the mainland coast (163 miles if including the shoreline of offshore rocks and islands) are part of the area proposed for sanctuary designation. The sanctuary's proposed boundaries also include the offshore marine waters from the western end of Channel Islands National Marine Sanctuary (CINMS), northwards to within approximately 2.5 miles of the southern end of Morro Bay Wind Energy Area (WEA; as referenced in the Bureau of Ocean Energy Management (BOEM)'s Final Sale Notice for Pacific Wind Lease Sale 1, 87 FR 64093, October 21, 2022), and then east and southeast to the point of origin at Hazard Canyon Reef. This area out to approximately 66 miles (50 nmi) from shore includes numerous offshore features including the Santa Lucia Bank, portions of its escarpment, Rodriguez Seamount, Arguello Canyon, and other offshore features and resources. Coastal watersheds drain into this area via multiple outlets, including the Santa Maria and Santa Ynez river mouths and several other coastal streams and rivers. Strong coastal winds drive seasonal upwelling which fuels the area's high biological productivity, supporting dense aggregations of marine life. Specifically, winds offshore of Point Arguello/Point Conception initiate

a powerful upwelling process that nourishes other nearby productive ecosystems such as CINMS. The presence of a biogeographic transition zone around Point Conception, where temperate waters from the north meet waters from the subtropics, creates an area of nationally-significant biodiversity in sea birds, marine mammals, invertebrates, and fishes.

For more than 10,000 years, the productive and diverse ecosystems in the region have been essential to the way of life of Indigenous peoples in the region, in particular the Chumash, one of the few ocean-going bands among the First Peoples of the Pacific Coast. The Salinan tribes have also relied on marine resources along the coast in this region. Tribes' connections to the region include their traditional and ancestral homelands, customary uses of marine resources for food and cultural connections, and stewardship of resources and ecosystems within their ancestral homelands and waters. Coastal landscapes and seascapes, including viewsheds, are integral and sacred elements of Native American cultural connections to the region"). Additionally, during the last glacial maximum, the region's coastline extended beyond the present-day coast to include now-submerged areas that were likely inhabited by ancestors of California Tribes before the last sea level rise. As ocean-going Indigenous people on the California coast, the Chumash traveled to sea, to the Channel Islands, and along the coast in traditional redwood plank canoes called "tomols." Coastal Chumash traditionally harvested an array of marine resources such as abalone and other shellfish, *Olivella* shells, fish, kelp and other seaweeds, and marine mammals. Today, Chumash Peoples undertake ocean voyages in tomol canoes to honor their ancestors' crossings to the offshore islands and to continue to honor ceremonial sites within their historic areas.

The marine environment of the proposed sanctuary has provided and continues to provide a special sense of place to its changing coastal communities and visitors because of its historical, archaeological, cultural, aesthetic, and biological resources. The Indigenous peoples along this coast were the first people living in present-day California to have contact with Europeans when Spanish explorers arrived on the Pacific Coast in the mid-1500s. Subsequent waves of Spanish, Mexican, English, Russian, and American explorers and settlers traveled to this region over the next 300 years. The region was shaped by development of a mission system from San Diego to

San Francisco, the California gold rush in the mid-1800s, ranching for cattle and the hide/tallow trade, military training and operations, a coastal and offshore oil boom, and, more recently, coastal and offshore renewable energy development. Maritime shipping has been prominent in this portion of California, with treacherous weather and currents leading to over 200 reported ship and aircraft wrecks; at least 20 prominent shipwrecks alone have been found in the area between Point Conception and Point Sal. Two shipwrecks that lie within the proposed sanctuary—the *Yankee Blade* and the *McCulloch*—have been listed on the National Register of Historic Places; the *Montebello*, also on the National Register, lies just beyond the proposed sanctuary's boundaries.

Coastal tourism, recreational activities, and commercial fishing are prominent components of the coastal and marine economy in this region, particularly in San Luis Obispo County. Coastal and offshore energy and military activities are more prominent in the portion of this region along the Santa Barbara County coastline. More public access is available for the portion of the area proposed for the sanctuary in San Luis Obispo County than in Santa Barbara County, where access is more limited due to the large military base and private land holdings along this stretch of coast. Marine research is a small but growing sector of the ocean uses in this area.

B. Need for Action

The National Marine Sanctuaries Act (NMSA; 16 U.S.C. 1431 *et seq.*) authorizes the Secretary of Commerce (Secretary) to designate national marine sanctuaries to meet the purposes and policies of the NMSA, including:

- "to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System" (16 U.S.C. 1431(b)(1));
- "to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities" (16 U.S.C. 1431(b)(2));
- "to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities" (16 U.S.C. 1431(b)(6));
- "to develop and implement coordinated plans for the protection and

management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas” (16 U.S.C. 1431(b)(7)); and,

- “to create models of, and incentives for, ways to conserve and manage these areas, including the application of innovative management techniques” (16 U.S.C. 1431(b)(8)).

The nationally-significant natural resources, physical features and habitats, and the cultural and historical resources within the proposed sanctuary warrant long-term protection and management to reduce threats that would adversely affect their historical, cultural, archaeological, recreational, and educational value. For example, many threatened or endangered species, such as blue whales, snowy plovers, black abalone, white sharks, and leatherback sea turtles, rely on habitats, physical features, or prey found in the proposed sanctuary rely on habitats, physical features, or prey found in the proposed sanctuary. This area also contains hundreds of known or suspected shipwrecks of historical importance, including several on the National Register of Historic Places. Moreover, this region and its abundant resources have been home to coastal, ocean-going Indigenous tribes for tens of thousands of years, and submerged village sites may exist along paleoshorelines in the submerged lands of the proposed sanctuary. Several key threats to these natural, cultural, and historical resources include: various levels of human development and activity from: offshore energy development; decommissioning and removal of coastal and offshore industrial facilities; sound, discharges and whale strikes from vessel traffic; plastics, marine debris and pollutants from coastal runoff; and most of all, acute and cumulative impacts of climate change.

Accordingly, NOAA is proposing to designate this area as a national marine sanctuary to: (1) manage and protect nationally-significant natural resources, physical features and habitats, and cultural and historical resources through a regulatory and nonregulatory framework; (2) document, characterize, monitor, study, and conserve these resources; (3) provide interpretation of their natural, cultural, historical, and educational value to the public; (4) promote public stewardship and responsible use of these resources for various purposes to the extent

compatible with the sanctuary’s principal goal of resource protection; (5) develop a coordinated, community-based, ecosystem-based management regime with partner Federal agencies, State and local governments, and Indigenous tribes and tribal organizations; and (6) develop and carry out an innovative collaborative management structure to involve Indigenous communities, including federally-recognized tribes and other tribal groups and organizations, in important management programs and initiatives of the sanctuary.

Designating a new national marine sanctuary along the coast of central California would allow NOAA to complement and supplement existing Federal and State resource management programs, policies, and regulations. For instance, proposed discharge regulations to establish more comprehensive water quality protection across the geographic range proposed for sanctuary protection under NMSA would bolster existing authorities under the Clean Water Act (CWA; 33 U.S.C. 1251 *et seq.*). NOAA has well-regarded and successful programs to conduct outreach, education, and communication that would recognize and promote this area’s nationally-significant natural, historical, and cultural properties. NOAA could assist the region’s scientific expertise and technological resources to enhance ongoing research, and provide a hub for the coordination of these activities. Through its focus on various initiatives benefiting the marine and coastal economy, NOAA’s designating the area as a national marine sanctuary would enhance and facilitate public stewardship of natural, historical, and cultural resources. Lastly, designating this proposed national marine sanctuary would provide expanded conservation of key resources within the California Current Large Marine Ecosystem, and create a collaborative framework to involve Indigenous communities in region-wide management.

C. Designation Process

1. Notice of Intent To Designate a National Marine Sanctuary

In July 2015, a broad community consortium led by the Northern Chumash Tribal Council submitted a nomination through the Sanctuary Nomination Process. The nomination identified opportunities for NOAA to expand upon existing local and State efforts to study, interpret, and manage the area’s unique cultural and biological resources. The nomination also highlighted the maritime history and

cultural heritage of the Chumash tribal nation, who, along with other Native American tribes, have deep cultural connections to this area of central California. NOAA completed its review of the nomination and, on October 5, 2015, added the area to the inventory of successful nominations eligible for designation. All nominations submitted to NOAA can be found at: <https://www.nominate.noaa.gov/nominations>.

On November 10, 2021, NOAA began the sanctuary designation process for the proposed CHNMS by publishing a notice of intent (86 FR 62512) to prepare a draft EIS as well as other pertinent designation materials such as a draft management plan, terms of designation, and this proposed rule, as required by NMSA and the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). The notice of intent also announced NOAA’s intent to fulfill its responsibilities under the requirements of the National Historic Preservation Act (NHPA; 54 U.S.C. 300101 *et seq.*) and Executive Order 13175.

Following the notice of intent, NOAA conducted three virtual public meetings, hearing oral comments from 100 participants, and received thousands of written comments during an 83-day public comment period. The majority of comments supported the goals of sanctuary designation, including protecting the cultural heritage of Chumash tribal communities and protecting the coastal California ecosystem’s health and resilience. Many commenters also noted the importance of managing the area to promote recreation and tourism to support the local economy, to foster education and research programs, and to establish a shared management approach with Indigenous communities. Commenters also voiced concerns about overlapping existing and potential uses of the area such as fishing and offshore energy development. Overall, comments covered a diversity of other topics including views on: the proposed boundary and name for the proposed sanctuary; alternatives to consider for the boundary and name for the proposed sanctuary; activities that should be regulated; what non-regulatory programs the proposed sanctuary should have; and different ways to structure collaborative or co-management with Native American tribes. More detail about the scoping comments are contained in the draft EIS, section 3.11 and appendix A.

2. Development of Proposed Terms of Designation and Proposed Regulations

Section 304(a)(4) of the NMSA requires that the terms of designation

include the geographic area proposed to be included within the sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or aesthetic value; and the types of activities that would be subject to regulation by the Secretary to protect these characteristics. Section 304(a)(4) also specifies that the terms of designation may be modified only by the same procedures by which the original designation was made.

The purpose and need for the sanctuary provide the overarching basis for developing the proposed regulations. NOAA developed this proposed rulemaking and the proposed sanctuary terms of designation based on information received during public scoping comments, cooperating agency review, and government-to-government consultation with Tribal Nations under Executive Order 13175, as well as on information from analysis of issues in the draft EIS, interagency coordination, and internal staff analysis and expertise. Scoping comments from tribal representatives, governmental agencies, users such as the fishing industry and offshore wind energy industry, other interested organizations, and the public addressed the need for regulations and exemptions for certain activities. NOAA consulted with the Pacific Fishery Management Council as required under NMSA section 304(a)(5). NOAA also considered existing regulations for other west coast national marine sanctuaries, including Monterey Bay, Greater Farallones, Channel Islands, and Olympic Coast national marine sanctuaries, and developed terms of designation and a set of proposed regulations that are generally consistent with other sanctuary provisions in similar resource areas. In developing the proposed regulations, NOAA evaluated resource sensitivity, industry practices, and feasibility of implementing certain regulations, to balance resource protection regulations with existing and future compatible activities that may occur in the sanctuary.

A detailed discussion of the proposed regulations is contained below in section II, subsections A through I. The proposed terms of designation are in section VI below and appendix B to the draft EIS, and would ultimately be incorporated as an appendix to the sanctuary management plan upon completion of designation.

3. Development of Draft Management Plan and Framework for Tribal Collaborative Management

When designating a national marine sanctuary, NOAA also develops and

presents a management plan that describes the management activities and initiatives that it proposes to conduct. The draft management plan for the proposed designation of CHNMS describes actions that NOAA will take to manage the sanctuary, summarized in 11 action plans, such as research and monitoring, education and outreach, sanctuary resource protection, and sanctuary operations, as well as practical programs to address certain issue areas, such as climate change, offshore energy, water quality, and wildlife disturbance. NOAA has developed the draft management plan for the largest boundary alternative as noted in the notice of intent and analyzed in the draft EIS as the “Initial Boundary Alternative,” so the public may evaluate the full suite of management measures for the proposed sanctuary; however, the final management plan could include fewer or reduced management actions if a boundary smaller than the Initial Boundary Alternative is ultimately designated.

In addition to engaging in government-to-government consultation with the only federally-recognized tribe in the area, the Santa Ynez Band of Chumash Indians (SYBCI), as described in section V, Classification, below, NOAA has conducted meetings with non-federally-recognized tribes and tribal organizations along the central California coast, including the Northern Chumash Tribal Council, yak tityu tityu yak tithini Northern Chumash Tribe, Coastal Band of the Chumash Nation, Xolon Salinan Tribe, Salinan Tribe of Monterey and San Luis Obispo Counties, Wishtoyo Chumash Foundation, and Barbareño/Ventureño Band of Mission Indians. Close, deliberate collaboration between NOAA and these tribes has been an essential element of this sanctuary designation process. NOAA intends to incorporate input from interested federally-recognized Indian tribes and all interested tribal entities, into the sanctuary designation process, as well as sanctuary management after the proposed designation. The draft management plan includes an Indigenous Cultural Engagement Action Plan that describes how sanctuary management would involve tribal perspectives and collaboration in a number of specific sanctuary management actions.

Additionally, NOAA is proposing a framework for collaborative management with Native American tribes and tribal groups for the proposed CHNMS. A detailed explanation of that proposed framework and an outline of

opportunities for tribal collaboration in management of the proposed sanctuary are found in the introduction to the draft management plan. In summary, the proposed framework, built upon extensive input from SYBCI, non-federally-recognized tribes, and tribal organizations in this area of coast, envisions relying on government-to-government consultation with federally-recognized Indian tribes; an Intergovernmental Policy Council involving federally-recognized Indian tribes and the State of California; a Sanctuary Advisory Council (to be established after designation) that has one or more voting seats for federally-recognized Indian tribes and one or more voting seats to represent the knowledge, history, and culture of Indigenous communities; and an Indigenous Cultures Advisory Panel, as a working group of the Sanctuary Advisory Council, to provide advice to the Sanctuary Advisory Council, with coordination and communication with other groups as appropriate, about cultural issues important to these coastal tribes. NOAA also envisions a role for one or more non-profit foundations to support joint projects between NOAA and federally-recognized Indian tribes and/or non-federally recognized tribes. The proposed framework was presented to SYBCI and other tribes in meetings during August 2022 and separately shared with the public in a workshop held on August 26, 2022. NOAA welcomes further comment on the proposed framework, as described in the draft management plan, through this rulemaking process.

4. Draft Environmental Impact Statement

In accordance with NEPA (42 U.S.C. 4321 *et seq.*) and the NMSA (16 U.S.C. 1434), NOAA is releasing a draft EIS for the proposed national marine sanctuary designation in conjunction with the publication of this proposed rule. The draft EIS (<https://sanctuaries.noaa.gov/chumash-heritage>) describes the purpose and need for the proposed action of designating a national marine sanctuary in the coastal and offshore waters of central California—the purpose of this proposed regulatory action—and evaluates the potential environmental consequences of the proposed designation of a national marine sanctuary; identifies a range of alternatives, including the preferred alternative; includes a comparison of the beneficial and adverse impacts among alternatives; and provides an assessment of resources and uses in the area.

The draft EIS analyzes the Initial Boundary Alternative (7,573 mi²; 5,718 nmi²; 152 miles of mainland coast), which generally represents the boundary identified in the notice of intent (86 FR 62512) but with some adjustments that are described in section 3.2 of the draft EIS, and four alternatives that are smaller than the Initial Boundary Alternative, including:

- Alternative 1, Bank to Coast, which focuses management from the Santa Lucia Bank to the coast (6,098 mi²; 4,605 nmi²; 152 miles of mainland coast);
- Alternative 2, Cropped Bank to Coast (5,553 mi²; 4,194 nmi²; 115 miles of mainland coast), largely copies Alternative 1, however it excludes the waters from Cambria to Hazard Canyon Reef, which would be the most direct path to shore for the installation of subsea electrical transmission lines from the Morro Bay WEA;
- Alternative 3, Diablo to Gaviota Creek, also excludes more (relative to Alternative 2) northern waters that BOEM has identified for potential offshore wind development by removing the Diablo Canyon Call Area from the boundaries of the proposed sanctuary, and focuses management on the area from the Diablo Canyon Call Area and nuclear power plant south to Gaviota Creek (5,952 mi²; 4,494 nmi²; 99 miles of mainland coast), but it includes offshore waters west of the Santa Lucia Bank;
- Alternative 4, Combined Smallest, excludes both the western and northern offshore areas focusing management on the smallest area (4,476 mi²; 3,380 nmi²; 99 miles of mainland coast).

The draft EIS also analyzes two small expansion areas:

- Sub-alternative 5a, Morro Bay Estuary (2.5 mi²; 1.9 nmi²; 11 miles of mainland coast), would include the tidally-influenced portions of Morro Bay Estuary and could be added to the Initial Boundary Alternative or Alternative 1 (but would not be added to alternatives 2–4);
- Sub-alternative 5b, Gaviota Coast Extension (64 mi²; 48 nmi²; 18 miles of mainland coast), would include in the proposed sanctuary the State waters from Gaviota Creek to the township of Naples, a potential addition to any of the action alternatives.

The draft EIS also includes a “No Action Alternative” in which NOAA would not designate the area as a national marine sanctuary.

NOAA has identified as the Agency-Preferred Alternative in the draft EIS the combination of Alternative 2 and Sub-alternative 5b. This is the boundary

alternative that is reflected in this proposed rule.

Based on public comments received on the draft designation documents and NOAA’s experience administering the national marine sanctuary program, pursuant to NEPA and the Administrative Procedure Act, NOAA may choose to select a new alternative in the final rule and final EIS that is within the geographic and regulatory scope of these alternatives currently considered in the draft EIS, and that is a logical outgrowth of this proposed rule. See, for example, sections 3.1.1 and 3.9.2 of the draft EIS.

The draft EIS evaluates and considers the potential impacts of implementing the proposed regulations that would be adopted as part of the preferred alternative and conducting the various management programs and initiatives described in the draft management plan.

The draft EIS focuses on eight issue areas: physical resources; biological resources; commercial fishing and aquaculture; cultural heritage and maritime heritage resources; socioeconomic, human uses, and environmental justice; offshore energy; marine transportation; and homeland security and Department of Defense (DoD) activities.

The BOEM, the Bureau of Safety and Environmental Enforcement (BSEE), the DoD and the Santa Ynez Band of Chumash Indians (SYBCI) are all cooperating agencies for the NEPA review.

5. Agency-Preferred Alternative

In accordance with NEPA (42 U.S.C. 4321 *et seq.*), NOAA is identifying as its preferred alternative the combination of Alternative 2, “Cropped Bank to Coast,” and Sub-alternative 5b, “Gaviota Coast Extension.” Section 5.4.9 of the draft EIS provides a map (Figure 5–1) and additional information regarding the reasons for identifying this alternative as the Agency-Preferred Alternative. NOAA has met with cooperating agencies for this action and considered their input. NOAA has also conducted formal government-to-government consultation with the SYBCI, and has held informational meetings with other bands of the Chumash and two bands of the Salinan Tribe. NOAA developed its preferred alternative from among the suite of alternatives analyzed after considering their views as well as those of cooperating agencies, including the SYBCI, the input from outreach meetings, and after weighing the NEPA analysis.

The Agency-Preferred Alternative (*i.e.*, preferred alternative) would provide numerous beneficial impacts on

various issue areas, such as physical resources; biological resources; commercial fishing and aquaculture; cultural heritage and maritime heritage resources; socioeconomic, human uses, and environmental justice; offshore energy; and homeland security and DoD activities; largely through sanctuary regulations that would limit the scale and scope of offshore development activities and other human uses that could harm natural, historical, and cultural resources. NOAA has considered the potential adverse impacts of the preferred alternative and finds them to be not significant while also allowing an acceptable balance between resource use and conservation of sanctuary resources. This alternative would also limit adverse impacts on offshore wind development and would lessen adverse impacts on marine transportation compared to the Initial Boundary Alternative analyzed in the draft EIS.

In identifying the preferred alternative, NOAA has considered which boundary alternatives NOAA could effectively manage while allowing for compatible uses and providing increased protection and conservation for sanctuary resources, which is the proposed sanctuary’s principal purpose. As such, the preferred alternative reflects NOAA’s consideration of key issues, including those pertaining to subsea electrical transmission cables and the name of the proposed sanctuary. The sanctuary boundary proposed under the preferred alternative would allow NOAA to focus its management on key areas historically important to the Chumash Peoples and natural resources important to their heritage, while appropriately managing for other resources and uses.

NOAA’s identification of Alternative 2 rather than Alternative 1 as part of the preferred alternative (in addition to Sub-alternative 5b, discussed below) is based on two principal concerns about designating the area from Montaña de Oro north to Cambria as a sanctuary. The first concern, described in more detail in section 5.4.9 of the draft EIS, derives from BOEM’s estimation that offshore wind development in the Morro Bay WEA could require up to 20–30 subsea electrical transmission cables and possibly floating substations in the area offshore of Morro Bay. While NOAA’s proposed regulations contain a permit process that could be used to allow for the placement and continued presence of subsea electrical transmission cables within the sanctuary boundaries (for additional details please refer to part III, section D below), provided that the applicable

criteria and requirements are met and that any permit conditions can be satisfied by developers, the disturbance of submerged lands and associated potential impacts on biological resources that could result from development on this scale would likely be unprecedented in a national marine sanctuary. In excluding this area, NOAA anticipates developers will be able to plan infrastructure for this area, which may minimize the potential requests to use other parts of the proposed sanctuary. Therefore, Alternative 2 would exclude some of the areas where subsea electrical transmission cables are expected to be placed from the proposed sanctuary. NOAA has evaluated the impacts of the proposed action on infrastructure in the draft EIS. NOAA additionally requests comment on any planned infrastructure in the area, as well as any potential impacts (including cost) that the sanctuary may have on this infrastructure.

The second consideration for NOAA's choice of Alternative 2 as part of the preferred alternative relates to the lack of agreement regarding the name for the portion of the proposed sanctuary from roughly Cambria to south of Morro Bay. During the scoping process and informational meetings, the Salinan bands objected to naming the sanctuary "Chumash" in that area which they identify as being part of their ancestral homeland. Chumash bands have also considered this section of coast part of their ancestral homeland. The Xolon Salinan have expressed support for sanctuary designation of this area, provided it had a different name. Chumash bands were unwavering in their view that the entirety of the sanctuary should be named "Chumash Heritage." Alternative 2 is responsive to Indigenous community input by delineating a geographic option that would ameliorate these concerns.

Including the Gaviota Coast Extension (Sub-alternative 5b) within the preferred alternative would provide additional protection to important coastal resources. It would include waters off three popular State beaches and parks—Gaviota, Refugio and El Capitan—and include all of Kashtayit and Naples State Marine Conservation Areas within the sanctuary. It would include additional beaches, kelp forests, and rocky and soft substrate reefs. As discussed in detail in section 4.5 of the draft EIS, that portion of the Gaviota Coast was home to numerous, large Chumash villages at the time of European first contact. Conservation of these resources is an important benefit to including this sub-alternative in the preferred alternative. Offshore

structures including those necessary for existing oil and gas production in this area, such as pipelines and cables related to the Santa Ynez Unit, could be accommodated via the certification process included in the proposed regulations. Repair, replacement, or removal of the structures necessary for existing oil and gas production could be considered via an ONMS authorization process. For more details regarding the proposed permitting, authorization, and certification processes for existing oil and gas production and repair, maintenance, and removal of oil and gas structures, please refer below to section III.D.1., as well as section III.H.

II. Proposed Terms of Designation for Chumash Heritage National Marine Sanctuary

Section 304(a)(4) of NMSA as amended, 16 U.S.C. 1434(a)(4), requires that the terms of designation be described at the time a new sanctuary is designated, including the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or aesthetic value, and the types of activities that will be subject to regulation to protect those characteristics.

The following represents the proposed terms of designation:

Preamble

Under the authority of the NMSA, approximately 5,600 mi² (4,200 nmi²) of the coast of central California's San Luis Obispo and Santa Barbara counties are hereby designated as a National Marine Sanctuary for the purpose of providing long-term protection and management of the ecological, cultural, and historical resources and the conservation, recreational, scientific, educational, and aesthetic qualities of the area.

Article I: Effect of Designation

The NMSA authorizes the issuance of such regulations as are necessary and reasonable to implement the designation, including managing and protecting the ecological, cultural, and historical resources and the conservation, recreational, scientific, educational, and aesthetic qualities of Chumash Heritage National Marine Sanctuary (the "Sanctuary"). Section 1 of article IV of these terms of designation lists those activities that may have to be regulated on the effective date of designation, or at some later date, in order to protect Sanctuary resources and qualities. Listing an activity does not necessarily mean that it will be regulated. However, if an

activity is not listed it may not be regulated, except on an emergency basis, unless section 1 of article IV is amended by the same procedures by which the original Sanctuary designation was made.

Article II: Description of the Area

CHNMS covers approximately 5,600 mi² (4,200 nmi²) in central California. The Sanctuary's shoreline is approximately 130 miles long along the mainland, and 163 miles long when also counting the shoreline of offshore rocks and islands. The boundary begins at the mean high water line (MHWL) at Hazard Canyon Reef in Montaña de Oro State Park, in San Luis Obispo County, and extends to the south along the MHWL to approximately two miles east of Dos Pueblos Canyon near the township of Naples along the Gaviota Coast, in Santa Barbara County. The boundary then shifts due south offshore to the State waters line, then to the west along the State waters line to approximately the outfall of Gaviota Creek, then in a southwest direction along the western end of Channel Islands National Marine Sanctuary, southward to include Rodriguez Seamount and shifting to the northwest in an arc reaching approximately 47 miles due west of Purisima Point and another arc reaching a distance approximately 54 miles due west of Morro Rock, then approximately 2.5 miles to the north, then approximately 15 miles due east, and finally to the southeast approximately 39 miles to the point of origin at MHWL at Hazard Canyon Reef. The private marina at Diablo Canyon Power Plant and Port San Luis are not included in the Sanctuary. The Sanctuary includes offshore waters and seafloor features such as Rodriguez Seamount, Arguello Canyon, and the Santa Lucia Bank. The boundary coordinates are defined by regulation (see 15 CFR 922.230 and appendix A to 15 CFR part 922, subpart V).

Article III: Special Characteristics of the Area

For well over 10,000 years, First Peoples along North America have resided on the coast and in inland valleys adjacent to central California. Caves and other village sites at the nearby Channel Islands indicate occupation in this region as much as 13,000 years before present. At that time, due to glaciation at northern latitudes, the sea level was as much as 10 miles offshore from the present coastline. Paleoshorelines may exist in this area that could provide further evidence of early human occupation. The Native Americans who live in this

coastal area today, the Chumash and Salinan, can trace generations of family lineages in this region, that, when coupled with other historical accounts and archaeological data, show this coast and ocean area have supported their people, cultures, and heritage for thousands of years.

The special characteristics of the coast east of Point Conception, consisting of a south-facing coast with a channel sheltered by offshore islands, allowed Chumash to develop and make use of the plank canoe, called a “tomol,” for fishing and trade with other Chumash groups. Chumash villages north of Point Conception could not make use of the plank canoe in the rough waters and instead relied on the abundance of shellfish in this area and reed canoes. There were approximately 14 Chumash villages within the area of the sanctuary at the time of contact with Europeans, nearly 500 years ago. The largest Chumash village on the California coast at that time was “Mikiw,” located on the west bluff of Dos Pueblos Canyon. Most of the inhabited sites were located at the mouths of rivers or along the seashore where there was an abundance of food. The range of sites documented along or near the Sanctuary’s coast includes rock art, shrines, village sites, camp sites, cemeteries, organic remains, evidence of trade systems, and evidence of various forms of subsistence, including hunting, fishing, and extraction.

Serial use and development along this coastline, beginning with Indigenous peoples, then Spanish exploration and occupation, Russian fur trading, ranching and the trade for hides and tallow, discovery of gold, commercial fishing, and onshore and offshore oil and gas development have all had a hand in shaping this region’s coast and human use of resources. All of these uses have been dependent on marine transportation, and as a result over 200 ship and aircraft wrecks are recorded in this area, including several of national significance such as the *Yankee Blade*. Commercial fishing for numerous abundant fish stocks and commercial fishermen are also part of the rich maritime heritage in the central coast region.

The natural resources of the ocean have been a principal element of most of the human occupation and exploitation of the region. Strong and persistent coastal winds drive upwelling, an oceanographic process critical to the highly productive marine ecosystem. Large kelp forests, vast sandy beaches, rocky shorelines, shallow and deep reefs, and coastal wetlands are interconnected, co-

dependent biological communities prominent in this region. Important, large-scale features include the Santa Lucia Bank, a highly productive, approximately 1,000-square mile area in the heart of the Sanctuary, and thriving deep sea communities at Rodriguez Seamount and in Arguello Canyon. These productive waters complement other protected portions of the California Current by serving as critical foraging habitat for huge populations of shearwaters from New Zealand, humpback whales born offshore of Central America, leatherback sea turtles that migrate from and back to Indonesian islands, and albatross from Hawaii. More sedentary, local species depend on healthy communities in the Sanctuary, including the endangered snowy plover and black abalone, and commercially-important fish species like Dungeness crab, sablefish, spot prawn, squid, salmon, and lingcod. An estimated 33 species of marine mammals are found in the area, 18 of which can be seen on a regular basis. The Sanctuary is considered a seabird hot spot, with a higher richness of bird species than other sanctuaries offshore California. At least 400 species of fish have been documented in the area, which is also a higher richness of species than in nearby areas, likely because the Sanctuary includes warmer waters south and east of the ecological transition zone around Point Conception—Point Arguello and colder waters to the north.

The nationally significant ecological transition zone in the area around Point Conception—Point Arguello, where species more common in sub-tropical waters to the south meet with species more common in colder temperate waters to the north, is a central feature of the Sanctuary. The northern range of many warmer water species and the southern range of many colder water species meet in the area between Point Conception and Point Arguello. Increasing ocean temperatures and other impacts from climate change intensify the need to study biogeographic shifts in this area and affirm the importance of protecting the habitats on which these species depend.

Rodriguez Seamount, 38 nmi southwest of Point Conception, formed 10–12 million years ago through volcanic activity. It rises more than a mile above the seafloor to a relatively shallow depth of around 2,000 ft. below sea level. Scientists consider it to be relatively rare in that it may once have been an island, rising to possibly 200 ft. above sea level; due to sea level rise and seafloor subsidence, the seamount is now fully submerged. From its time as

an island, it has remnants of sandy beach features and from its time as a seamount, it has large coral and sponge colonies. Preliminary studies indicate a high percentage of invertebrate species as well as fish species found on Rodriguez Seamount that are not found on other nearby seamounts. Some surveys have uncovered substantial aggregations of coral colonies, with large individuals likely decades old, indicating a low level of disturbance to date. A special management zone for Rodriguez Seamount has been designated by Sanctuary regulations to allow for special protection in the water column 500 ft. above the seamount and to complement regulations adopted separately under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to protect benthic habitats.

The area contains dramatic coastlines consisting of rocky shorelines, large bluffs, and sweeping sandy beaches. Other than an approximately 10-mile stretch of urban development along the coast from Port San Luis through Oceano, most of the 134 miles of Sanctuary coastline is undeveloped due to State and county park ownership, a large stretch owned by the U.S. Government as a military installation, and private landholdings of large and small ranches or dispersed single-family dwellings. This lack of development creates a sense of wildness and highly-valued aesthetics of a natural coastal setting worthy of national marine sanctuary designation.

Article IV: Scope of Regulations

Section 1. Activities Subject to Regulation

The following activities are subject to regulation, including prohibition, as may be necessary to ensure the protection and effective management of the ecological, cultural, historical, conservation, recreational, scientific, educational, or aesthetic resources or qualities of the area:

a. Exploring for, developing, or producing oil, gas, or minerals (e.g., clay, stone, sand, metalliferous ores, gravel, non-metalliferous ores, or any other solid material or other physical matter of commercial value) within the Sanctuary;

b. Discharging or depositing, from within or into the boundary of the Sanctuary, or from beyond the boundary of the Sanctuary, any material or other matter;

c. Taking, removing, moving, catching, collecting, harvesting, feeding, injuring, destroying, attracting, possessing, or causing the loss of, or attempting to take, remove, move, catch,

collect, harvest, feed, injure, destroy, attract, or cause the loss of, a marine mammal, sea turtle, bird, historical resource, or other Sanctuary resource;

d. Drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary;

e. Flying a motorized aircraft above the Sanctuary;

f. Operating a vessel (*i.e.*, water craft of any description) within the Sanctuary;

g. Aquaculture or kelp harvesting within the Sanctuary;

h. Introducing or otherwise releasing from within or into the Sanctuary an introduced species; and,

i. Interfering with, obstructing, delaying, or preventing an investigation, search, seizure, or disposition of seized property in connection with enforcement of the NMSA or any regulation or permit issued under the NMSA.

Listing an activity here means that Secretary of Commerce can regulate the activity, after complying with all applicable regulatory laws, without going through the designation procedures required by paragraphs (a) and (b) of section 304 of the NMSA, 16 U.S.C. 1434(a) and (b). No term of designation issued under the authority of the NMSA may take effect in California State waters within the Sanctuary if the Governor of California certifies to the Secretary of Commerce that such term of designation is unacceptable within the review period specified in the NMSA.

Section 2. Emergencies

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or to minimize the imminent risk of such destruction, loss, or injury, any and all activities, including those not listed in section 1, are subject to immediate temporary regulation, including prohibition.

Article V: Effect on Leases, Permits, Licenses, and Rights

Pursuant to section 304(c)(1) of the NMSA, no valid lease, permit, license, approval, or other authorization issued by any Federal, State, or local authority of competent jurisdiction, or any right of subsistence use or access, may be terminated by the Secretary of Commerce or designee as a result of this designation or as a result of any Sanctuary regulation if such authorization or right was in existence on the effective date of this designation.

The Secretary of Commerce or designee, however, may regulate the exercise (including, but not limited to, the imposition of terms and conditions) of such authorization or right consistent with the purposes for which the Sanctuary is designated.

In no event may the Secretary or designee issue a permit authorizing, or otherwise approve: (1) The exploration for, development of, or production of oil, gas, or minerals within the Sanctuary except for existing oil and gas production of existing reservoirs under production prior to the effective date of Sanctuary designation from Platform Irene and Platform Heritage; (2) the discharge of primary-treated sewage except for regulation, pursuant to section 304(c)(1) of the Act, of the exercise of valid authorizations in existence on the effective date of Sanctuary designation and issued by other authorities of competent jurisdiction; or (3) the disposal of dredged material within the Sanctuary other than at sites authorized by the U.S. Environmental Protection Agency (EPA) prior to the effective date of designation. The disposal of dredged material does not include the beneficial use of dredged material. Any purported authorizations issued by other authorities after the effective date of Sanctuary designation for any of these activities within the Sanctuary shall be invalid.

Article IV does not authorize the direct regulation of lawful fishing activities within the Sanctuary, such as setting catch quotas, establishing spatial closures for fishing, or setting fishing seasons. However, all activities listed in article IV could apply to a person engaged in the act of fishing, such as but not limited to vessel operations, wildlife disturbance, discharges, introduction of an introduced species, or disturbance of cultural or historical resources. Aquaculture and kelp harvesting are not subject to this limitation and are subject to regulation under these terms of designation. Fishing in the Sanctuary may be regulated by other Federal or State authorities of competent jurisdiction, and designation of the Sanctuary shall have no effect on any fishery management regulation, permit, or license issued thereunder.

Article VI: Alteration of This Designation

The terms of designation, as defined under section 304(a)(4) of the NMSA, may be modified only by the same procedures by which the original designation is made, including public hearings, consultations with interested Federal, State, Tribal, regional, and local

authorities and agencies, review by the appropriate congressional committees, and approval by the Secretary of Commerce, or his or her designee.

[End of terms of designation]

III. Summary of Proposed Regulations

A. Adding New Subpart V

NOAA is proposing to amend 15 CFR part 922 by adding a new subpart (subpart V) that contains site-specific regulations for the proposed sanctuary. This subpart would include the proposed boundary, contain definitions of common terms used in the new subpart, identify prohibited activities and exceptions, and establish procedures for certification of existing uses and permitting otherwise prohibited activities.

B. Proposed Sanctuary Boundary

NOAA proposes to designate Chumash Heritage National Marine Sanctuary, consisting of an area of approximately 5,600 square miles (mi²) (4,200 square nautical miles (nmi²)) of coastal and ocean waters along the central coast of California and the submerged lands thereunder. The northern boundary would commence at Hazard Canyon Reef within Montaña de Oro State Park at the mean high water line (MHWL) and extend for 134 miles south along the MHWL through the remainder of San Luis Obispo County coast, excluding the private marina at Diablo Canyon Power Plant and Port San Luis (at the port's boundary for International Regulations for Preventing Collisions at Sea (COLREGS) demarcation line (33 CFR 80.1130)), and then further south and east to include the coast of western Santa Barbara County to approximately two miles east of Dos Pueblos Canyon along the Gaviota Coast near the township of Naples. The boundary then shifts due south offshore to the State waters line, to the west along the State waters line to approximately Gaviota Creek, then in a southwest direction along the western end of CINMS, southward to include Rodriguez Seamount and shifting to the northwest in an arc reaching approximately 47 miles due west of Purisima Point and another arc reaching a distance approximately 54 miles due west of Morro Rock, then approximately 2.5 miles to the north, then approximately 15 miles due east, and finally to the southeast approximately 39 miles to the point of origin at MHWL at Hazard Canyon Reef.¹

¹ The proposed boundary would bisect Hazard Canyon Reef at MHWL. The detailed legal boundary description is included in § 922.230 and the

C. Definitions

This proposed rule incorporates and adopts common terms defined in the national regulations at 15 CFR 922.11. In addition, NOAA proposes to include two site-specific definitions.

NOAA has proposed to define “beneficial use of dredged material” to distinguish between suitable dredge material that is discharged into the sanctuary for the purpose of protecting or restoring habitat of the sanctuary, which could be permitted, versus disposal of dredge material at a new disposal site within the sanctuary for purposes other than habitat protection or restoration, which would not be permissible. Dredged material eligible for this definition can come from a public harbor adjacent to the sanctuary, which for the Agency-Preferred Alternative would mean Port San Luis. Beneficial use of dredged material is not disposal of dredged material.

NOAA is proposing a definition for the “Rodriguez Seamount Management Zone” to define the special marine area immediately on top of, around, and adjacent to the Rodriguez Seamount. This definition is necessary because NOAA is proposing a regulation that specifically prohibits the collection or other injury of any sanctuary resource below 1,500 ft. water depth in this area from any activity other than from lawful fishing. This corresponds to the water depth about 500 ft. above the very top of the seamount. Existing fishing regulations, separately established under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), already restrict bottom trawling in much of the Rodriguez Seamount Management Zone. This special area, entirely within the boundaries of the proposed sanctuary, is bounded by geodetic lines connecting a heptagon generally centered on the top of the Rodriguez Seamount, and consists of approximately 570 mi² (430 nmi²) of ocean waters and the submerged lands thereunder. The northeast corner of this zone is located approximately 27 mi southwest of Point Conception off the coast of Santa Barbara County. Exact coordinates for the Rodriguez Seamount Management Zone boundary are provided in appendix B to subpart V.

D. Prohibited and Regulated Activities

NOAA is proposing to supplement and complement existing management of this area by proposing the following regulations in § 922.232 to protect sanctuary resources and qualities.

1. Prohibition on Exploring for, Developing, or Producing Oil, Gas, or Minerals

The central California coast has hosted offshore oil and gas development for over 60 years and the area proposed for designation as a national marine sanctuary has hosted oil and gas development for nearly 40 years. There have been oil spills from platforms and pipelines in this area, and spills from onshore development and onshore pipeline transportation, all of which have caused significant environmental harm. Additional information about these spill incidents is contained in section 4.7 of the draft EIS. NOAA is proposing to prohibit exploration, development, and production of offshore oil and gas resources within the sanctuary to reduce the risk of offshore spills from oil and gas development in the area. Continued oil and gas production of existing reservoirs under production prior to the effective date of sanctuary designation from Platform Irene (as part of the Point Pedernales Unit development) and Platform Heritage (as part of the Santa Ynez Unit development), including well abandonment, and including transportation in pipelines of product to shore, would be allowed to continue after sanctuary designation until those fields are exhausted and/or the developer ends operation. However, this regulation would prevent development of new reservoirs from these existing platforms.

Constructing and operating offshore platforms and pipelines also can cause direct impacts on natural, historical, and cultural resources, particularly from disturbance to the seafloor and benthic species. Those impacts would also be prevented because this regulation would not allow new oil and gas exploration, development, or production. Any construction, repair, replacement, or removal of existing pipelines would require a ONMS authorization or other approval in order to allow disturbance to the submerged lands.

Most if not all of the platforms and pipelines within the sanctuary are likely to be decommissioned and removed within 5–10 years of sanctuary designation. The prohibition on new oil and gas development would not preclude the removal of these structures and restoration, if necessary, of any damage caused by removal, although a sanctuary permit, authorization, or other approval would be required in order to allow disturbance to the submerged lands during decommissioning, removal, and restoration activities. NOAA would be integrally involved in

the planning and conduct of such decommissioning, removal, and restoration activities for structures within the sanctuary.

This prohibition would also not allow for development, including exploratory activities, of any seafloor minerals. While seafloor mining has not been proposed in this area, this regulation would ensure that the disturbance to benthic habitat and species likely to result from seafloor mining would not occur in the sanctuary.

2. Prohibition on Discharges

This proposed prohibition on discharges has three main elements: prohibition on any discharge within or into the sanctuary; discharge from beyond the sanctuary boundary that subsequently enters and injures sanctuary resources; and discharges from cruise ships. Each is explained in separate paragraphs below. All three sub-elements of this prohibition are consistent with discharge prohibitions in adjacent national marine sanctuaries.

The proposed prohibition on discharges within or into the sanctuary is proposed in recognition that various substances can be discharged from vessels or from infrastructure or individuals along the shoreline that can harm sanctuary resources or quality. The proposed discharge regulations would bolster existing authorities such as the Clean Water Act (CWA; 33 U.S.C. 1251 *et seq.*) that provide some, yet incomplete, protection of resources from the adverse effects of discharges. Establishing a cohesive regulatory framework across the full range of the geography proposed for sanctuary protection would provide value to boaters and others using sanctuary waters. Section 4.2.1 of the draft EIS contains a detailed discussion of water quality and discharges that constitute key sources of water pollution in the area, and a brief summary of key points is provided here. While sewage is largely well-regulated from onshore facilities, and while the EPA has established a No Discharge Zone within three miles of the California coastline, NOAA’s proposed prohibition would complement this regulatory framework and apply throughout the entire geographic region of the proposed sanctuary; it would also provide additional enforcement authority to protect sanctuary resources. Moreover, NOAA would commit staff time towards education and outreach to help promote compliance with this important regulation. Furthermore, the prohibition would extend throughout the sanctuary to ensure discharge of sewage from vessels does not cause acute or

coordinates are located in 15 CFR part 922, subpart V, appendix A.

cumulative impacts on natural resources or water quality.

Oil discharged from vessels or from shore can cause acute toxicity in organisms, and can foul feathers of seabirds leading to illness or death. Discharging other debris from vessels, by accident or on purpose, can lead to long-term impacts on resources. A chronic accumulation of plastics in marine ecosystems, for instance, can lead to an accumulation of plastic in marine organisms including those that are eventually ingested by humans.

NOAA is proposing some exceptions for this prohibition consistent with those exceptions at adjacent sanctuaries. For instance, NOAA is proposing to except discharge of fish, fish parts, chumming materials, or bait used in and resulting from lawful fishing activities within the sanctuary. NOAA is also proposing to except discharge of sewage waste that has been treated by a Type I or Type II marine sanitation device, as these systems provide effective treatment for sewage as to mitigate any impact their discharge can have on marine resources. Normal vessel operations can also involve washing down the deck or the anchor, which is exempted provided the wash down qualifies as “clean” per the definition at 15 CFR 922.11. There are also normal discharges from operating motorized vessels that are excepted, such as clean vessel engine cooling water, clean vessel generator water, and clean bilge water, as well as exhaust from an engine or generator. Provided that these discharges are clean, they may be discharged within or into the sanctuary. The more common threat to sanctuary resources can come from oily bilge water, soiled by oil that drips or leaks into an engine compartment. Oily bilge water may not be discharged into the sanctuary under this proposed prohibition, and would have to be disposed of at onshore pumpout stations. NOAA will coordinate with harbor masters to ensure existing onshore pumpout facilities remain operable, and, if necessary, to explore if other facilities are needed.

NOAA is proposing to except the disposal of dredged material within the proposed sanctuary at disposal sites approved by the EPA prior to designation. The proposed sanctuary boundaries do not include the two known EPA-approved dredge disposal sites used for Morro Bay dredging. NOAA is not aware of any other such sites. Nonetheless, this exception would allow an agency to demonstrate, after sanctuary designation, that a disposal site approved by the EPA existed prior to sanctuary designation.

Within the proposed sanctuary, NOAA would also consider allowing via permit the beneficial use of material removed from dredging Port San Luis, specifically to protect or restore habitat such as a sandy beach. The beneficial use of dredged material for habitat protection or restoration purposes is different from the disposal, or discarding, of dredged material. A proposed project involving the beneficial use of dredged material from Port San Luis may be eligible for approval by NOAA if the project demonstrates a sanctuary habitat protection or restoration purpose and if the permit requirements and criteria are met.

NOAA is proposing an exception for routine discharges from U.S. Coast Guard operations. One part of the exception would allow U.S. Coast Guard vessels that lack sufficient holding tank capacity and lack a Type I or II marine sanitation device to discharge sewage and non-clean graywater beyond 3 nmi from shore. A second part of the exception would allow discharge of ammunition, pyrotechnics, and other material directly related to training from beyond 12 nmi from shore from U.S. Coast Guard vessels and aircraft conducting training activities for search and rescue and live ammunition fire in the sanctuary. NOAA recognizes that these exceptions are necessary to ensure existing U.S. Coast Guard patrols, operations, and training can be maintained in the new sanctuary. U.S. Coast Guard patrol vessels provide a tremendous benefit to NOAA by assisting with enforcement of national marine sanctuary regulations. Moreover, the U.S. Coast Guard is an essential element of marine safety to all mariners operating offshore in central California, and they also provide enforcement of other Federal laws, conduct drug smuggling interdiction activities, and protect the homeland. ONMS has developed plans with U.S. Coast Guard District 11 leadership through informal discussions and NMSA section 304(d) consultation to limit discharges into other west coast national marine sanctuaries and anticipates similar approaches could be explored for U.S. Coast Guard operations in the proposed sanctuary. Therefore, NOAA considers the proposed discharge exception for U.S. Coast Guard vessels appropriate.

Finally, NOAA is proposing an exception that would allow discharges incidental and necessary to normal oil and gas production activities from Platforms Irene and Heritage into reservoirs already in production. These could include drill cuttings and mud to maintain well pressure and control

during drilling as well as other materials necessary to force oil and gas products from one part of the reservoir into producing wells. The last step in the life of an oil and gas well is to abandon the well, with the operator pumping cement into the well to prevent release of hydrocarbons in the future; this activity would be part of the proposed exception. Use of the depleted reservoirs for injection or storage of any material not considered incidental and necessary to normal oil and gas production would not be covered by the exception yet could be considered via proposed permit processes.

Discharges from beyond the boundary of the sanctuary would also be prohibited when those discharges subsequently enter the sanctuary and harm a sanctuary resource or quality. An example of this could be a spill from an onshore oil pipeline that flows down a creek, enters the sanctuary at the MHWL, and injures seabirds, fish, algae, or the sanctuary seafloor or other habitat. Unlike a discharge directly within or into the sanctuary, for a discharge to violate this prohibition, the discharge must injure a sanctuary resource or quality. This prohibition could also be applied to a spill or other discharge that originated from the marine environment and subsequently entered the sanctuary and injured a sanctuary resource or quality. The same exceptions that are proposed for the sub-element prohibiting discharge directly within or into the sanctuary would also apply for a discharge from beyond the boundary, except for the exception for dredge disposal and the exception for discharges incidental and necessary to oil and gas production. NOAA intends that dredge disposal discharges beyond the boundary of the sanctuary need to be designed in such a manner that they do not enter the sanctuary and injure sanctuary resources or qualities.

The third sub-element of this discharge regulation would prohibit discharge from cruise ships. Across most national marine sanctuaries, NOAA has applied consistent regulations that allow for fewer exceptions for cruise ship discharges than for other vessel discharges within or into sanctuaries because cruise ships can generate very large volumes of waste or other discharges. Even if treated, the volume of sewage and graywater, for instance, on a cruise ship of more than 2,000 passengers can reach several million gallons a day. Sewage discharge may contain bacteria or viruses that can cause disease in humans and wildlife, and can cause excessive growth and decomposition of

oxygen-depleting plant life, resulting in harm or death to organisms. Section 4.2.1 of the draft EIS provides additional detail on these sorts of discharges. The only exceptions proposed for cruise ships discharging within CHNMS would be for clean vessel engine cooling water, clean vessel generator cooling water, vessel engine or generator exhaust, clear bilge water, or anchor wash; in essence, discharges directly linked to propelling and operating the vessel itself.

3. Prohibition on Drilling Into or Altering the Submerged Lands

The seabed is a large and important habitat in the ecosystem within the proposed sanctuary, and NOAA proposes to prohibit activities that would drill into, dredge, or otherwise alter or disturb the submerged lands of the sanctuary. This prohibition would include constructing, placing or abandoning any structure, material, or other matter on the submerged lands. This is a common regulatory prohibition that NOAA has applied to most national marine sanctuaries. The purpose is to prevent activities that cause harm to habitat and species on or near the seafloor, such as drilling into or dredging into the seafloor. The proposed regulation includes exceptions for certain activities including disturbance during the conduct of lawful fishing activities, kelp harvesting, or anchoring a vessel. NOAA also proposes to except from this prohibition the installation of an aid to navigation, as well as the repair, replacement, or other maintenance on existing structures, specifically docks, piers, breakwaters, or jetties. Also, NOAA proposes an exception for maintenance dredging of the entrance channels for Port San Luis in existence at the time the sanctuary is designated. Vandenberg Space Force Base periodically conducts dredging near its coastal loading dock, with onshore disposal of the sand, but that dredging disturbance would be exempted with the general exemption for existing Department of Defense activities. NOAA has also proposed an exception to allow for drilling, maintaining, and abandoning wells incidental and necessary to normal oil and gas production activities within or into existing reservoirs in production at the time of sanctuary designation from Platforms Irene or Heritage.

In proposing these exceptions, NOAA has considered both the anticipated level of disturbance to the submerged lands and the purpose of the specified activities, most of which are related to maritime safety. The proposed exceptions are intended to further the policy of the NMSA to facilitate public

and private uses of sanctuary resources to the extent compatible with the primary objective of resource protection. However, in order to conserve and protect populations of coral and sponge colonies, NOAA proposes to not apply any of these exceptions within the Rodriguez Seamount Management Zone. The only exception that would apply within the Rodriguez Seamount Management Zone is the exception for seabed disturbance conducted during lawful fishing activity as regulated under the MSA. Note, however, that most of the Rodriguez Seamount Management Zone has been designated by the Pacific Fishery Management Council as groundfish essential fish habitat under the MSA, and areas in and around the zone are currently closed to bottom trawling under regulations at 50 CFR part 660, subpart C.

Certain currently proposed or contemplated future activities could result in disturbance to the submerged lands in the area proposed for sanctuary designation. Procedures described below in the section on General Permits, Authorizations, Certifications, and Special Use Permits could be used to allow such an activity that is otherwise prohibited, provided that the applicable criteria and requirements are met and that any permit conditions can be satisfied by developers. Examples of such activities that would be prohibited by the proposed seabed disturbance regulation unless a sanctuary general permit, ONMS authorization, or certification were issued include construction and operation of subsea electrical transmission cables from wind development in Federal waters beyond the sanctuary, or construction and operation of wind platforms in State waters near Vandenberg Space Force Base. Disturbance of submerged lands during repair and maintenance of existing structures not listed as being exempted, such as oil pipelines to shore from Platform Irene, or trans-oceanic fiber-optic telecommunications cables, would also require a permit, authorization, or certification from NOAA before proceeding.

With respect to subsea electrical transmission cables, BOEM cannot issue leases, rights of way, or easements for wind development within national marine sanctuaries per the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1337(p)(10). As discussed in the draft EIS, NOAA intends to coordinate with BOEM on potential integration of NMSA authorities and BOEM's OCSLA authorities for the purposes of specific wind development projects contemplated adjacent to and within the proposed sanctuary.

Although the details of any individual permit or authorization would be project-specific and would depend upon NOAA's consideration of the permit application(s) for any particular project, NOAA believes that the most likely permitting approach for activities associated with subsea electrical transmission cables is as follows.

- To allow the site assessment and characterization activities that must be conducted prior to cable installation, NOAA could consider issuing a sanctuary general permit for research purposes under 15 CFR part 922, subpart D, and 15 CFR 922.233 of the proposed rule.

- For the installation of a subsea electric transmission cable on the outer continental shelf within the proposed sanctuary, NOAA could consider issuing an ONMS authorization of a permit issued by the U.S. Army Corps of Engineers (USACE) under section 10 of the Rivers and Harbors Act (33 U.S.C. 403), under 15 CFR 922.36 and 922.232(e) of the proposed rule.

- For installation of cables within State waters of the proposed sanctuary, NOAA could similarly consider authorizing a lease issued by the State Lands Commission or a coastal development permit issued by the California Coastal Commission, under 15 CFR 922.36 and 922.232(e) of the proposed rule.

- To authorize the continued presence of the cable on or in the seabed within the proposed sanctuary, NOAA could then consider issuing a special use permit under section 310 of the NMSA.

- To allow any necessary maintenance and repair associated with the cable that might cause a disturbance of the submerged lands of the sanctuary, NOAA could consider several potential options. These could include relying on the initial ONMS authorization of the USACE section 10 permit and/or State permit for the cable installation (depending on the duration of that permit and whether it included future repair and maintenance), or issuing an ONMS authorization of a separate USACE and/or State permit that is issued specifically for the maintenance and repair activity.

NOAA has coordinated with USACE regarding this approach in Federal waters, and intends to continue that coordination throughout the designation process and as plans for cabling in the area are developed. Regular coordination with State agencies has occurred in the past and NOAA would conduct specific coordination meetings related to cable permitting as necessary. That said, NOAA's proposed regulations

contain several permitting mechanisms (see section H of this preamble below and section 3.2.2 of the draft EIS) that would provide NOAA with flexibility in its approach to any individual permitting request.

Decommissioning and removal activities that would disturb the sanctuary seabed, such as oil and gas platform removal or decommissioning of the outfall at the Diablo Canyon Power Plant, would require a permit, authorization, or certification from NOAA before proceeding. Further, NOAA has already commented, or could comment in the future as appropriate, to Federal, State, and local agencies leading regulatory review of these actions; also, some of these examples have been discussed with BOEM and BSEE, as cooperating agencies under NEPA for this designation, given the relevance to their authorities.

4. Prohibition on Possessing, Moving, Removing, or Injuring or Attempting To Possess, Move, Remove, or Injure a Sanctuary Historical Resource

NOAA is proposing to prohibit possessing, moving, removing, or injuring, or attempting to possess, move, remove, or injure a sanctuary historical resource, as defined at 15 CFR 922.11. This prohibition aims to reduce the risk of direct harm to sanctuary historical and cultural resources. “Moving” and “injuring” would include any changes to the position or state of historical resources, as well as covering, uncovering, moving, or taking artifacts from a shipwreck, even if the artifacts are not located directly on a shipwreck. Sanctuary historical resources include cultural and archaeological resources and artifacts. This sanctuary prohibition would apply within both State and Federal waters of the sanctuary and is necessary to ensure conservation of historical resources on the more than 200 ship and aircraft wrecks thought to exist in the sanctuary, as well as other known or unknown historical resources, such as resources that may be associated with submerged Native settlements.

5. Prohibition on Taking Any Marine Mammal, Sea Turtle or Bird Within or Above the Sanctuary

This prohibition is proposed to ensure conservation of important populations of marine mammals, sea turtles, and birds that are found in or above the sanctuary. The regulation would not apply should a person be authorized to take a marine mammal, sea turtle, or bird by NOAA or the U.S. Fish and Wildlife Service pursuant to the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), or the

Migratory Bird Treaty Act (MBTA). The term “take” including “taking” is defined in the national sanctuary regulations at 15 CFR 922.11.

6. Prohibition on Possessing Within the Sanctuary (Regardless of Where Taken, Moved, or Removed From) Any Marine Mammal, Sea Turtle, or Bird

This regulation is a companion to the preceding prohibition and is proposed to restrict a person’s ability to possess any marine mammal, sea turtle, or bird within the sanctuary, except as allowed by the MMPA, ESA, or MBTA, or as necessary for valid law enforcement purposes.

7. Prohibition on Deserting a Vessel Aground, at Anchor, or Adrift in the Sanctuary or Leaving Harmful Matter Aboard a Grounded or Deserted Vessel in the Sanctuary

Other adjacent national marine sanctuaries, similar to the proposed CHNMS, have considerable boating traffic along the coast and from local harbors. NOAA has responded to dozens of vessel sinkings, groundings, and discharges each year in national marine sanctuaries throughout the National Marine Sanctuary System, many with significant response and restoration costs and damage to sanctuary resources. Along with responding to those incidents, NOAA has adopted this regulation as a means to prevent a vessel’s sinking, grounding, or other incident, given that prevention is much less expensive than responding to incidents and can optimally prevent impacts and damage to sanctuary resources as well as to private property. NOAA proposes prohibiting deserting a vessel aground within the sanctuary for the same reasons. In the definition of the term “deserting” in the national sanctuary regulations at 15 CFR 922.11, NOAA has clarified conditions that constitute deserting a vessel. Finally, with this proposed regulation NOAA also proposes prohibiting leaving harmful matter aboard a grounded or deserted vessel in the sanctuary; the intent would be to minimize additional damage to sanctuary resources. The sanctuary regulations at 15 CFR 922.11 also define “harmful matter.”

8. Prohibition on Attracting Any White Shark Within the Sanctuary

White sharks function as a key species in coastal ecosystems in three broad areas in the world, with California and Baja California forming one of those population centers. Several different areas within the proposed sanctuary have important populations of adult and sub-adult white sharks, and may offer

linkage to other white shark aggregation areas in CINMS, Monterey Bay National Marine Sanctuary (MBNMS), and Greater Farallones National Marine Sanctuary (GFNMS). Including this proposed regulation would provide similar levels of protection to these central California white shark aggregation sites within CHNMS by preventing harm or behavioral disturbance to white sharks. The proposed regulation would apply the definition of “attract” in the national sanctuary regulations at 15 CFR 922.11. The prohibition against attracting white sharks is intended to address harassment and disturbance related to human interaction from research activities directed at white sharks or shark diving programs known generally as adventure tourism, or from recreational boaters who may approach a white shark. NOAA has concluded these activities can degrade the natural environment, impacting the species as a whole, or adversely impacting individual sharks from repeated encounters with humans and boats. A similar prohibition against attracting great white sharks was promulgated for MBNMS in 1996 and GFNMS in 2008, and NOAA has not had issues at those sanctuaries with lawful fishing activities inadvertently attracting white sharks. NOAA would have the ability to issue permits for activities that involve attracting a white shark if the permit procedures and requirements are met, as described below.

9. Prohibition on Moving, Removing, Taking, Collecting, Catching, Harvesting, Disturbing, Breaking, Cutting or Otherwise Injuring a Sanctuary Resource Located Below 1,500 ft. Water Depth Within the Rodriguez Seamount Management Zone; Prohibition on Possessing any Sanctuary Resource, the Source of Which Is Below 1,500 ft. Water Depth With the Rodriguez Seamount Management Zone

NOAA is proposing a regulatory framework for Rodriguez Seamount that is similar to its approach for Davidson Seamount in MBNMS. With the CHNMS regulations, NOAA proposes to create the Rodriguez Seamount Management Zone to ensure conservation of diverse and rare resources found on the seamount, including coral and sponges and other invertebrates, or living in the water column immediately above it. The seamount has seafloor features that suggest it may have been exposed above sea level millions of years ago, and its uncommon geomorphologic and benthic habitat features could be damaged without further protection. The top of the seamount is at approximately 2,000

ft. water depth, so under the proposed regulation there would be a buffer of 500 ft. above the top of the seamount to protect organisms that migrate above the seamount diurnally.

This prohibition would not apply to lawful fishing activity that is regulated under the MSA and its implementing regulations. NOAA, through conservation actions under the MSA, has prohibited bottom trawling on and around Rodriguez Seamount since June 2006. Additional protections provided to the seamount by the proposed sanctuary regulations would protect the high biodiversity and deep-sea habitat on the seamount. Long life histories and slow growth of deep-sea communities mean that these habitats have long recovery times following injuries and adverse impacts; additional protections for resources 1,500 ft. below sea level (roughly 500 ft. above the top of the seamount) would add critical additional risk mitigation for these sensitive resources.

10. Prohibition on Introducing or Otherwise Releasing From Within or Into the Sanctuary an Introduced Species, Except Striped Bass Released During Catch and Release Fishing Activity

NOAA is proposing to prohibit introducing or otherwise releasing an introduced species into the sanctuary. NOAA has adopted the same introduced species regulation at other national marine sanctuaries offshore of California to prevent the incidental or deliberate release of an introduced species into the sanctuary. Releases and subsequent spreading of introduced species have devastated marine ecosystems across the globe; most notably the alga *Sargassum horneri* has become a disruptive introduced species at nearby CINMS and has the potential to cause ecological and economic harm. This and other introduced species are potentially spread by vessels and have proliferated in the Santa Barbara Channel. Removing or otherwise eradicating introduced species once they have established local populations is extremely difficult; hence NOAA prefers to rely on prevention measures and deterring introducing such species within national marine sanctuaries. The proposed exemption for catch and release of striped bass recognizes the State of California has size limits for striped bass, an introduced but now established species harvested by recreational fishermen. Releasing a striped bass would not be a violation of this prohibition.

11. Prohibition on Interfering With, Obstructing, or Preventing an Investigation, Search, or Other Enforcement Activity

NOAA proposes a regulation, similar to regulations at other local national marine sanctuaries, to prohibit interfering with various sanctuary enforcement activities. This regulation would assist in NOAA's enforcement of the sanctuary regulations and strengthen sanctuary management.

E. Exemption for Emergencies

The proposed prohibitions for CHNMS would not apply to any activity necessary to respond to emergencies that threaten life, property, or the environment. However, this proposed exemption for emergencies would not apply to the prohibitions on the development of oil, gas, or minerals; attracting a white shark; introducing an introduced species; or interfering with an investigation or other enforcement activity.

F. Department of Defense Exemption

NOAA has proposed a broad exemption to allow existing activities carried out or approved by the various branches of the Department of Defense as specifically identified in chapter 4.9 or appendix I to the draft EIS. NOAA has coordinated with the Department of Defense, a cooperating agency under NEPA, to include in appendix I to the draft EIS a list of the activities that occur in the area proposed for sanctuary designation.

The area overlaps with the Point Mugu sea range and is adjacent to Vandenberg Space Force Base, which conducts both military missions from the base as well as hosting commercial space launches. All launches from the base or within the proposed sanctuary that are carried out or approved by DoD would be included in this exemption. With respect to commercial and civil launches from the base and associated activities, DoD has informed NOAA that:

- DoD approval is required for these activities.
- DoD conducts NEPA reviews for these activities. Other Federal agencies, such as the Federal Aviation Administration and/or the U.S. Coast Guard, may be cooperating agencies for purposes of these NEPA reviews.
- DoD also conducts all required natural and cultural resource consultations for these activities.
- Civil partners and commercial providers conducting these activities are required to comply with DoD best management practices.

NOAA advises that based on public comments received, additional coordination with DoD, and NOAA's experience administering the national marine sanctuary system, pursuant to NEPA and the Administrative Procedure Act, the final rule and final EIS may reflect any modifications to the DoD exemption that are a logical outgrowth of the proposed rule and that do not constitute a substantial change to the proposed action relevant to the environmental concerns.

New DoD activities that would not otherwise be prohibited by the CHNMS regulations would not require an amendment to the list of exempted activities. For those new DoD activities that would otherwise be prohibited by the CHNMS regulations, NOAA has proposed a process whereby the ONMS Director, upon consultation with the appropriate counterpart at the Department of Defense, can also exempt such new activities carried out by the Department of Defense.

An activity is considered to be a new activity, and not covered by the exemption for existing Department of Defense activities, if, as determined by NOAA, the activity is new or modified in any way (including change in location, frequency, duration, or technology used) from the activities described or listed in section 4.9 or appendix I, and the activity is likely to cause adverse effects on sanctuary resources or qualities that are substantially greater or different in kind than the effects of the activities described or listed in section 4.9 or appendix I.

A new activity that is not covered by the exemption for existing Department of Defense activities could be conducted if a sanctuary general permit or ONMS authorization, as applicable, were issued for the proposed activity.

In addition, NOAA commits to working with the Department of Defense to consider exempting new activities from the CHNMS regulatory prohibitions through subsequent rulemaking procedures, for instance in subsequent management plan and regulatory review processes for CHNMS. Any changes to the list of exempted Department of Defense activities could only occur after compliance with all applicable laws, such as the Administrative Procedure Act and NEPA, as necessary, and after public notice and comment, as applicable.

NOAA is willing to work with the Department of Defense to create a mechanism whereby new activities that are likely to injure sanctuary resources, and thereby also require section 304(d)

consultation, could be handled in a single, consolidated review.

This proposed regulation also contains language common to regulations for other national marine sanctuaries about obligations of the Department of Defense in the event an incident results in threatened or actual destruction, loss of, or injury to a sanctuary resource or quality. NOAA recognizes that this broad exemption is necessary to ensure military readiness for the Department of Defense to conduct existing training, operations, and military readiness activities in the area proposed to be designated as a national marine sanctuary. The United States military has been able to maintain readiness and conduct training and other operations in other national marine sanctuaries based on similar broad exemptions.

G. Emergency Regulations

NOAA is not proposing any sanctuary-specific regulation to allow for development of emergency regulations to address urgent threats to sanctuary resources. Rather, the emergency regulation provision included in the regulations of general applicability, which apply to all national marine sanctuaries (see 15 CFR 922.7), would also apply to CHNMS. Emergency regulations are used when there is an imminent risk to sanctuary resources and a temporary regulation or prohibition is necessary to prevent or minimize the destruction or loss of those resources, or otherwise minimize the imminent risk of such destruction, loss, or injury.

H. General Permits, Certifications, Authorizations, and Special Use Permits

1. Sanctuary General Permits

NOAA is proposing to include authority to issue sanctuary general permits to allow certain activities that would otherwise violate prohibitions in the proposed sanctuary's regulations. NOAA's proposal would not allow issuance of a sanctuary general permit for oil, gas, or mineral exploration, development, or production; introducing an introduced species; or interfering with an investigation or other enforcement activity; or as further limited in § 922.232(f) of the proposed regulations. National marine sanctuary program-wide regulations describe, at 15 CFR 922.30, different purposes for which a sanctuary general permit could be issued, three of which would apply to this proposed sanctuary: "Research—activities that constitute scientific research or scientific monitoring of a national marine sanctuary resource or

quality," "Education—activities that enhance public awareness, understanding, or appreciation of a national marine sanctuary or national marine sanctuary resource or quality," and "Management—activities that assist in managing a national marine sanctuary."

NOAA is proposing to add to the list at § 922.30, an additional purpose specific to CHNMS for which a sanctuary general permit could be issued: "Native American cultural or ceremonial activities—activities within Chumash Heritage National Marine Sanctuary that will promote or enhance local Native American cultural or ceremonial activities; or will promote or enhance education and training related to local Native American cultural or ceremonial activities." NOAA is proposing this general permit category to address a need identified during scoping. Specifically, NOAA received a scoping comment letter stating that indigenous peoples should be allowed to conduct the following cultural activities in the proposed sanctuary, subject to all other applicable law: collecting culturally-significant resources including bones, feathers, shells, animals, and plants; burials of cremated remains in biodegradable receptacles; survey and other work at submerged indigenous living sites, like villages or caves, including collecting artifacts like stone bowls or pestles. ONMS may be able to allow some of these activities to occur within the proposed sanctuary under existing authorities and the current general permit categories at § 922.30 (*e.g.*, a research or education permit may be appropriate to authorize survey activities at submerged indigenous living sites); however, ONMS is proposing this additional general permit category for CHNMS to ensure that activities to promote or enhance Native American cultural or ceremonial activities may be allowed to occur within the proposed sanctuary, consistent with the purpose and need of the proposed action. The proposed permit category would be recipient neutral; *i.e.*, any person, as that term is defined in 15 CFR 922.11, would be able to apply for a permit under the proposed category. However, permits may only be issued for those activities that will promote or enhance local Native American cultural or ceremonial activities or education and training related to such activities. NOAA has determined that this proposed permit category would further the purposes and policies of the NMSA by facilitating uses of sanctuary resources compatible

with the primary objective of resource protection, and by enhancing public awareness, understanding, appreciation, and wise and sustainable use of the historical, cultural, and archaeological resources of the proposed sanctuary.

The proposed regulations would require compliance with 15 CFR part 922, subpart D, in the national regulations for permit application processes, review procedures, amendments, and other permitting stipulations. These national permitting regulations include a list of factors NOAA considers in deciding whether or not to issue the permit, such as whether the activity must be conducted within the sanctuary, or whether the activity will be compatible with the primary objective of protection of sanctuary resources and qualities. NOAA would be able to impose specific terms and conditions through a permit as appropriate.

2. Certifications

Pre-existing activities specifically authorized by a valid Federal, State, or local lease, permit, license, or rights of subsistence use or access might be occurring within the proposed CHNMS area that would otherwise be prohibited by sanctuary regulations. Therefore, NOAA proposes including § 922.234 to describe the process by which it could certify an existing valid lease, permit, license, or right of subsistence use or access within the proposed sanctuary boundaries, consistent with 16 U.S.C. 1434(c) and 15 CFR 922.10. In compliance with the NMSA, the regulations at § 922.234 would state that certification is the process by which such activities existing prior to the designation of the sanctuary that violate sanctuary prohibitions may be allowed to continue. NOAA may, however, further regulate the exercise of such activities by applying additional terms and conditions as a condition of the certification to achieve the purposes for which the sanctuary would be designated. Requests for certifying permitted existing uses would have to be received by NOAA within 90 days of the effective date of the designation.

3. ONMS Authorizations

Pursuant to § 922.36 in the national regulations and § 922.232(e) in the CHNMS regulations, NOAA would have the authority to consider allowing an activity otherwise prohibited by § 922.232 if such activity is specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of sanctuary designation. This "ONMS authorization authority"

would apply to most of the proposed prohibitions as outlined in § 922.232(e) and as limited in § 922.232(f). However, NOAA could not issue an authorization to allow for exploration, development, or production of oil, gas, or minerals, or for interfering with an investigation or other enforcement action. In general, an ONMS authorization could not be issued to allow for an introduction of an introduced species; however, NOAA proposes a process by which an ONMS authorization for aquaculture projects raising an introduced species approved in concert with the State of California could be issued after making certain findings. NOAA has previously adopted a memorandum of agreement (MOA) with the State of California for considering aquaculture projects raising an introduced species in State waters of MBNMS and intends to update that MOA to address future aquaculture projects raising an introduced species that may be proposed within CHNMS.

4. Special Use Permits

NOAA has the authority under the NMSA to issue special use permits (SUPs) at national marine sanctuaries, as established by section 310 of the NMSA (16 U.S.C. 1441) and by 15 CFR 922.31. SUPs can be used to authorize specific activities in a sanctuary if such authorization is necessary to establish conditions of access to, and use of, any sanctuary resource or to promote public use and understanding of a sanctuary resource. Section 310 of the NMSA establishes four requirements for SUPs: (1) activities must be compatible with the purposes for which the sanctuary is designated and with protection of sanctuary resources; (2) SUPs shall not authorize the conduct of any activity for a period of more than five years unless otherwise renewed; (3) activities carried out under the SUP must be conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources; and (4) permittees are required to purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the SUP and to agree to hold the United States harmless against such claims. The NMSA authorizes NOAA to assess and collect fees for the conduct of any activity under an SUP, including costs incurred, or expected to be incurred, in issuing the permit and the fair market value use of sanctuary resources; for instance, for use of the seabed to protect a buried cable from anchor damage. Implementing regulations at 15 CFR 922.35 provide additional detail on assessment of fees for SUPs. Like with

sanctuary general permits, NOAA can place conditions on SUPs specific to the activity being permitted.

The activities that may qualify for a SUP are set forth in the **Federal Register** (78 FR 25957 (May 3, 2013); 82 FR 42298 (Sept. 7, 2017)). Categories of SUPs may be changed or added to through public notice and comment, and no SUP may be issued for any category of activity unless ONMS has published a notice in the **Federal Register** that such category of activity is subject to the requirements of section 310 of the NMSA. NOAA is not proposing any new SUP category as part of the designation of CHNMS. However, SUP categories that are potentially relevant to known activities at the proposed CHNMS include the continued presence of commercial subsea cables, discharge of cremated human remains, and discharges from fireworks displays.

I. Other Conforming Amendments

The general regulations in 15 CFR part 922, subpart A, for general information and 15 CFR part 922, subpart D, for National Marine Sanctuary permitting would also have to be amended so that the regulations are accurate and up-to-date. The modified sections to conform to adding a new sanctuary are:

- Section 922.1 Purposes and applicability of the regulations
- Section 922.4 Boundaries
- Section 922.5 Allowed activities
- Section 922.6 Prohibited or otherwise regulated activities
- Section 922.30 National Marine Sanctuary general permits
- Section 922.36 National Marine Sanctuary authorizations
- Section 922.37 Appeals of permitting decisions

IV. Request for Comments

NOAA requests comments on this proposed rule including the terms of designation and proposed regulations, the draft EIS including the range of alternatives, and the draft management plan for the proposed CHNMS. NOAA will publish the final EIS and final management plan following public review and comment on this proposed rule and following NOAA's consideration of substantive comments received. NOAA also requests comments on the Regulatory Flexibility Act certification and economic analysis (see section V.F). All substantive comments received, or comprehensive summary of all public comments on these documents as applicable, along with responses to comments, will be included in the final EIS.

Sensitive personally identifiable information, such as account numbers and Social Security numbers, should not be included with the comment. Comments that are not related to the proposed Chumash Heritage National Marine Sanctuary or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

V. Classification

A. National Marine Sanctuaries Act

NOAA has determined that the designation of Chumash Heritage National Marine Sanctuary (CHNMS) will not have a negative impact on the National Marine Sanctuary System and that sufficient resources exist to effectively implement sanctuary management plans and to update site characterizations. The preliminary finding for NMSA section 304(f) is available on the proposed sanctuary's website at: <https://sanctuaries.noaa.gov/chumash-heritage/>. In addition, NOAA consulted with the Pacific Fishery Management Council (PFMC) as required in accordance with NMSA section 304(a)(5). Through this consultation, NOAA provided the PFMC with the opportunity to recommend any fishing regulations it deemed necessary to implement the proposed sanctuary designation, and participated in two public meetings with the PFMC in September 2022 and November 2022 as the Council deliberated on this issue. At its hearing on November 6, 2022, the PFMC decided not to recommend any fishing regulations to implement the proposed designation but expressed a willingness to reconsider in the future should new information about the need for fishing regulations arise. The PFMC documented this decision in a letter to ONMS West Coast Regional Office dated December 1, 2022. NOAA accepts the PFMC's response relative to the proposed designation of CHNMS.

B. National Environmental Policy Act

As described in section I above, NOAA prepared a draft EIS to evaluate the impacts of this proposed action of designating a national marine sanctuary, which considered alternatives for the proposed designation of a national marine sanctuary along and offshore of the coast of central California. Copies of the draft EIS and related draft management plan are available at the address and website listed in the **ADDRESSES** section of this proposed rule. NOAA is also soliciting public comments on the draft EIS and draft management plan. Responses to comments received on this proposed

rule as well as on the draft EIS and draft management plan will be published in the final EIS and preamble to the final rule.

C. Executive Order 12866: Regulatory Impact

The Office of Management and Budget (OMB) has determined this proposed rule is significant action under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 190 (Oct 4, 1993), as supplemented and reaffirmed E.O. 14094, “Modernizing Regulatory Review,” 88 FR 21879 (April 11, 2023). Based upon the information provided in NOAA’s accompanying Cost-Benefit Analysis (draft EIS appendix D), this proposed rule would not meet the criteria for a significant regulatory action as defined in section 3(f)(1) of E.O. 12866, as supplemented and reaffirmed by E.O. 14094. This means the estimated annual effect is less than \$200 million, and the action would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, NOAA did not prepare the full regulatory impact analysis under E.O. 12866. However, NOAA requests public comment on all the costs and benefits discussed in the accompanying Cost-Benefit Analysis.

D. Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132 because NOAA supplements and complements Federal, State, and local laws under the NMSA rather than supersedes or conflicts with them. NOAA has coordinated with State partners in the development of this proposed rule. NOAA has aimed for consistent regulations throughout sanctuary waters including those within State and Federal jurisdiction.

E. Executive Order 13175 Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13175 of November 6, 2000, Federal departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with officials of federally-recognized Tribal Nations on the development of Federal policies that have tribal implications. The Executive order identifies fundamental principles guiding agencies in formulating or implementing policies that have tribal

implications, including working with federally-recognized Tribal Nations on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights, recognizing the right of Indian tribes to self-government, and supporting tribal sovereignty and self-determination. NOAA implements Executive Order 13175 through the NOAA Administrative Order 218–8 (Policy on Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations), and the NOAA Tribal Consultation Handbook. Under these policies and procedures, NOAA offers affected federally-recognized Tribal Nations government-to-government consultation at the earliest practicable time it can reasonably anticipate that a proposed policy or initiative may have Tribal implications.

NOAA identified the Santa Ynez Band of Chumash Indians (SYBCI) as the only federally-recognized Tribe in the area of the proposed sanctuary. To date, five formal consultation meetings have been conducted, on January 27, 2022, April 14, 2022, August 12, 2022, September 1, 2022, and December 19, 2022, as well as one informational meeting with NOAA leadership on April 28, 2022. In the course of this consultation, NOAA has shared relevant portions of the draft EIS and the draft management plan with the SYBCI and incorporated comments received and information exchanged in consultation to revise and update the draft EIS. NOAA’s government-to-government consultation with the SYBCI for the purpose of designating the new national marine sanctuary is still ongoing.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) requires Federal agencies to prepare an analysis of a rule’s impact on small entities whenever the agency is required to publish a notice of proposed rulemaking, unless the agency certifies, pursuant to 5 U.S.C. 605, that the action will not have significant economic impact on a substantial number of small entities. The RFA requires agencies to consider, but not necessarily minimize, the effects of proposed rules on small entities. The goal of the RFA is to inform the agency and public of expected economic effects of the proposed rule and to ensure the agency considers alternatives that minimize the expected economic effects on small entities while meeting applicable goals and objectives.

Pursuant to section 605(b) of the RFA, the Chief Counsel for Regulation of the

Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The purpose, context, and statutory basis for this action is described above and not repeated here. The analysis below discusses the potential effects of the proposed designation of a Chumash Heritage National Marine Sanctuary and serves as the factual basis for the certification. In summary, with this proposed rulemaking, small businesses (commercial fishing, for-hire charter operations) are not expected to experience significant impacts. The extent of costs imposed on businesses would be for those seeking a general sanctuary permit of \$172.

I. Description of Small Entities to Which the Initial Boundary Alternative Would Apply

NOAA has identified commercial and for-hire fishing vessels and the non-consumptive recreational industry, which includes for-hire operations such as wildlife viewing, as small entities impacted by the Initial Boundary Alternative. Each relevant small business category is based on the most recent size standards published by the U.S. Small Business Administration (SBA) (2022). Size standards are based upon the average annual receipts (all revenue) or the average employment of a firm. The commercial size standard is \$25.0 million for finfish fishing (North American Industry Classification System [NAICS] code—114111), \$14.0 million for shellfish fishing (NAICS code—114112), and \$11.5 million for other marine fishing (NAICS code—114119). Water-based scenic and sightseeing transportation operations (NAICS code—487210), such as for-hire recreational fishing operations and dive/snorkeling for-hire operations, have size standards of \$14.0 million. All businesses within the industries analyzed here are small businesses, which include commercial and recreational fishing and non-consumptive recreational businesses. There are other businesses that operate within the study area; however, they are not considered small businesses (e.g., cruise ships). These large entities are discussed in the Cost-Benefit Analysis (draft EIS appendix D).

All commercial fishing and for-hire fishing vessel count data presented in this section are derived from California Department of Fish and Wildlife (CDFW) data. NOAA calculated the potential number of vessels that may be

impacted by the proposed rule—as implemented in the Agency-Preferred Alternative (Alternative 2 and Gaviota Coast Extension (Sub-alternative 5b)) in the draft EIS—based on the number of vessels reporting activity, from 2016–2020, within the CDFW statistical areas that best align with the proposed sanctuary boundary. Statistical areas were included in the analysis if their center is located within the proposed boundary. In total, 53 statistical areas were included in the area analyzed—meaning if a fishing vessel landed at least one pound of commercial fish species within one of the 53 statistical areas within the study period, that vessel was considered in this analysis. Further information, including maps of the statistical areas included may be found in Eynon, 2023. Estimates of the number of vessels that operate within the proposed sanctuary boundaries are provided below. Data for non-consumptive industries are not publicly available, so information was collected from personal communication with NOAA staff.

i. Commercial Fishing

All commercial fishing vessels were determined to be small businesses based on the SBA size standards. On average (2016–2020), 250.6 vessels landed at least one pound of marine life within the area analyzed each year and 3,057.6 commercial fishing vessels operated within the State (CDFW, 2020a, 2021, 2020b, 2019, 2018, 2017).

ii. For-Hire Recreational Fishing

For-hire recreational fishing includes both charter boats and headboats. Charter boats are fishing vessels that are typically hired to take up to six anglers on a fishing trip. In general, charter boats charge on a per-trip basis. Headboats usually operate on a schedule and may provide several trips in a single day, taking multiple fishing parties per trip and charging on a per-person basis. Headboats are usually larger and able to accommodate more anglers than a charter boat. All recreational fishing operations were determined to be small businesses. From 2016–2020, there was an annual average of 18.8 for-hire recreational fishing vessels operating within the proposed sanctuary boundaries annually and 532 vessels on average each year operating within the State (CDFW, 2020c, 2021, 2020b, 2019, 2018, 2017).

iii. Non-Consumptive Recreation Industry

Businesses considered to operate in the non-consumptive recreation

industry include dive and snorkel operations, rental equipment operations, wildlife viewing operations, and other businesses that either utilize or whose customers utilize, but do not take, sanctuary resources.

There are several harbors within the study area that support non-consumptive recreation businesses. Santa Barbara, Morro Bay, and Avila Beach all have been identified to have operations that use the harbors. Across these three harbors, NOAA identified nine operations that are likely to use the proposed sanctuary waters to support their operations for whale watching and other wildlife viewing (NOAA personal communication). All of these businesses were determined to be small businesses. No operations visiting the proposed sanctuary for white shark tours were identified.

II. Analysis of Small Entities

The proposed regulatory action would establish new reporting and recordkeeping requirements for small entities that apply for sanctuary general permits, certifications, or authorizations (see 15 CFR part 922 and the description in part III, section H above). As a result of this proposed action, only a minimal increase in the number of permits (approximately 5–15 permits per year) is expected, and these requirements would have a minimal impact on small entities because few operators in the area would need to apply for a permit in order to continue their activities. Minimal reporting and recordkeeping requirements are expected because lawful commercial and recreational fishing and recreational activities would be allowed to continue in the proposed sanctuary without a permit (with certain exceptions discussed below). An operator would be required to obtain a permit only if they wish to conduct activities that would be prohibited in the proposed sanctuary; for example, if a research operation or commercial activity was likely to result in damage to the seabed, a permit would be required unless an exception or exemption applies.

As discussed below, in section G., the public reporting burden for ONMS general permits is estimated to average three responses with an average of 1.5 hours per response, to include application submission, a cruise or flight log (or some other form of activity report), and a final summary report after the activity is complete. The only expected costs are related to permitting. The total cost estimate for reporting a permit is \$171.68 based on an hourly rate of \$38.15 (see Paperwork Reduction Act OMB control number (0648–

0141²)). All small and large entities would be subject to the same permitting and reporting requirements, and no unique professional skills are necessary to meet these reporting requirements. Therefore, the reporting and recordkeeping requirements resulting from this proposed rule would not have a significant impact on a substantial number of small entities.

The proposed rule does not propose to regulate commercial fishing or recreational fishing. The proposed rule is not likely to impact commercial fishermen's operations or profits within the statistical areas corresponding to the proposed sanctuary designation. Although vessels would not be permitted to discharge within the proposed sanctuary boundary, they are still permitted to discharge outside of sanctuary boundaries. As discussed in the supporting draft EIS (section 4.2.3), this regulation is unlikely to have an adverse impact on vessels, provided they plan accordingly to discharge outside of the sanctuary or use appropriate facilities near shore. Additionally, vessels are unlikely to be impacted by the seabed disturbance prohibition. If a vessel did need to engage in seabed disturbance, the small business could seek a permit from NOAA.

It is also likely that increased name recognition, marketing, and outreach of the proposed sanctuary would result in increased demand for the services offered by small businesses that utilize sanctuary resources. This is described in more detail in the economic review of the potential impacts; see appendix D of the draft EIS.

As described above, NOAA does not expect a significant reduction in profits, as the only expected costs are for permitting (\$172 per permit). No duplicative, overlapping, or conflicting Federal rules have been identified for this proposed rule. Therefore, NOAA has concluded that the proposed rule would not have a significant impact on a substantial number of small entities operating in the area of the proposed sanctuary due to the minimal permitting costs. Therefore, an Initial Regulatory Flexibility Analysis is not required.

G. Paperwork Reduction Act

Notwithstanding any other provisions of the law, no person is required to

² Many of the permit applicants are from academic institutions; thus, ONMS' information collection renewal uses the Bureau of Labor Statistics (BLS) Occupational Employment and Wages (May 2020) for "Life, Physical, and Social Science Occupations." For this group, BLS estimated a mean hourly wage of \$38.15 (<https://www.bls.gov/oes/current/oes190000.htm>).

respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number.

NOAA has an OMB control number (0648–0141) for the collection of public information related to the processing of ONMS permits across the National Marine Sanctuary System. NOAA's proposal to create a national marine sanctuary along the coast of central California would likely result in a minimal increase in the number of requests for ONMS general permits, special use permits, certifications, and authorizations because this action proposes to add those approval types for this proposed sanctuary. A large increase in the number of permit requests would require a change to the reporting burden certified for OMB control number 0648–0141. While not expected, if such permit requests do increase, a revision to this control number for the processing of permits would be requested.

In the most recent Information Collection Request revision and approval for national marine sanctuary permits (dated November 30, 2021), NOAA reported approximately 424 national marine sanctuary permitting actions each year, including applications for all types of ONMS permits, requests for permit amendments, and the conduct of administrative appeals. Of this amount, CHNMS is expected to add 5 to 15 permit requests per year. The public reporting burden for national marine sanctuaries general permits is estimated to average three responses with an average of 1.5 hours per response, to include application submission, a cruise or flight log (or some other form of activity report), and a final summary report after the activity is complete. Therefore, the total annual burden hours would be expected to increase by approximately 22.5 to 67.5 hours.

Please send any comments regarding the burden estimate for this data collection requirement or any other aspect of this data collection, including suggestions for reducing the burden, to NOAA (see **ADDRESSES** above). Comments can also be submitted to www.reginfo.gov/public/do/PRAMain. Before an agency submits a collection of information to OMB for approval, the agency shall provide 60-day notice in the **Federal Register**, and otherwise consult with members of the public and affected agencies concerning each

proposed collection of information, to solicit comments to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the 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.

H. National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA, 54 U.S.C. 306108) requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to the undertaking. "Historic property" means any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and material remains that are related to and located within such properties, including properties of traditional religious and cultural importance to an Indigenous nation or tribe or Native Hawaiian organization. 36 CFR 800.16(l).

The regulations implementing section 106 of the NHPA (36 CFR part 800) establish a process requiring Federal agencies to: (i) determine whether the undertaking is a type of activity that could affect historic properties, (ii) identify historic properties in the area of potential effects, (iii) assess potential adverse effects, and (iv) resolve adverse effects. The regulations require that Federal agencies consult with States, tribes, and other interested parties when making their effect determinations.

NOAA has determined that the designation of a national marine sanctuary and related rulemaking for sanctuary-specific regulations meet the definition of an undertaking as defined at § 800.16(y).

In fulfilling its responsibilities under section 106 of the NHPA, NOAA is seeking to identify potential consulting parties in addition to the State Historic Preservation Officer (SHPO), and will complete the identification of historic properties in the area of potential effects and the assessment of the effects of the undertaking on such properties in consultations with those identified parties. By this notice of proposed rulemaking, NOAA seeks public input, particularly in regard to the identification of historic properties within the proposed area of potential effect. Pursuant to 36 CFR 800.16(l)(1),³ the term "historic property" means "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior." The term includes "artifacts, records, and remains that are related to and located within such properties" as well as "properties of traditional religious and cultural importance to an Indian tribe . . . that meet the National Register criteria." If you, your organization(s), or business(es) would like to be considered a "consulting party" under section 106 please contact the individual listed under the heading **FOR FURTHER INFORMATION CONTACT**; include contact information for the principal representative for the consultation; and describe you or your party's interest in the proposed designation. In accordance with 36 CFR 800.3(f)(3), NOAA will consider all "consulting party" requests but has ultimate discretion in determining and inviting additional consulting parties.

I. Sunken Military Craft Act

The Sunken Military Craft Act of 2004 (SMCA; Pub. L. 108–375, Title XIV, sections 1401 to 1408; 10 U.S.C. 113 note) preserves and protects from unauthorized disturbance all sunken military craft that are owned by the United States Government, as well as foreign sunken military craft that lie within United States waters, as defined in the SMCA. Thousands of U.S. sunken military craft lie in waters around the world, many accessible to looters, treasure hunters, and others who may cause damage to them. These craft, and their associated contents, represent a collection of non-renewable and significant historical resources that often serve as war graves, carry unexploded ordnance, and contain oil and other hazardous materials. By protecting sunken military craft, the

³ <https://www.ecfr.gov/current/title-36/chapter-VIII/part-800/subpart-C/section-800.16>.

SMCA helps reduce the potential for irreversible harm to these nationally important historical and cultural resources.

There are seven known U.S. Navy destroyers that ran aground and sunk near Point Honda in 1923 within the proposed CHNMS. The proposed CHNMS may also include sunken military craft that have yet to be discovered. Sunken military craft fall under the jurisdiction of a number of Federal agencies such as the U.S. Navy and the U.S. Coast Guard. The USCGC *McCulloch* is an example of a known sunken military craft in the proposed National Marine Sanctuary that is under the jurisdiction of the U.S. Coast Guard, per the SMCA. NOAA would coordinate with the U.S. Navy, the U.S. Coast Guard and any other applicable Federal agency, or State agency if found within State waters, regarding activities directed at sunken military craft discovered within the sanctuary.

J. Coastal Zone Management Act (CZMA)

Section 307 of the Coastal Zone Management Act (CZMA; 16 U.S.C. 1456) requires Federal agencies to consult with a State's coastal program on potential Federal agency activities that affect any land or water use or natural resource of the coastal zone. Because the proposed sanctuary lies partially within State waters, NOAA intends to submit a copy of this proposed rule and supporting documents, including the draft EIS, to the California Coastal Commission for evaluation of Federal consistency under the CZMA. NOAA will publish the final rule and designation only after completion of the Federal consistency process under the CZMA.

K. Executive Order 12898: Environmental Justice

Executive Order 12898 directs Federal agencies to identify and address disproportionately high and adverse effects of their actions on human health and the environment of minority or low-income populations. The designation of national marine sanctuaries by NOAA helps to ensure the enhancement of environmental quality for all populations in the United States. The proposed sanctuary designation would not result in disproportionate negative impacts on any minority or low-income population. In addition, many of the potential impacts from designating the proposed sanctuary would result in long-term or permanent beneficial impacts by protecting sanctuary resources, which may have a positive impact on communities by providing

employment and educational opportunities, and potentially result in improved ecosystem services.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Cultural resources, Historic preservation, Marine protected areas, Marine resources, National marine sanctuaries, Recreation and recreation areas, Reporting and recordkeeping requirements, Shipwrecks.

Nicole R. LeBoeuf,

Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, National Oceanic and Atmospheric Administration.

For the reasons set forth above, NOAA proposes to amend part 922, title 15 of the Code of Federal Regulations as follows:

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

■ 1. The authority citation for part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

■ 2. Amend § 922.1 by revising paragraph (a)(2) to read as follows:

§ 922.1 Purposes and applicability of the regulations.

(a) * * *

(2) To implement the designations of the national marine sanctuaries, for which specific regulations appear in subpart F through subsequent subparts of this part, by regulating activities affecting them, consistent with their respective terms of designation, in order to protect, restore, preserve, manage, and thereby ensure the health, integrity, and continued availability of the conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological, and aesthetic resources and qualities of these areas.

* * * * *

■ 3. Revise § 922.4 to read as follows:

§ 922.4 Boundaries.

Subpart F and subsequent subparts of this part set forth the boundaries for all national marine sanctuaries.

■ 4. Revise § 922.6 to read as follows:

§ 922.6 Prohibited or otherwise regulated activities.

Subpart F and subsequent subparts of this part set forth site-specific regulations applicable to the activities specified therein.

■ 5. Amend § 922.30 by:

■ a. Revising paragraph (a)(2);

■ b. Removing the word “and” at the end of paragraph (b)(5);

■ c. Removing the period at the end of paragraph (b)(6) and adding “; and” in its place; and

■ d. Adding paragraph (b)(7).

The addition reads as follows:

§ 922.30 National Marine Sanctuary general permits.

(a) * * *

(2) The permit procedures and criteria for all national marine sanctuaries in which the proposed activity is to take place in accordance with relevant site-specific regulations appearing in subpart F and subsequent subparts of this part.

(b) * * *

(7) Native American cultural or ceremonial activities—activities within Chumash Heritage National Marine Sanctuary that will promote or enhance local Native American cultural or ceremonial activities; or will promote or enhance education and training related to local Native American cultural or ceremonial activities.

■ 6. Amend § 922.36 by revising paragraphs (a) and (b)(1)(ii) to read as follows:

§ 922.36 National Marine Sanctuary authorizations.

(a) *Authority to issue authorizations.* The Director may authorize a person to conduct an activity otherwise prohibited by subparts L through P, or subparts R through V, of this part, if such activity is specifically allowed by any valid Federal, State, or local lease, permit, license, approval, or other authorization (hereafter called “agency approval”) issued after the effective date of sanctuary designation or expansion, provided the applicant complies with the provisions of this section. Such an authorization by the Office of National Marine Sanctuaries (ONMS) is hereafter referred to as an “ONMS authorization.”

(b) * * *

(1) * * *

(ii) Notification must be sent to the Director, Office of National Marine Sanctuaries, to the attention of the relevant Sanctuary Superintendent(s) at the address specified in subparts L through P, or subpart R through V, of this part as appropriate.

* * * * *

■ 7. Amend § 922.37 by revising paragraph (a)(2) to read as follows:

§ 922.37 Appeals of permitting decisions.

(a) * * *

(2) An applicant or a holder of a National Marine Sanctuary permit issued pursuant to § 922.30 or pursuant to site-specific regulations appearing in subparts F through V of this part;

* * * * *

■ 8. Add subpart V to read as follows:

Subpart V—Chumash Heritage National Marine Sanctuary

- Sec.
- 922.230 Boundary.
- 922.231 Definitions.
- 922.232 Prohibited or otherwise regulated activities.
- 922.233 Permit procedures.
- 922.234 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or other rights to conduct a prohibited activity.
- Appendix A to Subpart V of Part 922—Chumash Heritage National Marine Sanctuary Boundary Description and Coordinates
- Appendix B to Subpart V of Part 922—Coordinates for Rodriguez Seamount Management Zone

§ 922.230 Boundary.

Chumash Heritage National Marine Sanctuary (CHNMS) consists of an area of approximately 5,617 square miles (mi²) (4,242 square nautical miles (nmi²)) of coastal and ocean waters along the central coast of California and the submerged lands thereunder. The northern boundary would commence at Hazard Canyon Reef within Montaña de Oro State Park at the mean high water line (MHWL) and extend for 134 miles south along the MHWL through the remainder of the San Luis Obispo County coast, excluding the private marina at Diablo Canyon Power Plant and Port San Luis (at the port's boundary for International Regulations for Preventing Collisions at Sea (COLREGS) demarcation line (33 CFR 80.1130)), and then further south and east to include the coast of western Santa Barbara County to approximately two miles east of Dos Pueblos Canyon along the Gaviota Coast near the township of Naples. The boundary then shifts due south offshore to the State waters line, then to the west along the State waters line to approximately 3 nmi offshore of Gaviota Creek, then in a southwest direction along the western end of Channel Islands National Marine Sanctuary, southward to include Rodriguez Seamount and shifting to the northwest in an arc reaching approximately 47 miles due west of Purisima Point and another arc reaching a distance approximately 54 miles due west of Morro Rock, then approximately 2.5 miles to the north, then approximately 15 miles due east, and finally to the southeast approximately 39 miles to the point of origin at MHWL at Hazard Canyon Reef.

§ 922.231 Definitions.

In addition to the definitions found in § 922.11, the following terms are defined for purposes of this subpart:

Beneficial use of dredged material means the use of dredged material removed from the public harbor adjacent to the Sanctuary (Port San Luis) that is determined by the Director to be suitable as a resource for habitat protection or restoration purposes. Beneficial use of dredged material is not disposal of dredged material.

Rodriguez Seamount Management Zone means the area bounded by geodetic lines connecting a heptagon generally centered on the top of the Rodriguez Seamount, and consists of approximately 570 mi² (430 nmi²) of ocean waters and the submerged lands thereunder. The northeast corner of this zone is located approximately 27 miles southwest of Point Conception off the coast of Santa Barbara County. Exact coordinates for the Rodriguez Seamount Management Zone boundary are provided in appendix B to this subpart.

§ 922.232 Prohibited or otherwise regulated activities.

(a) Except as specified in paragraphs (b) through (e) and paragraph (g) of this section, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted:

(1) Exploring for, developing, or producing oil, gas, or minerals within the Sanctuary, except for continued oil and gas production, which includes well abandonment, of existing reservoirs under production prior to the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) from Platform Irene and Platform Heritage.

(2)(i) Discharging or depositing from within or into the Sanctuary, other than from a cruise ship, any material or other matter, except:

(A) Fish, fish parts, chumming materials, or bait used in or resulting from lawful fishing activities within the Sanctuary, provided that such discharge or deposit is during the conduct of lawful fishing activities within the Sanctuary;

(B) For a vessel less than 300 gross registered tons (GRT), or a vessel 300 GRT or greater without sufficient holding tank capacity to hold sewage while within the Sanctuary, clean effluent generated incidental to vessel use by an operable Type I or II marine sanitation device (U.S. Coast Guard classification) approved in accordance with section 312 of the Federal Water Pollution Control Act, as amended (FWPCA), 33 U.S.C. 1322. Vessel

operators must lock all marine sanitation devices in a manner that prevents discharge or deposit of untreated sewage;

(C) Clean vessel deck wash down, clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash;

(D) For a vessel less than 300 GRT, or a vessel 300 GRT or greater without sufficient holding capacity to hold graywater while within the Sanctuary, clean graywater as defined by section 312 of the FWPCA;

(E) Vessel engine or generator exhaust;

(F) Beyond 3 nautical miles from shore, sewage and non-clean graywater as defined by section 312 of the FWPCA generated incidental to vessel use by a U.S. Coast Guard vessel without sufficient holding tank capacity and without a Type I or II marine sanitation device; and beyond 12 nautical miles from shore, ammunition, pyrotechnics, or other materials directly related to training for search and rescue and live ammunition activities conducted by U.S. Coast Guard vessels and aircraft;

(G) Dredged material deposited at disposal sites within the Sanctuary authorized by the U.S. Environmental Protection Agency (EPA), in consultation with the U.S. Army Corps of Engineers, prior to the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]); or

(H) Discharges incidental and necessary to oil and gas production within or into existing reservoirs under production prior to the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) from Platform Irene or Platform Heritage, including well abandonment.

(ii) Discharging or depositing from within or into the Sanctuary any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, vessel engine or generator exhaust, clean bilge water, or anchor wash.

(iii) Discharging or depositing from beyond the boundary of the Sanctuary any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except material or other matter listed in paragraphs (a)(2)(i)(A) through (F) and (a)(2)(ii) of this section.

(3) Drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary, except as incidental and necessary to:

(i) Conduct lawful fishing activities or lawful kelp harvesting;

(ii) Anchor a vessel;

(iii) Install or maintain an authorized navigational aid;

(iv) Repair, replace, or rehabilitate an existing dock, pier, breakwater, or jetty;

(v) Conduct maintenance dredging of entrance channels for harbors in existence prior to the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]); or,

(vi) Drill, maintain, or abandon a well necessary for purposes related to oil and gas production within or into existing reservoirs under production prior to the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) from Platform Irene or Platform Heritage.

(vii) The exceptions listed in paragraphs (a)(3)(ii) through (vi) of this section do not apply in the Rodriguez Seamount Management Zone, the boundary of which is defined in appendix B to this subpart.

(4) Moving, removing, or injuring, or attempting to move, remove, or injure, a Sanctuary historical resource; or possessing or attempting to possess a Sanctuary historical resource, except as necessary for valid law enforcement purposes. This prohibition does not apply to, moving, removing, or injury resulting incidentally from lawful kelp harvesting or lawful fishing activities.

(5) Taking any marine mammal, sea turtle, or bird within or above the Sanctuary, except as authorized by the Marine Mammal Protection Act, as amended (MMPA), 16 U.S.C. 1361 *et seq.*, Endangered Species Act, as amended (ESA), 16 U.S.C. 1531 *et seq.*, Migratory Bird Treaty Act, as amended (MBTA), 16 U.S.C. 703 *et seq.*, or any regulation promulgated under the MMPA, ESA, or MBTA.

(6) Possessing within the Sanctuary (regardless of where taken, moved, or removed from), any marine mammal, sea turtle, or bird, except as authorized by the MMPA, ESA, MBTA, by any regulation promulgated under the MMPA, ESA, or MBTA, or as necessary for valid law enforcement purposes.

(7) Deserting a vessel aground, at anchor, or adrift in the Sanctuary or leaving harmful matter aboard a grounded or deserted vessel in the Sanctuary.

(8) Attracting any white shark within the Sanctuary.

(9)(i) Moving, removing, taking, collecting, catching, harvesting, disturbing, breaking, cutting, or otherwise injuring, or attempting to move, remove, take, collect, catch, harvest, disturb, break, cut, or otherwise injure, any Sanctuary resource located

more than 1,500 ft. below the sea surface within the Rodriguez Seamount Management Zone, as defined in appendix B to this subpart. This prohibition does not apply to lawful fishing, which is regulated pursuant to 50 CFR part 660.

(ii) Possessing any Sanctuary resource, the source of which is more than 1,500 ft. below the sea surface within the Rodriguez Seamount Management Zone, except as necessary for valid law enforcement purposes. This prohibition does not apply to possession of fish resulting from lawful fishing, which is regulated pursuant to 50 CFR part 660.

(10) Introducing or otherwise releasing from within or into the Sanctuary an introduced species, except striped bass (*Morone saxatilis*) released during catch and release fishing activity.

(11) Interfering with, obstructing, delaying, or preventing an investigation, search, seizure, or disposition of seized property in connection with enforcement of the Act or any regulation or permit issued under the Act.

(b) The prohibitions in paragraphs (a)(2) through (7) and (9) of this section do not apply to an activity necessary to respond to an emergency threatening life, property, or the environment.

(c)(1) The prohibitions in paragraphs (a)(2) through (7) and (9) and (10) of this section do not apply to existing activities carried out or approved by the Department of Defense that were conducted prior to the effective date of this designation ([EFFECTIVE DATE OF FINAL RULE]), as specifically identified in section 4.9 or appendix I to the final environmental impact statement for Chumash Heritage National Marine Sanctuary (for availability, see <https://sanctuaries.noaa.gov/chumash-heritage/>). New activities may be exempted from the prohibitions in paragraphs (a)(2) through (7) and (9) and (10) of this section by the Director after consultation between the Director and the Department of Defense. All Department of Defense activities must be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities.

(2) In the event of threatened or actual destruction of, loss of, or injury to a Sanctuary resource or quality resulting from an untoward incident, including but not limited to spills and groundings caused by the Department of Defense, the Department of Defense shall promptly coordinate with the Director for the purpose of taking appropriate actions to respond to and mitigate the harm and, if practicable, restore or

replace the Sanctuary resource or quality.

(d) The prohibitions in paragraphs (a)(2) through (9) of this section do not apply to any activity conducted under and in accordance with the scope, purpose, terms, and conditions of a National Marine Sanctuary general permit issued pursuant to subpart D of this part and § 922.233, or a special use permit issued pursuant to subpart D of this part.

(e) The prohibitions in paragraphs (a)(2) through (9) of this section, and paragraph (a)(10) of this section regarding any introduced species of shellfish that NOAA and the State of California have determined is non-invasive and will not cause significant adverse effects to Sanctuary resources or qualities, and that is cultivated in State waters as part of commercial shellfish aquaculture activities, do not apply to any activity authorized by any lease, permit, license, approval, or other authorization issued after the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) and issued by any Federal, State, or local authority of competent jurisdiction, provided that the applicant complies with § 922.36, the Director notifies the applicant and authorizing agency that the Director does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities. Amendments, renewals, and extensions of authorizations in existence on the effective date of designation constitute authorizations issued after the effective date of Sanctuary designation.

(f)(1) Notwithstanding paragraphs (d) and (e) of this section, in no event may the Director issue a National Marine Sanctuary general permit under subpart D of this part and § 922.233, or an ONMS authorization or special use permit under subpart D of this part authorizing, or otherwise approve:

(i) The exploration for, development, or production of oil, gas, or minerals within the Sanctuary;

(ii) The discharge of untreated or primary-treated sewage within the Sanctuary (except by certification, pursuant to §§ 922.10 and 922.234, of valid authorizations in existence prior to the effective date of designation ([EFFECTIVE DATE OF FINAL RULE]) and issued by other authorities of competent jurisdiction); or

(iii) The disposal of dredged material within the Sanctuary other than at sites authorized by the U.S. Environmental Protection Agency prior to the effective date of designation ([EFFECTIVE DATE

OF FINAL RULE)). For the purposes of this subpart, the disposal of dredged material does not include the beneficial use of dredged material, as defined at § 922.231, related to dredging activity at Port San Luis.

(2) Any purported authorizations issued by other authorities within the Sanctuary shall be invalid.

(g) A person may conduct an activity prohibited by paragraphs (a)(2) through (10) of this section within the Sanctuary if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, or right of subsistence use or of access that is in existence on the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) and within the sanctuary designated area and complies with § 922.10, provided that the holder of the lease, permit, license, or right of subsistence use or of access complies with the certification procedures for CHNMS as outlined in § 922.234.

§ 922.233 Permit procedures.

(a) A person may conduct an activity prohibited by § 922.232(a)(2) through (9), if such activity is specifically authorized by, and conducted in accordance with the scope, purpose, terms, and conditions of, a sanctuary general permit issued under this section and subpart D of this part.

(b) Applications for permits should be addressed to the West Coast Regional Office, Office of National Marine Sanctuaries; ATTN: Superintendent, Chumash Heritage National Marine Sanctuary, 99 Pacific Street, Suite 100F, Monterey, CA 93940.

§ 922.234 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or other rights to conduct a prohibited activity.

(a) To obtain a certification of an activity that is specifically authorized by a valid Federal, State, or local lease, permit, license, or right of subsistence use or access in existence on the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) and within the sanctuary designated area, pursuant to §§ 922.10 and 922.232(g), the holder of such authorization, permit, or right shall:

(1) Notify the Director, in writing, within 90 days of the effective date of Sanctuary designation ([EFFECTIVE DATE OF FINAL RULE]) of the existence and location of such authorization or right and requests certification of such authorization or right; and

(2) Comply with any terms and conditions on the exercise of such authorization or right imposed as a

condition of certification, by the Director, to achieve the purposes for which the Sanctuary was designated.

(b) The holder shall address any requests for certifications to: West Coast Regional Office, Office of National Marine Sanctuaries; ATTN: Superintendent, Chumash Heritage National Marine Sanctuary, 99 Pacific Street, Suite 100F, Monterey, CA 93940, or send by electronic means as defined in the instructions for the ONMS permit application. A copy of the lease, permit, license, or right of subsistence use or of access must accompany the request.

(c) A holder requesting certification of an authorization or right described in § 922.232(g) may continue to conduct the activity without being in violation of Sanctuary prohibitions pending the Director's review of and decision regarding the holder's certification request, provided the holder is otherwise in compliance with this section.

(d) The Director may request additional information from the certification requester as the Director deems reasonably necessary to condition appropriately the exercise of the certified authorization or right to achieve the purposes for which the Sanctuary was designated. The Director must receive the information requested within 45 days of the date of the Director's request for information. Failure to provide the requested information within this time frame may be grounds for denial by the Director of the certification request.

(e) In considering whether to issue a certification, the Director may seek and consider the views of any other person or entity, within or outside the Federal Government, and may hold a public hearing as deemed appropriate by the Director.

(f) Upon completion of review of the authorization or right and information received with respect thereto, the Director shall communicate, in writing, any decision on a certification request or any action taken with respect to any certification made under this section, in writing, to both the holder of the certified lease, permit, license, approval, other authorization, or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(g) The Director may amend, suspend, or revoke any certification issued under this section whenever continued operation would otherwise be inconsistent with any terms or conditions of the certification. Any such action shall be forwarded in writing to both the certification holder and the agency that issued the underlying lease,

permit, license, or right of subsistence use or of access, and shall set forth reason(s) for the action taken.

(h) The Director may amend any certification issued under this section whenever additional information becomes available that the Director determines justifies such an amendment.

(i) The holder may appeal any action conditioning, amending, suspending, or revoking any certification in accordance with the procedures set forth in § 922.37.

(j) Any time limit prescribed in or established under this section may be extended by the Director for good cause.

(k) It is unlawful for any person to violate any terms and conditions in a certification issued under this section.

Appendix A to Subpart V of Part 922—Chumash Heritage National Marine Sanctuary Boundary Description and Coordinates

Coordinates listed in this appendix are unprojected (Geographic) and based on the North American Datum of 1983.

Point ID	Longitude	Latitude
1	– 121.81352	35.39844
2	– 121.56586	35.39742
3*	– 120.88251	35.28952
4*	– 120.85694	35.20600
5*	– 120.85605	35.20671
6*	– 120.74984	35.15602
7*	– 120.72509	35.17425
8*	– 119.93333	34.43590
9	– 119.93333	34.37859
10	– 119.93822	34.38126
11	– 119.94270	34.38391
12	– 119.94657	34.38362
13	– 119.95046	34.38354
14	– 119.95292	34.38358
15	– 119.95496	34.38367
16	– 119.95698	34.38381
17	– 119.95900	34.38401
18	– 119.96257	34.38451
19	– 119.96946	34.38575
20	– 119.97406	34.38677
21	– 119.97601	34.38729
22	– 119.97815	34.38794
23	– 119.98047	34.38872
24	– 119.98274	34.38959
25	– 119.98497	34.39053
26	– 119.98715	34.39154
27	– 119.98928	34.39263
28	– 119.99136	34.39379
29	– 119.99319	34.39491
30	– 119.99514	34.39621
31	– 119.99731	34.39713
32	– 119.99962	34.39823
33	– 120.00168	34.39930
34	– 120.00386	34.40054
35	– 120.00625	34.40107
36	– 120.00882	34.40173
37	– 120.01178	34.40261
38	– 120.01409	34.40339
39	– 120.01636	34.40425
40	– 120.01878	34.40527
41	– 120.02094	34.40628
42	– 120.02320	34.40744

Point ID	Longitude	Latitude	Point ID	Longitude	Latitude	Point ID	Longitude	Latitude
43	-120.02641	34.40752	117	-120.24801	34.41758	7	-120.75892	34.14264
44	-120.02955	34.40774	118	-120.25140	34.41735	8	-120.75816	34.02873
45	-120.03246	34.40806	119	-120.26775	34.38689			
46	-120.03569	34.40855	120	-120.32691	34.33744	[FR Doc. 2023-18271 Filed 8-24-23; 8:45 am]		
47	-120.03855	34.40907	121	-120.37560	34.30480	BILLING CODE 3510-NK-P		
48	-120.04137	34.40971	122	-120.41671	34.27979			
49	-120.04394	34.41040	123	-120.53987	34.20486			
50	-120.04667	34.41126	124	-120.60041	34.18182			
51	-120.04870	34.41100	125	-120.64208	34.10208			
52	-120.05096	34.41077	126	-120.73023	34.07464			
53	-120.05323	34.41062	127	-120.85081	33.87643			
54	-120.05528	34.41054	128	-120.90550	33.82377			
55	-120.05733	34.41052	129	-121.21320	33.83184			
56	-120.05961	34.41056	130	-121.34958	33.85137			
57	-120.06188	34.41068	131	-121.40902	33.91005			
58	-120.06392	34.41084	132	-121.40925	34.08467			
59	-120.06679	34.41046	133	-121.49111	34.16932			
60	-120.06927	34.41021	134	-121.49220	34.21050			
61	-120.07175	34.41004	135	-121.49681	34.26897			
62	-120.07424	34.40997	136	-121.50604	34.32128			
63	-120.07984	34.40990	137	-121.51066	34.37975			
64	-120.08368	34.41002	138	-121.51681	34.41821			
65	-120.08666	34.40991	139	-121.52704	34.45284			
66	-120.08964	34.40992	140	-121.56178	34.54049			
67	-120.09352	34.41011	141	-121.57941	34.57950			
68	-120.09739	34.41051	142	-121.59010	34.59446			
69	-120.09987	34.41088	143	-121.62378	34.64285			
70	-120.10255	34.41138	144	-121.63763	34.65978			
71	-120.10677	34.41203	145	-121.65637	34.67837			
72	-120.10941	34.41251	146	-121.66652	34.69012			
73	-120.11288	34.41331	147	-121.68042	34.70722			
74	-120.11729	34.41453	148	-121.69538	34.72486			
75	-120.11919	34.41509	149	-121.70340	34.74143			
76	-120.12107	34.41571	150	-121.70500	34.76227			
77	-120.12292	34.41639	151	-121.69966	34.78952			
78	-120.12474	34.41711	152	-121.58778	35.00443			
79	-120.12733	34.41802	153	-121.57744	35.02331			
80	-120.13068	34.41937	154	-121.57606	35.03601			
81	-120.13314	34.42030	155	-121.58377	35.06135			
82	-120.13678	34.42183	156	-121.59758	35.10429			
83	-120.14015	34.42266	157	-121.61148	35.13903			
84	-120.14124	34.42285	158	-121.61469	35.14972			
85	-120.14365	34.42227	159	-121.65301	35.23983			
86	-120.14631	34.42173	160	-121.65744	35.24965			
87	-120.14922	34.42126	161	-121.66492	35.25607			
88	-120.15216	34.42091	162	-121.67721	35.26729			
89	-120.15458	34.42039	163	-121.70874	35.28974			
90	-120.15725	34.41992	164	-121.81352	35.35424			
91	-120.16108	34.41942	165	-121.81352	35.39844			
92	-120.16493	34.41913						
93	-120.16857	34.41904						
94	-120.17221	34.41913						
95	-120.17583	34.41941						
96	-120.17943	34.41986						
97	-120.18173	34.41968						
98	-120.18378	34.41957						
99	-120.18583	34.41952						
100	-120.18788	34.41952						
101	-120.19038	34.41961						
102	-120.19288	34.41978						
103	-120.19514	34.42001						
104	-120.19763	34.42034						
105	-120.20103	34.42014						
106	-120.20468	34.42010						
107	-120.21923	34.42062						
108	-120.22203	34.41994						
109	-120.22509	34.41933						
110	-120.22818	34.41885						
111	-120.23141	34.41849						
112	-120.23501	34.41819						
113	-120.23821	34.41806						
114	-120.24012	34.41788						
115	-120.24279	34.41768						
116	-120.24551	34.41758						

Note 1 to appendix A: The coordinates in the table marked with an asterisk (*) are not a part of the sanctuary boundary. These coordinates are landward reference points used to draw a line segment that intersects with the shoreline.

Appendix B to Subpart V of Part 922—Coordinates for Rodriguez Seamount Management Zone Within the Sanctuary

Coordinates listed in this table are unprojected (Geographic) and based on the North American Datum of 1983.

Point ID	Longitude	Latitude
1	-120.75816	34.02873
2	-120.85081	33.87643
3	-120.90550	33.82377
4	-121.21320	33.83184
5	-121.25782	33.83812
6	-121.25937	34.13926

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 23 and 37

RIN 3038-AF34

Swap Confirmation Requirements for Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing amendments to its swap execution facility (SEF) regulations related to uncleared swap confirmations, as well as associated technical and conforming changes.

DATES: Comments must be received on or before October 24, 2023.

ADDRESSES: You may submit comments, identified by “Swap Confirmation Requirements for Swap Execution Facilities” and RIN number 3038-AF34, by any of the following methods:

- *CFTC Comments Portal:* <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established under

§ 145.9 of the Commission's regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

FOR FURTHER INFORMATION CONTACT:

Roger Smith, Associate Chief Counsel, (202) 418-5344, rsmith@cftc.gov, Division of Market Oversight, Commodity Futures Trading Commission, 77 West Jackson Blvd., Suite 800, Chicago, Illinois 60604; Stephen Kane, Research Economist, (202) 418-5911, skane@cftc.gov, or Madison Lau, Research Economist, (202) 418-5276, mlau@cftc.gov, Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
 - A. Regulatory History: The Part 37 Rules
 - B. Summary of Proposed Changes to § 37.6
 - C. Consultation With Other U.S. Financial Regulators
- II. Proposed Regulations
 - A. § 37.6—Enforceability
 - 1. Proposed Regulation § 37.6(b)(1)—Uncleared Swap Confirmations: Incorporation by Reference of Underlying Previously Negotiated Agreements
 - 2. Proposed Amendment to § 37.6(b)—Timing of Swap Transaction Confirmation
 - 3. Proposed Amendment to § 37.6(b)—Conflicting Terms
 - 4. Proposed Clarification of § 37.6(b)
 - 5. Proposed Clarification of § 37.6(a)
 - B. Proposed Amendments to § 23.501(a)(4)(i)
- III. Effective Date and Transition Period
- IV. Related Matters
 - A. Regulatory Flexibility Act
 - B. Paperwork Reduction Act
 - C. Cost-Benefit Considerations
 - D. Antitrust Considerations

I. Background

A. Regulatory History: The Part 37 Rules

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Commodity Exchange Act (CEA or Act) by adding section 5h, which establishes registration requirements and core principles for SEFs.² The Commission implemented CEA section 5h by adopting part 37 of its regulations, which, among other things, sets forth operational requirements for SEFs and establishes various requirements for the trading of swaps on SEFs.³ As part of the implementing SEF regulations, the Commission adopted § 37.6(b), which requires a SEF to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF—whether cleared or uncleared—with a written record of all of the terms of the transaction, which shall legally supersede any previous agreement and serve as a confirmation of the transaction.⁴ Pursuant to § 37.6(b), the confirmation of all terms of the transaction must take place at the same time as execution, subject to a limited exception for certain information related to accounts included in bunched orders.⁵

In November 2018, the Commission issued a comprehensive proposal to amend the SEF regulatory framework.⁶ In the 2018 SEF Proposal, the Commission proposed to amend § 37.6(b) to establish separate swap transaction documentation requirements for cleared and uncleared swaps.⁷ For uncleared swap transactions, the Commission proposed to amend § 37.6(b) to require a SEF to provide the counterparties to the transaction with a “trade evidence record” that would memorialize the terms of the transaction agreed upon between the counterparties on the SEF.⁸ Under the 2018 SEF Proposal, a “trade evidence record” was defined as a legally binding written documentation (electronic or otherwise)

that memorializes the terms of a swap transaction agreed upon by the counterparties and legally supersedes any conflicting term in any previous agreement (electronic or otherwise) that relates to the swap transaction between the counterparties.⁹ In 2021, the Commission withdrew the unadopted portions of the 2018 SEF Proposal,¹⁰ including the proposed amendments to § 37.6, from further consideration.¹¹

Pursuant to section 731 of the Dodd-Frank Act, which added section 4s(i) to the CEA,¹² the Commission has adopted regulations to prescribe documentation standards for swap dealers (SDs) and major swap participants (MSPs) related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The Commission adopted § 23.501 to specifically address swap confirmation requirements for SDs and MSPs, including for those swaps executed on a SEF or designated contract market (DCM).¹³ Among other things, § 23.501 provides that any swap transaction executed on a SEF or DCM shall be deemed to satisfy the swap confirmation requirements set forth in § 23.501, provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution.¹⁴

B. Summary of Proposed Changes to § 37.6

During the implementation of part 37, SEFs informed the Commission that the confirmation requirement for uncleared swaps under § 37.6(b) is operationally and technologically difficult and

⁹ *Id.* at 61973; 62067.

¹⁰ The following final rulemakings of the Commission adopted certain portions of the 2018 SEF Proposal: (i) Exemptions From Swap Trade Execution Requirement, 86 FR 8993 (Feb. 11, 2021); and (ii) Swap Execution Facilities, 86 FR 9224 (Feb. 11, 2021).

¹¹ See Swap Execution Facilities and Trade Execution Requirement, 86 FR 9304 (Feb. 12, 2021). The Commission notes that because the 2018 SEF Proposal was withdrawn, comments on the proposed amendments to § 37.6(b) that were included in the 2018 SEF Proposal will not be part of the administrative record with respect to the current proposal to amend § 37.6(b). Further, the Commission notes that while certain proposals and rationales contained herein are similar, or in some cases identical, to proposals or rationales set forth in the 2018 SEF Proposal, the Commission believes that, overall, the context in which the current discrete proposal to amend § 37.6(b) is being adopted is very different from the comprehensive foundational shift in the regulatory framework for SEFs that was proposed in 2018. As such, commenters should submit comments relevant to this current proposal to amend § 37.6(b); commenters who wish to reference prior comment letters, including comment letters on the 2018 SEF Proposal, should reference those prior comment letters as specifically as possible.

¹² 7 U.S.C. 6s(i).

¹³ 17 CFR 23.501(a)(4)(i).

¹⁴ *Id.*

² 7 U.S.C. 7b-3.

³ Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (June 4, 2013) (SEF Core Principles Final Rule). The SEF Core Principles Final Rule also articulates, where appropriate, guidance and acceptable practices for complying with the SEF core principles set forth in CEA section 5h.

⁴ 17 CFR 37.6(b).

⁵ 17 CFR 37.6(b). Specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a SEF if the applicable requirements of 17 CFR 1.35(b)(5) are met.

⁶ Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov. 30, 2018) (2018 SEF Proposal).

⁷ *Id.*

⁸ *Id.* at 62096.

¹ 17 CFR 145.9. The Commission's regulations referred to in this release are found at 17 CFR Chapter I (2022), available on the Commission's website at <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

impractical to implement. As discussed more fully below, Commission staff from the Division of Market Oversight (DMO) acknowledged these technological and operational challenges and provided no-action positions for SEFs with respect to certain provisions of the Commission's regulations related to uncleared swap confirmations.¹⁵ In particular, DMO most recently issued CFTC No-Action Letter No. 17-17 (NAL No. 17-17), which provides a no-action position with respect to the obligation to obtain copies of underlying, previously negotiated agreements between the counterparties, as discussed in greater detail below, for a SEF that seeks for uncleared swaps to satisfy the confirmation requirement in § 37.6(b) by incorporating by reference terms of such underlying agreements.¹⁶

The Commission proposes to amend § 37.6(b) to codify this no-action position, which would enable SEFs to incorporate such terms by reference in an uncleared swap confirmation without being required to obtain the underlying, previously negotiated agreements. Further, the Commission proposes to amend § 37.6(b), which currently requires confirmation of all terms of a swap transaction to take place at the same time as execution, to require such confirmation to take place "as soon as technologically practicable" after the execution of the swap transaction on the SEF for both cleared and uncleared swap transactions. The Commission also proposes to amend § 37.6(b) to make clear that the SEF-provided confirmation under § 37.6(b) shall legally supersede any *conflicting terms*

in a previous agreement, rather than the entire agreement. In addition, the Commission proposes to make conforming amendments to § 23.501(a)(4)(i) to correspond with the proposed amendments to § 37.6(b).

Finally, the Commission proposes to make certain non-substantive amendments to §§ 37.6(a)–(b) to enhance clarity.

C. Consultation With Other U.S. Financial Regulators

In developing these rules, the Commission has consulted with the Securities and Exchange Commission (SEC), pursuant to section 712(a)(1) of the Dodd-Frank Act.¹⁷

II. Proposed Regulations

A. § 37.6—Enforceability

1. Proposed § 37.6(b)(1)—Uncleared Swap Confirmations: Incorporation by Reference of Underlying Previously Negotiated Agreements

Commission Regulation 37.6(b) requires a SEF to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF, whether cleared or uncleared, with a "confirmation"—a written record that contains all of the terms of the transaction—at the time of execution.¹⁸ The terms of a swap transaction include economic terms that are specific to the transaction, *e.g.*, swap product, price, and notional amount, and can also include non-specific "relationship terms" that generally govern all transactions between two counterparties—including, for example, relationship-level default, margin, or governing law provisions.

For uncleared swap transactions,¹⁹ the Commission is aware that many

relationship terms that may govern certain aspects of the transaction are often negotiated and agreed upon in written documentation between the counterparties prior to execution.²⁰ The Commission previously stated that, for purposes of satisfying the requirements of § 37.6(b), a SEF's confirmation terms for uncleared swap transactions may incorporate by reference relevant terms set forth in such underlying agreements, as long as those agreements have been submitted to the SEF prior to execution.²¹ As applied, § 37.6(b) requires that the SEF incorporate this documentation by reference into the issued confirmation, which is intended in part to provide SEF participants with legal certainty with respect to the terms of uncleared swap transactions.²²

The requirement that the underlying agreements be submitted to the SEF prior to execution has, however, created impractical burdens for SEFs. Based upon feedback from SEFs, the Commission understands that SEFs have encountered many issues in trying to comply with the requirement, including high financial, administrative, and logistical burdens in order to collect and maintain bilateral transaction agreements from many individual counterparties. SEFs have stated that they are unable to develop a cost-effective method to request, accept, and maintain a library of every relevant previous agreement between

²⁰ SEF Core Principles Final Rule at 33491 n.195. See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55906 (Sept. 11, 2012) (noting that swap counterparties have typically relied on the use of industry-standard legal documentation to document their swap trading relationships. This documentation, such as the ISDA Master Agreement and related Schedule and Credit Support Annex (ISDA Agreements), as well as related documentation specific to particular asset classes, offers a framework for documenting uncleared swap transactions between counterparties.); see also 17 CFR 23.504(b) (noting that for uncleared swap transactions, § 23.504(b) requires written swap trading relationship documentation that includes all terms governing the trading relationship between an SD or MSP and its counterparty).

²¹ SEF Core Principles Final Rule at 33491 n.195. While the Commission's statement specifically referenced the incorporation by reference of previously negotiated terms from "a freestanding master agreement," the Commission recognizes that other previously negotiated freestanding agreements similarly may contain terms that are relevant to an uncleared swap confirmation.

²² To ensure that the SEF confirmation provides legal certainty, the Commission has stated that counterparties choosing to execute a swap transaction on or pursuant to the rules of a SEF must have all terms, including possible long-term credit support arrangements, agreed to no later than execution, such that the SEF can provide a written confirmation inclusive of those terms. SEF Core Principles Final Rule at 33491.

¹⁵ NAL No. 17-17, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017). NAL No. 17-17 extended the no-action position previously provided by Commission staff. See CFTC Letter No. 16-25, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 14, 2016) (NAL No. 16-25); CFTC Letter 15-25, Re: Extension of No-Action Relief for SEF Confirmation and Recordkeeping Requirements under Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2, and Additional Relief for Confirmation Data Reporting Requirements under Commission Regulation 45.3(a) (Apr. 22, 2015) (NAL No. 15-25); and CFTC Letter No. 14-108, Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2 (Aug. 18, 2014) (NAL No. 14-108). See also CFTC Letter No. 13-58, Time-Limited No-Action Relief to Temporarily Registered Swap Execution Facilities from Commission Regulation 37.6(b) for Non-Cleared Swaps in All Asset Classes (Sept. 30, 2013) (NAL No. 13-58).

¹⁶ See NAL No. 17-17.

¹⁷ Dodd-Frank Act, Public Law 111-203, tit. VII, § 712(a)(1), 124 Stat. 1376 (2010). On May 11, 2022, the SEC adopted proposed rules for security-based swap execution facilities (SB SEFs). See Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities, 87 FR 28872 (May 11, 2022) (SEC SB SEF Proposal). As part of the SEC SB SEF Proposal, the SEC proposed SEC rule 242.812 (SEC Proposed Rule 812), which was modeled after existing § 37.6 with some modifications. In particular, SEC Proposed Rule 812 would require an SB SEF to as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction that were agreed to on the facility, which shall legally supersede any previous agreement regarding such terms. *Id.* at 28893. To date, the SEC has not adopted the SEC SB SEF Proposal or SEC Proposed Rule 812.

¹⁸ 17 CFR 37.6(b). See also 17 CFR 23.500(c) (providing a similar definition of "confirmation" that is applicable to SDs and MSPs).

¹⁹ The Commission notes that swap trading relationship documentation is not required for swaps cleared by a derivatives clearing organization. See 17 CFR 23.504(a)(1).

counterparties.²³ SEFs have also noted that the potential number of previous agreements is considerable, given that SEF counterparties often enter into agreements with many other parties and may have multiple agreements for different asset classes.²⁴

Commission staff from DMO has acknowledged these technological and operational challenges and has accordingly granted no-action positions, most recently in NAL No. 17–17.²⁵ Based on these no-action positions, many SEFs have incorporated by reference applicable relationship terms from previously negotiated underlying agreements between counterparties in confirmations for uncleared swaps, without obtaining copies of these agreements prior to the execution of a swap and without maintaining copies of such underlying agreements on an ongoing basis.²⁶

Based on its experience with the part 37 implementation, the Commission acknowledges that cleared and uncleared swap transactions raise different issues with respect to confirmation requirements²⁷ and that the current § 37.6(b) requirements create difficulties for the latter type of swap transaction. As such, the Commission proposes to amend § 37.6(b) by adding § 37.6(b)(1) to permit SEFs to incorporate relevant terms from underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.²⁸

²³ Many of these agreements are maintained in paper form or as scanned PDF files that are difficult to quickly digitize in a cost-effective manner. See WMBAA, Request for Extended Relief from Certain Requirements under Parts 37 and 45 Related to Confirmations and Recordkeeping for Swaps Not Required or Intended to be Cleared at 3 (Mar. 1, 2016). Further, some SEFs have cited the considerable resource cost of obtaining the number of different agreements that exist to accommodate different types of counterparties and asset classes. *Id.*

²⁴ *Id.*

²⁵ See *supra* note 15.

²⁶ *Id.* As a condition of staff's no-action positions, a SEF has been required to have a rule in its rulebook that requires its participants to provide copies of the underlying agreements to the SEF on request, as well as a rule in its rulebook that requires the SEF to (i) request from a participant an underlying agreement upon request from the Commission, and (ii) to furnish such agreement to the Commission as soon as it is available.

²⁷ See *supra* note 19.

²⁸ In addition to stating that DMO will not recommend enforcement action if a SEF incorporates by reference relevant terms from underlying, previously negotiated agreements in confirmations for uncleared swap transactions, without obtaining copies of such agreements, which the Commission proposes to codify in this release, NAL No. 17–17 also provides no-action positions with respect to the requirement to maintain copies of such agreements in order to comply with SEF

recordkeeping obligations under §§ 37.1000, 37.1001, and 45.2. Among other things, these requirements obligate a SEF to maintain records of all activities relating to the business of the SEF. The Commission preliminarily believes that allowing a SEF to incorporate by reference relevant terms from the underlying, previously negotiated agreements without obtaining such agreements will rectify the compliance issues posed with respect to §§ 37.1000, 37.1001, and 45.2. As a SEF would no longer be required to obtain the underlying, previously negotiated agreements, the Commission preliminarily believes that these agreements would not, as a general category, constitute records relating to the SEF's business for purposes of §§ 37.1000, 37.1001, and 45.2. The Commission notes, however, that if a SEF did obtain such an underlying, previously negotiated agreement, including at the request of the Commission or its staff or in connection with the fulfillment of the SEF's regulatory obligations, the SEF would, with respect to such agreement, need to comply with its recordkeeping obligations under §§ 37.1000, 37.1001, and 45.2. NAL No. 17–17 also provides a no-action position with respect to the swap data reporting requirements that apply to a SEF under § 45.3(a). In November 2020, the Commission amended its swap data reporting regulations, which amendments included the removal of the term “primary economic terms” and “confirmation data” from § 45.3(a). See Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020) (Amended Part 45 Rules). Currently, SEFs are required to report as specified in the technical specification published on the Commission's website, available at https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_18_RealTimeReporting/index.htm. As relevant in this context, the technical specification sets out the required validations and message types, including when, for swap data reporting purposes, specific data fields are mandatory, conditional, or optional. For example, the technical specification distinguishes between transaction, collateral, and valuation reporting. In general, SEFs will report transaction message types and not valuation and collateral message types. Those data elements in the technical specification relevant to on-SEF transactions that are contained in the transaction message type are readily available for a SEF to fulfil its reporting obligations under Commission regulations in part 45. As further evidence of this, the defined term “confirmation data” no longer exists in § 45.3(a). Therefore, the no-action position stated in Staff Letter 17–17 that “the Division will not recommend that the Commission take enforcement action against a SEF for failure to report certain confirmation data pursuant to Commission Regulation 45.3(a) . . .” (See NAL No. 17–17 at 3–4) has not been in effect since the implementation of the Commission's Amended Part 45 Rules. Staff have not received a related, updated request for no-action position with respect to SEF reporting requirements. The Commission preliminarily believes the Amended Part 45 Rules and the associated technical specification requirements eliminate the need for the no-action position related to § 45.3(a) in NAL No. 17–17. Finally, the Commission is not proposing to codify certain conditions from NAL No. 17–17, including conditions that require a SEF to have rules in its rulebook that (i) require a SEF confirmation to state, where applicable, that it incorporates by reference the terms of the underlying previously negotiated freestanding agreements between the counterparties, and (ii) state that in the event of any inconsistency between a SEF confirmation and the underlying previously negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms and that require the SEF's confirmations to state the same. The Commission preliminarily believes that the proposed amendments herein, if adopted, would clarify the requirements for uncleared swap

The Commission preliminarily believes, following staff's observation of SEFs and market participants operating under the existing no-action position in NAL No. 17–17 and precursor no-action letters, that proposed § 37.6(b)(1) would not compromise the legal certainty of confirmations issued by SEFs for uncleared swap transactions, and that proposed § 37.6(b)(1) is a financially and logistically appropriate alternative for SEFs to comply with the confirmation requirement under § 37.6(b) as it applies to uncleared swaps.²⁹ The approach set forth in proposed § 37.6(b)(1) should address the technological and operational challenges that have prevented SEFs from fully complying with § 37.6(b), by reducing the administrative burdens for SEFs, who would not be required to obtain and maintain a library of every relevant previously negotiated agreement between counterparties, and for market participants themselves, who would not be required to submit to the SEF all of their relevant underlying documentation with other potential counterparties on the SEF.

As more fully discussed below, the Commission expects that proposed § 37.6(b)(1) will reduce the cost of SEFs' compliance with the confirmation requirement in § 37.6(b).

Therefore, the Commission proposes to amend § 37.6(b) by adding § 37.6(b)(1) to permit SEFs to incorporate underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.

In order to avail themselves of the no-action position under NAL No. 17–17, SEFs must have rules in their rulebooks that, among other things;³⁰ (1) require “participants to provide copies of the underlying previously negotiated freestanding agreements to the SEF on request;” and (2) require “the SEF to request from participants the underlying previously negotiated freestanding agreements on request from the Commission and [require] the SEF to furnish such documents to the Commission as soon as they are available.”³¹ The Commission

confirmations issued by SEFs in a manner that obviates the need to codify these conditions. See also the discussion, *infra*, of those conditions in NAL No. 17–17 that address the SEF's ability to obtain, upon request, copies of the underlying previously negotiated freestanding agreements that have been incorporated by reference into an uncleared swap confirmation.

²⁹ The proposed amendment would also preserve the legal certainty of the terms of swap transactions for market participants.

³⁰ See also note 28, *supra*.

³¹ See NAL No. 17–17 at 4.

preliminarily believes that the existing requirements for SEFs under the CEA and the Commission's part 37 regulations sufficiently account for these conditions of NAL No. 17–17, such that these conditions do not need to be incorporated as specific conditions of proposed new § 37.6(b)(1).

In particular, SEF Core Principle 5 and the implementing part 37 regulations require, among other things, that a SEF establish and enforce rules that will allow the SEF to obtain any necessary information to perform any of the functions described in section 5h of the Act; establish and enforce rules that will allow the SEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under part 37; have rules that allow for its examination of books and records kept by the market participants on its facility; and provide information to the Commission on request.³² The Commission believes that, pursuant to these requirements and as necessary to carry out its statutory and regulatory functions, a SEF has the ability and authority to request copies of the underlying agreements that are incorporated by reference into a confirmation for an uncleared swap transaction and to provide such agreements to the Commission upon request.³³

Request for Comment

The Commission requests comments on all aspects of proposed § 37.6(b)(1). In particular, the Commission requests comment on the following questions:

(1) Should the Commission allow a SEF to issue a confirmation for an uncleared swap transaction that does not, as currently contemplated under § 37.6(b), include all the terms of the transaction, for example by only including in the confirmation the terms agreed to on the SEF? If so, should the Commission amend § 23.501 accordingly?

(2) Should the Commission require a SEF to establish and enforce exchange rules that specifically require participants to maintain copies of all agreements incorporated by reference into an uncleared swap confirmation?

(3) Taking into account a SEF's obligations under SEF Core Principle 5 and the associated part 37 regulations,

should the Commission require a SEF to establish and enforce exchange rules specifically requiring market participants to provide the SEF upon request with a copy of any document or agreement incorporated by reference into an uncleared swap confirmation?

(4) Taking into account the Commission's authorities under § 37.5 and § 37.1000, should the Commission adopt an express requirement for a SEF to furnish to the Commission upon request a copy of any document or agreement incorporated by reference into an uncleared swap confirmation?

(5) Is the term “agreement” within proposed § 37.6(b)(1) broad enough to capture the types of documentation governing swap trading relationships that may need to be incorporated by reference into an uncleared swap confirmation?

2. Proposed Amendment to § 37.6(b)—Timing of Swap Transaction Confirmation

Section 37.6(b) requires that confirmation of all the terms of a swap transaction entered into on or pursuant to the rules of a SEF must take place at the same time as execution, except for a limited exception for certain information related to accounts included in bunched orders.³⁴ The Commission proposes to amend this timing requirement and instead require a confirmation of all the terms of a swap transaction as soon as technologically practicable after the execution of a swap transaction on the SEF.³⁵

The Commission believes that the proposed standard—as soon as technologically practicable after execution—would continue to promote the Commission's goals of providing swap counterparties with legal certainty in a prompt manner, while also being

³⁴ 17 CFR 37.6(b). Specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a SEF if the applicable requirements of § 1.35(b)(5) are met. *See* 17 CFR 1.35(b)(5), which provides that specific customer account identifiers for accounts included in bunched orders executed on DCMs or SEFs need not be recorded at time of order placement or upon report of execution if the requirements set forth in § 1.35(b)(5)(i)–(v) are met.

³⁵ The Commission notes that in the context of real-time public reporting, it has defined as soon as technologically practicable to mean as soon as possible, taking into consideration the prevalence, implementation, and use of technology by comparable market participants. 17 CFR 43.2. The meaning of this term, as proposed in § 37.6(b) herein, would be consistent with this definition, except applying to comparable SEFs. For example, for purposes of taking into consideration the prevalence, implementation and use of technology by comparable SEFs, the Commission would expect that fully electronic SEFs would be comparable to one another, while SEFs that utilize more manual processes, such as voice, would be comparable to each other.

consistent with other Commission requirements related to swap confirmations.³⁶

In addition, for a block trade that is executed “away from” a SEF,—*i.e.*, outside of the SEF's trading system or platform, but still “pursuant to the rules” of the SEF for purposes of the § 37.6(b) confirmation requirement—a SEF would be unaware of the execution of the trade until the counterparties report the trade details to the SEF. From a temporal perspective, the SEF would consequently be unable to confirm all terms of the block trade at the same time as execution.

The Commission believes that the proposed standard reflects existing SEF capabilities while maintaining the Commission's goal of providing swap counterparties with legal certainty for transactions. Given the Commission's understanding that SEFs are complying with the at the same time as execution timing standard in existing § 37.6(b) for non-block swap transactions or block transactions executed on the SEF, the Commission expects that the impact of the proposed as soon as technologically practicable timing standard for confirmations for such swap transactions would not be substantive.³⁷ Rather, the proposal would take into account practical realities for confirming block trades executed away from the SEF but pursuant to the rules of the SEF, while ensuring that confirmation for all SEF-executed trades takes place in as prompt a manner as possible.

Therefore, the Commission proposes to require a SEF to confirm the terms of a swap transaction “as soon as technologically practicable” after the execution of the swap transaction on the SEF.

Request for Comment

The Commission requests comments on all aspects of the as soon as technologically practicable after execution standard proposed for confirmations pursuant to § 37.6(b). In particular, the Commission requests comment on the following questions:

(6) Is the Commission's proposal to require a SEF to confirm the terms of a swap transaction “as soon as technologically practicable” after the execution of the transaction on the SEF

³⁶ For example, §§ 23.501(a)(1) and 23.501(a)(2) require that an SD or MSP issue a confirmation or acknowledgement for a swap transaction (as applicable) to its counterparty “as soon as technologically practicable . . .” *See* 17 CFR 23.501(a)(1)–(2). Further, the Commission notes that the proposed standard is consistent with the SEC's proposed standard for SB SEFs in SEC Proposed Rule 812. *See* SEC SB SEF Proposal at 28893.

³⁷ *See supra* note 35.

³² 7 U.S.C. 7b–3(f)(5); 17 CFR 37.500–503.

³³ Further the Commission also has the ability to request information from the SEF under 17 CFR 37.5(a), which requires a SEF to file with the Commission information related to its business as a SEF upon the Commission's request. *See* 17 CFR 37.5.

an appropriate time frame? Should the Commission require that the SEF issue the confirmation by no later than a specified time for swap block trades that are executed away from the SEF but pursuant to the SEF's rules, such as within 10 minutes of execution as this is consistent with various SEF rulebooks that require swap block trades executed away from the SEF to be reported to the SEF within 10 minutes of execution?

(7) Should as soon as technologically practicable mean something different for purposes of § 37.6(b) than the definition of as soon as technologically practicable set forth at § 43.2? If so, what should the definition be?

3. Proposed Amendment to § 37.6(b)—Conflicting Terms

The Commission proposes to amend § 37.6(b) to make clear that the terms of a swap confirmation issued by a SEF shall legally supersede *any conflicting terms* of a previous agreement (emphasis added).³⁸ As SEFs will now be able to incorporate underlying, previously negotiated agreements by reference into confirmations for uncleared swap transactions, this proposed amendment will help ensure legal certainty with respect to the terms of such transactions, and will also clarify the continuing applicability of those terms in the underlying agreements that do not conflict with the confirmation and that may, for example, govern the counterparties' non-SEF transactions.³⁹

As a condition of relying on the no-action position in NAL No. 17–17, SEFs must have rules which state that “in the event of any inconsistency between a SEF confirmation and the underlying previously negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms.”⁴⁰ As such, this proposed amendment would also provide the benefits of continuing to allow SEFs that rely on NAL No. 17–17 to maintain market practices established under NAL No. 17–17 and precursor no-action letters.

³⁸ While this amendment would apply with respect to both cleared and uncleared swap transactions executed on or pursuant to the rules of the SEF, the Commission notes that swap trading relationship documentation is not required for swaps cleared by a derivatives clearing organization. See 17 CFR 23.504(a)(1).

³⁹ In the SEF Core Principles Final Rule, the Commission noted that the counterparties to the uncleared swap transaction would need to ensure that nothing in the confirmation terms contradicted the standardized terms intended to be incorporated from the underlying agreement. SEF Core Principles Final Rule at 33491, n.195.

⁴⁰ See NAL No. 17–17 at 4.

Request for Comment

The Commission requests comments on all aspects of the proposal to amend § 37.6(b) to make clear that the terms of a swap confirmation issued by a SEF “shall legally supersede any conflicting terms of a previous agreement.” In particular, the Commission requests comment on the following questions:

(8) Does the proposed amendment provide sufficient legal certainty with respect to any contradictory terms that may be contained within previous agreements that are incorporated into an uncleared swap confirmation by reference?

(9) For uncleared swaps, to avoid any conflict between the terms of the swap and the SEF's confirmation, should the Commission require that the SEF's confirmation specifically state that the terms of the confirmation legally supersede any conflicting terms in underlying previously negotiated agreements that have been incorporated by reference?

(10) Should the Commission maintain the current requirement that the confirmation legally supersede any previous agreement? Why or why not?

4. Proposed Clarification of § 37.6(b)

Section 37.6(b) provides that a SEF shall provide each counterparty to a transaction that is entered into on or pursuant to the rules of the SEF with a written record of all of the terms of the transaction.

The Commission proposes a non-substantive amendment to § 37.6(b) to change the phrase “entered into” to “executed” in order to provide greater consistency within § 37.6(b). Currently § 37.6(b) uses “entered into” and “executed” interchangeably. This non-substantive amendment would, in conjunction with the proposed non-substantive amendment to § 37.6(a) discussed below, ensure consistent use of “executed” throughout § 37.6.

5. Proposed Clarification of § 37.6(a)

Section 37.6(a) is intended to provide market participants with legal certainty with respect to swap transactions on a SEF and generally clarifies that a swap transaction entered into on or pursuant to the rules of a SEF cannot be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable due to a violation by the SEF of section 5h of the Act or part 37 of the Commission's regulations or any proceeding that alters or supplements a rule, term or condition that governs such swap or swap transaction.⁴¹

⁴¹ 17 CFR 37.6(a).

The Commission proposes a non-substantive amendment to § 37.6(a) to change the phrase “entered into” to “executed” in order to provide greater consistency within § 37.6. Currently § 37.6 uses “entered into” and “executed” interchangeably. This non-substantive amendment would amend § 37.6(a) to use “executed” and, in conjunction with the proposed non-substantive amendment to § 37.6(b) discussed above, would ensure consistent use of “executed” throughout § 37.6.

B. Proposed Amendments to § 23.501(a)(4)(i)

The Commission proposes two amendments to § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b). Section 23.501(a)(4)(i) provides that a swap transaction executed on a SEF or DCM will be deemed to satisfy the swap confirmation requirements set forth for SDs and MSPs in § 23.501(a), provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution. First, the Commission proposes to clarify that the safe harbor for SDs and MSPs in § 23.501(a)(4)(i) also applies to swap transactions executed pursuant to the rules of a SEF or DCM, *i.e.*, block trades executed away from the SEF's or DCM's trading system or platform. This clarification is consistent with the definition of “block trade” under § 43.2. Second, the Commission proposes to amend § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b), which would permit confirmation of all terms of a swap transaction as soon as technologically practicable following execution.⁴²

Request for Comment

The Commission requests comments on the proposed conforming changes to § 23.501(a)(4)(i).

III. Effective Date and Transition Period

The Commission proposes that the effective date for the final regulations be 30 days after publication of final regulations in the **Federal Register**. The Commission preliminarily believes that such an effective date would allow SEFs and market participants sufficient time to adapt to the amended confirmation rules in an efficient and orderly manner.

⁴² The Commission notes that while DCMs may provide confirmations for swap block trades executed away from but pursuant to the rules of the DCM, DCMs do not have a regulatory obligation analogous to the current regulatory obligation under § 37.6(b) for SEFs to provide such confirmations.

Request for Comment

The Commission requests comment on whether the proposed effective date is appropriate and, if not, the Commission further requests comment on possible alternative effective dates and the basis for any such alternative dates.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies, in promulgating regulations, to consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis with respect to such impact.⁴³ The regulations proposed herein will affect SEFs and their market participants. The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.⁴⁴ The Commission previously concluded that SEFs are not small entities for the purpose of the RFA.⁴⁵ The Commission has also previously stated its belief in the context of relevant rulemakings that SEFs’ market participants, which are all required to be eligible contract participants (ECPs)⁴⁶ as defined in section 1a(18) of the CEA,⁴⁷ are not small entities for purposes of the RFA.⁴⁸ Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA), imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any “collection of information,”⁴⁹ as defined by the PRA. Among its purposes, the PRA is intended to minimize the paperwork burden to the private sector, to ensure that any collection of information by a

government agency is put to the greatest possible uses, and to minimize duplicative information collections across the government.⁵⁰

The PRA applies to all information, regardless of form or format, whenever the government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.⁵¹ The PRA requirements have been determined to include not only mandatory, but also voluntary information collections, and include both written and oral communications.⁵² The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rulemaking affects regulations that contain collections of information for which the Commission has previously received control numbers from OMB. The titles for these collections of information are “Swap Documentation, OMB control number 3038–0088” and “Core Principles and Other Requirements for Swap Execution Facilities, OMB control number 3038–0074.” This proposal, if adopted, would modify the information collection requirements associated with OMB control number 3038–0074, as discussed below. The Commission therefore is submitting this proposal to the OMB for its review in accordance with the PRA.⁵³

1. OMB Collection 3038–0088—Swap Documentation

The Commission proposes two amendments to § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b). Section 23.501(a)(4)(i) provides that a swap transaction executed on a SEF or DCM will be deemed to satisfy the swap confirmation requirements set forth for SDs and MSPs in § 23.501(a), provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution. First, the Commission proposes to clarify that the safe harbor for SDs and MSPs in § 23.501(a)(4)(i) also applies to swap

transactions executed pursuant to the rules of a SEF or DCM, *i.e.*, block trades executed away from the SEF’s or DCM’s trading system or platform. Second, the Commission proposes to amend § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b), which would permit confirmation of all terms of a swap transaction as soon as technologically practicable following execution.

The Commission does not believe that these proposed amendments would substantively or materially modify any existing information collection burdens. Accordingly, the Commission is retaining its existing estimates for the burden associated with the information collections under OMB Collection 3038–0088.⁵⁴

2. OMB Collection 3038–0074—Core Principles and Other Requirements for Swap Execution Facilities

Under existing § 37.6(b), a SEF is required to provide each counterparty to a swap transaction, whether cleared or uncleared, that is entered into on or pursuant to the rules of the SEF, with a written “confirmation” that contains all of the terms of the transaction. With respect to an uncleared swap transaction, a SEF may comply with the requirement to include in the confirmation all of the terms of the transaction, by incorporating by reference relevant terms set forth in underlying, previously negotiated agreements between the counterparties, as long as the SEF has obtained these agreements prior to execution of the transaction.⁵⁵

The proposed rulemaking would add new § 37.6(b)(1), which would permit SEFs to incorporate by reference in a confirmation relevant terms set forth in underlying, previously negotiated agreements without being required to obtain these agreements.

The Commission preliminarily believes that this proposed approach would address technological and operational challenges that have prevented SEFs from fully complying with § 37.6(b), by reducing the administrative burdens for SEFs, who would not be required to request, accept, and maintain a library of every relevant previously negotiated agreement between counterparties.

As a result, the Commission believes that the proposed rulemaking would

⁴³ 5 U.S.C. 601 *et seq.*

⁴⁴ 47 FR at 18618–21 (Apr. 30, 1982).

⁴⁵ SEF Core Principles Final Rule at 33548 (citing, among others, 47 FR 18618, 18621 (Apr. 30, 1982) (discussing DCMs).

⁴⁶ 17 CFR 37.703.

⁴⁷ 7 U.S.C. 1(a)(18).

⁴⁸ 66 FR 20740, 20743 (Apr. 25, 2001) (stating that ECPs by the nature of their definition in the CEA should not be considered small entities).

⁴⁹ See 44 U.S.C. 3502(3)(A).

⁵⁰ See 44 U.S.C. 3501.

⁵¹ See 44 U.S.C. 3502(3).

⁵² See 5 CFR 1320.3(c)(1).

⁵³ See 44 U.S.C. 3507(d) and 5 CFR 1320.11.

⁵⁴ See Amended Supporting Statement for Currently Approved Information Collection, Swap Documentation, OMB Control Number 3038–0088 (Oct. 24, 2022), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202210-3038-007.

⁵⁵ SEF Core Principles Final Rule at 33491 n.195.

reduce a SEF's annual recurring information collection burden for uncleared swap transactions. The Commission estimates that proposed § 37.6(b)(1) would reduce annual recurring information collection burdens by one-third from 563 hours per SEF to 375 hours per SEF.⁵⁶

The aggregate annual estimates for the reporting burden associated with § 37.6(b), as proposed to be amended, would be as follows:

Estimated Number of Respondents:

23.

Estimated Average Burden Hours per Respondent: 375 hours.

Estimated Total Annual Burden on Respondents: 8,625 hours.

Frequency of Collection: On occasion.

There are no capital costs or operating and maintenance costs associated with this collection.

3. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. The Commission will consider public comments on this proposed collection of information in:

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) Enhancing the quality, utility, and clarity of the information proposed to be collected; and

(4) Minimizing the burden of the proposed information collection requirements on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological

information collection techniques, *e.g.*, permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418-5714 or from <https://RegInfo.gov>. Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202) 395-6566 (fax); or
- OIRAsubmissions@omb.eop.gov (email).

Please provide the Commission with a copy of submitted comments so that comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this release in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

C. Cost-Benefit Considerations

1. Background

Section 15(a) of the CEA⁵⁷ requires the Commission to “consider the costs and benefits” of its actions before promulgating a regulation under the CEA or issuing certain orders. CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) factors.

The Commission is proposing to amend certain rules in parts 23 and 37

of its regulations relating to the confirmation by CFTC-regulated exchanges, in particular SEFs, of the terms of swap transactions.

The baseline against which the Commission considers the costs and benefits of these proposed rule amendments is the statutory and regulatory requirements of the CEA and Commission regulations now in effect, in particular CEA section 5h and certain rules in parts 23 and 37 of the Commission's regulations. The Commission, however, notes that as a practical matter many SEFs and market participants have adopted some current practices based upon a no-action position provided by Commission staff that the proposed rule amendments generally would codify. As such, to the extent that SEFs and market participants have relied on this no-action position, the actual costs and benefits of the proposed rule amendments as realized in the market may not be as significant.

In some instances, it is not reasonably feasible to quantify the costs and benefits to SEFs and certain market participants with respect to certain factors, for example, market integrity. Notwithstanding these types of limitations, however, the Commission otherwise identifies and considers the costs and benefits of these proposed rule amendments in qualitative terms.

In the following consideration of costs and benefits, the Commission first identifies and discusses the benefits and costs attributable to the proposed rule amendments. The Commission, where applicable, then considers the costs and benefits of the proposed rule amendments in light of the five public interest considerations set out in § 15(a) of the CEA.

The Commission notes that this consideration of costs and benefits is based on its understanding that the swaps market functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed rule amendments on all relevant swaps activity, whether based on its actual occurrence in the United States or on its connection with or effect on U.S. commerce.⁵⁸

⁵⁶ The Commission previously estimated that the information collections related to § 37.6 would take SEFs approximately 1.5 hours per SEF participant and that on average, a SEF has about 375 participants. For purposes of estimating the number of burden hours that the proposed regulations would eliminate, however, the Commission is revising its previous estimate and will assume the relevant process would take SEFs approximately 1.0 hours per SEF participant. Accordingly, 375 participants × 1.0 hour per participant = 375 estimated burden hours. For information about the Commission's previous estimate, see Supporting Statement for New and Revised Information Collections, Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038-0074, note 12 (Apr. 15, 2021), available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202104-3038-001.

⁵⁷ 7 U.S.C. 19(a).

⁵⁸ See, *e.g.*, 7 U.S.C. 2(i).

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs or benefits not discussed herein; the potential costs and benefits of the alternatives that the Commission discussed in this release; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed rule amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. Commenters may also suggest other alternatives to the proposed approach where the commenters believe that the alternatives would be appropriate under the CEA and would provide a more appropriate cost-benefit profile.

2. Proposed Amendments to 37.6(b)

a. Benefits

Under existing § 37.6(b), a SEF is required to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF, with a written "confirmation" at the time of execution that contains all of the terms of the transaction. SEFs may satisfy the requirements under existing § 37.6(b) for uncleared swap transaction confirmations by incorporating by reference, in the confirmation, the relevant terms set forth in underlying, previously negotiated agreements between the counterparties, as long as such agreements have been submitted to the SEF prior to execution.

Absent an adoption of proposed new § 37.6(b)(1), which would allow SEFs to incorporate relevant terms set forth in such underlying agreements without being required to obtain the agreements, SEFs would need to comply with the existing requirements under § 37.6(b) for uncleared swap confirmations, notwithstanding the significant burdens of doing so. The Commission understands that the financial, administrative, and logistical burdens to collect and maintain bilateral transaction agreements from any individual counterparties would be high. SEFs have stated that they are unable to develop a cost-effective method to request, accept and maintain a library of every relevant previous agreement between counterparties.⁵⁹ SEFs have also noted that the potential

number of previous agreements is considerable, given that SEF counterparties often enter into agreements with many other parties and may have multiple agreements for different asset classes.⁶⁰

The Commission preliminarily believes that the proposed addition of § 37.6(b)(1) should benefit both SEFs and market participants by decreasing the financial, administrative, and logistical burdens to execute an uncleared swap on a SEF. Not only would a SEF not be required to expend time and resources to gather and maintain all of the underlying relationship documentation between all possible counterparties on the SEF, but market participants would also not be required to expend time and resources in gathering and submitting this documentation to the SEF, including any amendments or updates to that documentation. Moreover, the Commission preliminarily believes that not requiring SEFs to obtain the underlying relationship documentation would eliminate associated financial, logistical and administrative burdens.

The Commission notes that these benefits are currently available to market participants through the existing no-action position provided by Commission staff in NAL No. 17–17. As such, to the extent that SEFs, and by extension market participants, have relied on the existing no-action position to avoid the above described financial, operational and logistical burdens, through the incorporation by reference of relevant terms set forth in underlying relationship documentation, they have been availing themselves of the benefits from these reduced burdens.

The Commission also recognizes that many SEFs have already expended resources to implement technological and operational changes needed to avail themselves of the no-action position under NAL No. 17–17. The proposed amendments would preclude the need to expend additional resources to negate those changes.

Further, the proposed rule amendments do not propose to change the existing requirement for a SEF to issue a confirmation for all terms of a swap transaction for uncleared swaps. To the extent that a SEF were to not issue a confirmation that includes or incorporates by reference all of the terms of an uncleared swap transaction, the counterparties to the swap may be subject to other Commission regulations that impose those obligations, and therefore, increased costs. For example, where one of the counterparties to an

uncleared swap transaction is an SD or MSP, § 23.501 requires that the SD or MSP issue a confirmation for the transaction as soon as technologically practicable.⁶¹

SEFs should also benefit from the proposed requirement to confirm transaction terms "as soon as technologically" practicable after execution, rather than at the same time as execution. As noted above, the Commission preliminarily believes that this proposal would continue to promote the Commission's goals of providing the swap counterparties with legal certainty in a prompt manner.

b. Costs

With respect to uncleared swaps, the proposed addition of § 37.6(b)(1) could reduce the financial integrity of transactions on SEFs compared to the current rule. There could be a greater risk of misunderstanding between the counterparties to a swap transaction if SEFs do not provide all the terms of a transaction at the time of execution. Even when underlying agreements are incorporated by reference, confusion could arise from issues such as multiple versions of an agreement with the same labeling, or missing sections. However, the Commission does not expect that this risk will materially reduce the integrity of the swaps market. The Commission notes that the relevant underlying agreements usually establish relationship terms between counterparties that govern all trading between them in uncleared swaps, and do not generally concern the terms of specific transactions.

To the extent that SEFs are relying on the existing no-action position provided by Commission staff in NAL No. 17–17, they could continue to implement existing industry practice related to confirmations for uncleared swap transactions which should not impose costs on SEFs. But to the extent that SEFs need to modify their rules or procedures in light of the proposed amendments, such as removing the SEF rules required as conditions under NAL No. 17–17, they may incur modest costs.

c. Consideration of Alternatives

The relevant no-action position set forth in NAL No. 17–17, upon which the proposal is based, is subject to withdrawal by Commission staff. In addressing alternatives to adopting the proposed amendments to § 37.6(b), the Commission considered the costs and benefits associated with withdrawal of the no-action position in NAL No. 17–17, which would obligate SEFs and

⁵⁹ See WMBAA, Request for Extended Relief from Certain Requirements under Parts 37 and 45 Related to Confirmations and Recordkeeping for Swaps Not Required or Intended to be Cleared at 3 (Mar. 1, 2016).

⁶⁰ *Id.*

⁶¹ See 17 CFR 23.501(a).

market participants to satisfy the requirements of existing § 37.6(b). The Commission preliminarily believes that adopting the proposed amendments to § 37.6(b), and the conforming amendments set forth in this proposal, would help to maintain the benefits previously articulated in the SEF Core Principles Final Rule, but also reduce related costs for SEFs with respect to confirmation requirements.⁶²

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The proposed rule amendments should continue to promote the legal certainty of swap transactions executed on SEFs. The proposed amendments to § 37.6 for uncleared swaps, and the conforming amendments set forth in this proposal, would clarify compliance requirements, consistent with the position taken by Commission staff in NAL No. 17–17, while helping to maintain the protection of market participants and the public.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

The proposed amendments to § 37.6 for uncleared swaps, and the conforming amendments set forth in this proposal, would ease compliance for SEFs and market participants on a longer-term basis, *i.e.*, by providing a regulatory solution beyond the corresponding no-action position provided by Commission staff in NAL No. 17–17. This may improve the efficiency of the swap markets with respect to issuing and transmitting swap confirmations to counterparties. In particular, SEFs would attain greater operational efficiency because they would not be required to develop an infrastructure for collecting and maintaining all relevant underlying, previously negotiated agreements.

As above, with respect to uncleared swaps, the proposed addition of § 37.6(b)(1) could reduce the financial integrity of transactions on SEFs compared to the current rule. There could be a greater risk of misunderstanding between the counterparties to a swap transaction if SEFs do not provide all the terms of a

transaction at the time of execution. Even when underlying agreements are incorporated by reference, confusion could arise from issues such as multiple versions of an agreement with the same labeling, or missing sections. However, the Commission does not expect that this risk will materially reduce the integrity of the swaps market. As noted above, the Commission notes that the relevant underlying agreements usually establish relationship terms between counterparties that govern all trading between them in uncleared swaps, and do not generally concern the terms of specific transactions. Moreover, the proposed rule amendments could encourage financial integrity of the swap markets by, among other things, providing clarity that the terms of an uncleared swap confirmation issued by a SEF supersedes any conflicting terms in underlying agreements between the counterparties that have been incorporated by reference into the confirmation.

(3) Price Discovery

The Commission is not aware of significant effects on the price discovery process from the proposed amendments to § 37.6, and the conforming amendments set forth in this proposal, regarding confirmations.

(4) Sound Risk Management Practices

The proposed amendments to the confirmation requirements within § 37.6(b), and the conforming amendments set forth in this proposal, would maintain the promotion of sound risk management practices with respect to the requirement for SEFs to issue transaction confirmations, *i.e.*, by providing market participants with the certainty that transactions executed on or pursuant to the rules of a SEF will be legally enforceable with respect to all counterparties to the transaction.⁶³

(5) Other Public Interest Considerations

The Commission is identifying a public interest benefit in codifying the no-action position in NAL 17–17, where the efficacy of that position has been demonstrated. In such a situation, the Commission believes it serves the public interest to engage in notice-and-comment rulemaking, where it seeks and considers the views of the public in amending its regulations, rather than for SEFs to continue to rely on a staff provided no-action position that does not bind the Commission, provides less long-term certainty, and offers a more limited opportunity for public input.

Request for Comment

The Commission invites public comment on all aspects of its cost benefit considerations, including the discussion of the section 15(a) factors. Commenters are requested to provide data and any other information or statistics to support their position. To the extent commenters believe that the costs or benefits of any aspect of the proposed rules are reasonably quantifiable, the Commission requests that they provide data and any other information or statistics to assist the Commission in quantification.

(11) The Commission preliminarily believes that SEFs are relying on the no action position in NAL 17–17 and are not currently obtaining and maintaining previously negotiated underlying agreements that are incorporated by reference in uncleared swap transaction confirmations. Is the Commission's understanding correct or are there SEFs that have found practical ways to obtain and maintain such underlying agreements?

(12) If a SEF were required to comply with existing § 37.6(b) and obtain previously negotiated underlying agreements prior to incorporating by reference terms from such agreements in uncleared swap transaction confirmations, what costs and expenses would the SEF incur?

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anti-competitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation.⁶⁴ The Commission does not anticipate that the proposed amendments to parts 23 and 37 would promote or result in anti-competitive consequences or behavior. However, the Commission encourages comments from the public with respect to any aspect of the proposal that may be perceived as potentially inconsistent with the antitrust laws or anti-competitive in nature.

List of Subjects

17 CFR Part 23

Confirmations, Swaps.

17 CFR Part 37

Swaps, Swap confirmations, Uncleared Swap Confirmations, Swap execution facilities.

For the reasons stated in the preamble, the Commodity Futures

⁶² The Commission recognized the important benefits provided by the § 37.6(b) confirmation requirements in the cost-benefit considerations to the SEF Core Principles Final Rule. Among those benefits, the Commission stated that the requirements would (i) provide legal certainty to market participants; (ii) promote accuracy for counterparties regarding exposure levels with other counterparties; and (iii) reduce costs and risks involved with resolving error trade disputes between counterparties. SEF Core Principles Final Rule at 33570.

⁶³ *Id.*

⁶⁴ 7 U.S.C. 19(b).

Trading Commission proposes to amend 17 CFR parts 23 and 37 to read as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for Part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. Revise § 23.501(a)(4)(i) to read as follows:

§ 23.501 Swap confirmation.

(a) * * *

(4) * * *

(i) Any swap transaction executed on or pursuant to the rules of a swap execution facility or designated contract market shall be deemed to satisfy the requirements of this section, provided that the rules of the swap execution facility or designated contract market establish that confirmation of all terms of the transaction shall take place as soon as technologically practicable after execution.

* * * * *

PART 37—SWAP EXECUTION FACILITIES

■ 3. The authority citation for Part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

■ 4. Revise § 37.6 to read as follows:

§ 37.6 Enforceability.

(a) A transaction executed on or pursuant to the rules of a swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of:

(1) A violation by the swap execution facility of the provisions of section 5h of the Act or this part;

(2) Any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or

(3) Any other proceeding the effect of which is to:

(i) Alter or supplement a specific term or condition or trading rule or procedure; or

(ii) Require a swap execution facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(b) A swap execution facility shall provide each counterparty to a transaction that is executed on or pursuant to the rules of the swap execution facility with a written record of all of the terms of the transaction which shall legally supersede any conflicting terms of a previous agreement and serve as a confirmation of the transaction. The confirmation of all terms of the transaction shall take place as soon as technologically practicable after execution; provided that specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a swap execution facility if the applicable requirements of § 1.35(b)(5) of this chapter are met.

(1) For a confirmation of an uncleared swap transaction, the swap execution facility may satisfy the requirements of this paragraph (b) by incorporating by reference terms from underlying, previously negotiated agreements governing such transaction between the counterparties, without obtaining such incorporated agreements except as otherwise necessary to fully perform its operational, risk management, governance, or regulatory functions, or any requirements under this part.

(2) [Reserved]

Issued in Washington, DC, on August 14, 2023, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Swap Confirmation Requirements for Swap Execution Facilities—Voting Summary and Chairman’s and Commissioners’ Statements

Appendix 1—Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Rostin Behnam

Today the Commission votes to propose amendments to Parts 23 and 37 of the Commission regulations to address longstanding issues with the uncleared swap confirmation requirements under Rule 37.6(b). During the initial implementation of Part 37, SEFs informed the CFTC that the confirmation requirement for uncleared swaps was operationally and technologically difficult and impractical to implement. The Division of Market Oversight (DMO) investigated and acknowledged these challenges and provided targeted no-action positions for SEFs with respect to certain provisions of Commission regulations

throughout the last decade.¹ I support this proposal which represents sound judgment and clear consideration of the issues.

As there remains no workable solution that could effectuate the original language of the relevant rule, and the currently applicable staff letter has no explicitly set expiration date, the Commission is proposing to amend Rule 37.6(b) to codify the staff no-action position. The proposed amendment would enable SEFs to incorporate terms by reference in an uncleared swap confirmation without being required to obtain the underlying, previously negotiated agreements between the counterparties. A proposed clarification and conforming amendment to Rule 23.501 will clarify the consistent treatment of trades executed away from a SEF or DCM and permit confirmation of all terms of a swap transaction as soon as technologically practicable following execution, as opposed to requiring confirmation “at the same time as execution.”² The simplicity of these latter proposed amendments should not overshadow their practical impact.

Appendix 3—Statement of Commissioner Kristin N. Johnson

In the aftermath of the 2008 global financial crisis, the G20 leaders met in Pittsburgh, Pennsylvania.¹ This meeting resulted in an agreement among the G20 leaders to bring transparency and oversight to the then-unregulated swaps market.² Emerging in the 1980s, the swaps market remained unregulated for decades, operating with little to no transparency and causing significant integrity concerns for the global financial market.

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-

¹ See CFTC Letter No. 13–58, Time Limited No-Action Relief to Temporarily Registered Swap Execution Facilities from Commission Regulation 37.6(b) for non-Cleared Swaps in All Asset Classes (Sept. 30, 2013), <https://www.cftc.gov/csl/13-58/download>; CFTC Letter No. 14–108, Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2 (Aug. 18, 2014), <https://www.cftc.gov/csl/14-108/download>; CFTC Letter No. 15–25, Extension of No-Action Relief for SEF Confirmation and Recordkeeping Requirements under Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2, and Additional Relief for Confirmation Data Reporting Requirements under Commission Regulation 45.3(a) (Apr. 22, 2015), <https://www.cftc.gov/csl/15-25/download>; CFTC Letter No. 16–25, Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 14, 2016), <https://www.cftc.gov/csl/16-25/download>; and CFTC Letter No. 17–17, Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017), <https://www.cftc.gov/csl/17-17/download>.

² Commission Rule 23.501(a)(4)(i), 17 CFR 23.501(a)(4)(i).

¹ Looking back at OTC derivative reforms—objectives, progress and gaps, European Central Bank (Dec. 21, 2016), https://www.ecb.europa.eu/pub/pdf/other/eb201608_article02.en.pdf.

² *Id.*

Frank Act)³ amended the Commodity Exchange Act (CEA) and introduced a framework for the regulation of swaps that imposed central clearing and trade execution requirements, registration and comprehensive regulation of swap dealers, and recordkeeping and real-time reporting requirements.⁴ Under the Dodd-Frank Act, standardized swap transactions that are subject to the clearing mandate and designated made-available-to-trade must be executed on a registered or exempt designated contract market (DCM) or swap execution facility (SEF).⁵

Section 5h of the CEA prohibits a person from operating “a facility for the trading or processing of swaps unless the facility is registered as a [SEF] or as a [DCM] under this section.”⁶ A SEF, as a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, actively facilitates swap transactions in our markets by facilitating the execution of swaps between persons. Additionally, as registered platforms, SEFs play an active role in price discovery and transparency and policing and reporting swap transactions in an effort to monitor systemic risk.

Implementing the statutory mandate of the CEA, the Commission adopted new rules and principles for SEFs in 2013.⁷ In the adopting release, the Commission noted several of the key goals of the Dodd-Frank Act, including greater pre- and post-trade transparency, which results in lower costs for investors, businesses, and consumers; lower risk to the swap market and economy; and enhanced market integrity to protect market participants and the greater public.⁸ With these goals in mind, the Commission adopted the Part 37 regulations including Regulation 37.6.

Part 37 sets forth the operational requirements for SEFs and trading swaps on SEFs. The Commission adopted Regulation 37.6 and, in the adopting release, explained that this regulation was “intended to provide market participants who execute swap transactions on or pursuant to the rules of a SEF with legal certainty with respect to such transactions.”⁹

Specifically, CFTC Regulation 37.6(b) “requires, for uncleared transactions executed on or pursuant to the rules of a SEF, that the SEF ‘must have all terms . . . agreed

to no later than execution, such that the SEF can provide a written confirmation inclusive of those terms at the time of execution and report complete, non-duplicative, and non-contradictory data to an SDR as soon as technologically practicable after execution.’”¹⁰ Further, CFTC Regulation 37.6 explicitly stated that a “swap execution facility shall provide each counterparty with written documentation of all terms of the transaction to serve as confirmation of such transaction.”¹¹

Since the adoption of Regulation 37.6(b), some have expressed concerns regarding the feasibility of complying with the regulation.¹² In 2014,¹³ 2015,¹⁴ 2016,¹⁵ and 2017,¹⁶ the Division of Market Oversight issued no-action letters offering guidance and exempted relief.

In March of 2017, the Commission provided relief for SEFs with respect to the following requirements: (1) SEFs’ obligation to obtain documents incorporated by reference in a swap confirmation issued under Regulation 37.6(b) prior to issuing the confirmation; (2) SEFs’ obligation maintain such documents as records; and (3) SEFs’ obligation to report terms contained in such documents that are confirmation data.¹⁷ The Commission issued guidance and exemptive relief based on concerns that SEFs had been unable to develop a practicable and cost-effective method to request, accept, and maintain a library of the underlying previously-negotiated freestanding agreements between counterparties.

The proposal before us today seeks to codify the no-action relief provided in NAL 17–17 and address a decade of concerns voiced by SEFs. I support the proposal and look forward to carefully considering the comments we receive to determine the best path forward to protect our markets through the stability of SEFs while balancing practical approaches to implementing our regulatory requirements. I am hopeful the comments submitted in response to the proposal will answer some of the explicit questions set out in the release text as well as support the drafting of final rules that create clarity for SEFs and our markets.

I want to thank the staff of the Division of Market Oversight and in the Office of General Counsel—Roger Smith, Nora Flood, Jake Chachkin, Dina Moussa, Carlene Kim, Laura Badian, Paul Schlichting, Kenny Wright, Stephen Kane, and Madison Lau—for their diligent and thoughtful work on these proposed amendments.

Appendix 4—Statement of Commissioner Christy Goldsmith Romero

The regulation of swap markets, as mandated by Dodd-Frank Act reforms, is predicated on transparency, reporting, and recordkeeping. Swap execution facilities (SEF) registered with the CFTC are required under core principle 10 to maintain records of all activities, including a complete audit trail. Commission regulations require a SEF to provide a confirmation of transactions to counterparties, including a written record of all of the terms of the transaction, and to obtain copies of underlying, previously negotiated agreements between the counterparties.

From time to time, the Commission learns that its regulations are technologically difficult to implement. In those situations, it is prudent for the CFTC to revisit its regulations in order to keep pace with technology. Revisiting our regulations provides a permanent fix, rather than temporary no action relief that is extended over and over again, as the Commission staff have done with SEF confirmation requirements for uncleared swaps. This relief previously relieved SEFs of the requirement to obtain copies of the underlying, previously negotiated agreements between the counterparties.

As a general rule, I believe we need to be careful about proposing new rules that only codify no action relief from our regulation, particularly no action relief that has been extended for years. Instead, we should determine what we were trying to accomplish with the regulation, if we still want to accomplish that, and if there is another way to achieve that.

As the sponsor of the Technology Advisory Committee, I believe that we should be forward looking in considering technological innovations to bring the right fix when it comes to areas where there have been technological obstacles to compliance with CFTC regulations. Today, I support this rule because I support the idea that we need to fix what has become a technological obstacle.

I look forward to public comment about whether this proposed fix is the right permanent fix from a technological standpoint. I look forward to public comment on whether this fix locks in a system that may limit incentives for SEFs and other market participants to innovate using new technology that could provide copies of the underlying, previously negotiated agreements in compliance with the rule. In our risk-based regulatory system, counterparties should know who they are dealing with, and doing so requires swaps participants to proactively revisit existing documents. I am interested in public comment on whether the proposed fix would disincentivize SEFs from digitizing legacy documents and agreements, and requiring their market participants to do so as well. I am also interested in public comment about whether these digitized documents could be machine readable.

Digitized and/or machine-readable data could lower compliance costs, and increase transparency. In the Financial Data Transparency Act of 2022, which does not apply to the CFTC, other federal financial regulatory agencies will be required to

³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

⁴ Ilya Beylin, *Designing Regulation for Mobile Financial Markets*, 10 U. Cal. Irvine L. Rev. 497, 511 (2020).

⁵ Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33,606, 33,606 (June 4, 2013) (codified at 17 CFR parts 37, 38).

⁶ 7 U.S.C. 7b–3(a).

⁷ Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33,475 (Jun. 4, 2013) (codified in 17 CFR 37) (hereinafter “2013 SEF Core Principles Release”).

⁸ 2013 SEF Core Principles Release at 33,477.

⁹ 2013 SEF Core Principles Release at 33,490.

¹⁰ CFTC No-Action Letter 14–108 (Aug. 8, 2014) (quoting 2013 SEF Core Principles Release at 33,491), <https://www.cftc.gov/csl/14-108/download>.

¹¹ 2013 SEF Core Principles Release at 33,491.

¹² *Id.*

¹³ CFTC No-Action Letter 14–108.

¹⁴ CFTC No-Action Letter 15–25 (Apr. 22, 2015), <https://www.cftc.gov/csl/15-25/download>.

¹⁵ CFTC No-Action Letter 16–25 (Mar. 14, 2016), <https://www.cftc.gov/csl/16-25/download>.

¹⁶ CFTC No-Action Letter 17–17 (Mar. 24, 2017), <https://www.cftc.gov/csl/17-17/download>.

¹⁷ CFTC No-Action Letter 17–17 (Mar. 24, 2017), <https://www.cftc.gov/csl/17-17/download>.

develop data collection protocols and standards for machine readability. Other federal financial regulators will push this requirement to its registrants and supervised entities to collect, maintain, and submit data pursuant to these data transparency protocols and standards. This will impact registrants in our space that are dual registered with those financial regulators, and who will need to comply with those protocols and standards.

I look forward to hearing from members of industry, investor and consumer advocates, academics, and other stakeholders on these questions. I thank the staff for their work on this issue.

Appendix 5—Statement of Commissioner Caroline D. Pham

I support the Notice of Proposed Rulemaking on Swap Confirmation Requirements for Swap Execution Facilities (SEF Confirmation Proposal) because the Commission is finally fixing unworkable rules that have defied the reality of market structure, legal documentation, and operational processes since they were first issued in 2013. I would like to thank Roger Smith, Nora Flood, and Vince McGonagle in the Division of Market Oversight for their work on the SEF Confirmation Proposal.

As I previously stated, the Commission must take action to fix unworkable rules by codifying “perpetual” no-action relief through notice-and-comment rulemaking as required by the Administrative Procedure Act.¹ I am pleased that we are doing so today.

The Dodd-Frank Act amended the Commodity Exchange Act (CEA) to establish the SEF regulatory framework in order to reduce risk, promote transparency, and enhance market integrity for over-the-counter (OTC) derivatives.² Following that mandate, the CFTC implemented Part 37, which requires, among other things, that SEFs provide written final confirmation for uncleared swaps at the time of execution.³ Moreover, Rule 37.6(b) requires that SEFs provide each counterparty “a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction.” Contrary to its intent, this requirement actually *undermines* legal certainty by potentially voiding carefully negotiated and highly technical and complex legal agreements.⁴ These provisions, while well-intentioned, have proven impracticable (if not impossible) for both SEFs and market participants. In fact, the requirement to provide SEF confirmation at the time of execution is temporally impossible for block trades, which are executed away from the

SEF and then submitted to the SEF afterwards.

After hearing from the public, CFTC staff provided no-action relief in 2014 that has been extended repeatedly in order to provide a practical solution that could be implemented and would still support the CFTC’s public and regulatory transparency requirements. For example, the no-action relief provided that SEFs could incorporate prior agreements to a transaction by reference, instead of receiving hundreds of thousands of pages of legal agreements, such as bilateral counterparty swap trading relationship documentation, and then attaching hundreds of pages to SEF confirmations.⁵ This requirement was unworkable in light of Part 23 rules for swap dealers, and for a SEF to collect such legal documentation from swap counterparties and then to maintain it continuously on an ongoing basis (since these bilateral agreements are occasionally revised), turns SEFs into giant legal document repositories of questionable benefit.

Once CFTC staff realized the unrealistic nature of these SEF confirmation requirements, I believe the staff very prudently issued no-action relief. And I believe that this was an appropriate exercise of no-action relief because in the rush to implement the Dodd-Frank Act, the Commission did not always get it right.

When we don’t get it right, it is incumbent upon the Commission to acknowledge technical and operational issues and fix them. I look forward to public comment, particularly whether this proposal sufficiently fixes the unworkable aspects of our existing rules. Thank you.

[FR Doc. 2023–17747 Filed 8–24–23; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 161

[Docket No. FDA–2016–P–0147]

RIN 0910–AI74

Fish and Shellfish; Canned Tuna Standard of Identity and Standard of Fill of Container

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA or we) is proposing to amend the standard of identity and standard of fill of container for canned tuna. This action partially

responds to a citizen petition submitted by Bumble Bee Foods, LLC, StarKist Co., and Tri Union Seafoods, LLC (doing business as Chicken of the Sea International). We tentatively conclude that this action, if finalized, will promote honesty and fair dealing in the interest of consumers.

DATES: Either electronic or written comments on the proposed rule must be submitted by November 24, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of November 24, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, we will post your comment, as well as any attachments, except for

¹ Statement of Commissioner Caroline D. Pham on Conditional Order of SEF Registration, U.S. Commodity Futures Trading Commission (July 20, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072022>.

² Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1213, 1214 (Jan. 7, 2011) (codified at 17 CFR part 37).

³ See 17 CFR 37.6(b) (“The confirmation of all terms of the transaction shall take place at the same time as execution.”).

⁴ *Id.*

⁵ See, e.g., NAL No. 17–17, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017).

information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2016–P–0147 for “Fish and Shellfish; Canned Tuna Standard of Identity and Standard of Fill of Container.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Jennifer Shemansky, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration,

5001 Campus Dr., College Park, MD 20740, 240–402–2371, or Holli Kubicki, Center for Food Safety and Applied Nutrition, Office of Regulations and Policy (HFS–024), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2378.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary
A. Purpose and Coverage of the Proposed Rule
B. Legal Authority
C. Costs and Benefits
II. Background
A. Need for the Regulation—Citizen Petition and Temporary Marketing Permits
B. FDA’s Food Standards Modernization
C. Incorporation by Reference
III. Legal Authority
IV. Description of the Proposed Rule
A. Proposed Amendments to the Standard of Fill of Container
B. Proposed Amendments to the Standard of Identity
C. Proposed Update of Incorporation by Reference
D. Proposed Additional Revisions
V. Proposed Effective and Compliance Dates
VI. Request for Information
VII. Preliminary Economic Analysis of Impacts
VIII. Analysis of Environmental Impact
IX. Paperwork Reduction Act of 1995
X. Federalism
XI. Consultation and Coordination With Indian Tribal Governments
XII. References

I. Executive Summary

A. Purpose and Coverage of the Proposed Rule

FDA is proposing to revise the canned tuna standard of identity and standard of fill of container established at § 161.190 (21 CFR 161.190). The proposed rule, if finalized, will modernize and update these food standards and is in partial response to a citizen petition submitted by Bumble Bee Foods, LLC, StarKist Co., and Tri Union Seafoods, LLC (doing business as (dba) Chicken of the Sea International) (the petitioners). The proposed rule would:

- replace the pressed cake weight method with the drained weight method to determine the standard fill of container (see proposed § 161.190(a)(3)(ii) and (iii), (a)(7), and (c));
- revise the introductory text in § 161.190(a)(5) thereby clarifying that use of a packing medium is optional;
- remove provisions for specific flavorings and spices (*i.e.*, monosodium glutamate currently in § 161.190(a)(6)(ii), spices or spice oils or spice extracts currently in

§ 161.190(a)(6)(iv), garlic currently in § 161.190(a)(6)(vi), and lemon flavoring currently in § 161.190(a)(6)(vii)), which are covered under § 101.22(a) (21 CFR 101.22(a)), to avoid redundancy;

- revise § 161.190(a)(6)(ii) to allow use of safe and suitable optional ingredients in accordance with § 101.22, and remove the discussion of safe and suitable carriers, solubilizing, or dispersing ingredients that may be used in combination with a flavoring or spice ingredient currently in § 161.190(a)(6)(vii);

- revise § 161.190(a)(1) to move the optional ingredient of sodium acid pyrophosphate to proposed § 161.190(a)(6)(v) and revise § 161.190(a)(8)(vii) regarding the labeling of canned tuna products containing sodium acid pyrophosphate to update the cross-reference from paragraph (a)(1) to paragraph (a)(6)(v);

- revise the upper and lower limits of vegetable extractives under § 161.190(a)(6)(iii) pertaining to amount of vegetable broth allowed to be used as an optional ingredient;

- amend § 161.190(a)(8)(vi) for clarity and consistency with other label declaration provisions in the Code of Federal Regulations (CFR);

- add a provision at § 161.190(a)(8)(x) for clarity and consistency with food standards in 21 CFR parts 131 through 169, which include a similar provision for label declaration information;

- revise § 161.190(a)(7) to update the method for determining the Munsell value and remove the incorporation by reference text regarding the Journal of the Optical Society of America (in current § 161.190(a)(7)(iii));

- add paragraph (d) to § 161.190 to update the incorporation by reference information (currently found in § 161.190(a)(7)); and

- revise language throughout the section to improve clarity and readability.

B. Legal Authority

We are issuing this proposed rule under section 401 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 341), which grants FDA the authority to establish a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container if such actions will promote honesty and fair dealing in the interest of consumers. There are already standards of identity and fill of container in place for canned tuna (§ 161.190(a) and (c), respectively). We tentatively conclude that revising these food standards will promote honesty and fair dealing in the interest of consumers. Allowing for

more flexibility and for the use of modern methods in the standards will allow for production of a wider range of products to meet consumer tastes and preferences.

C. Costs and Benefits

We estimate benefits of the proposed rule, if finalized. We estimate ongoing annual cost savings ranging from approximately \$4 million to \$15.9 million at a 3 percent discount rate, and approximately \$3.9 million to \$15.8 million at a 7 percent discount rate. Our primary annualized estimates are approximately \$7.9 million at both the 3 percent and 7 percent discount rates. The primary estimate of the present value of total cost savings in the 10 years following any final rule that may be issued based on the proposed rule is \$67.6 million at a 3 percent rate of discount and \$55.4 million at a 7 percent rate of discount. Manufacturers and consumers may benefit from other provisions of the proposed rule, if finalized, but these impacts are harder to quantify.

The costs of the proposed rule, if finalized, are associated with costs to industry for reading and understanding the rule, training employees on new requirements, and the purchase of new equipment. These are one-time costs that industry incurs immediately after any final rule that may be issued based on this proposed rule passes its compliance date. When annualized over a period of 10 years, we estimate these costs range from approximately \$3,800 to \$6,000 at a 3 percent discount rate, and approximately \$4,500 to \$7,100 at a 7 percent discount rate. Our primary annualized estimates are approximately \$4,900 at a 3 percent discount rate and \$5,800 at a 7 percent discount rate. The primary estimate of total costs in the 10 years following any final rule that may be issued based on this proposed rule is \$41,600 at a 3 percent discount rate and \$40,600 at a 7 percent discount rate.

II. Background

A. Need for the Regulation—Citizen Petition and Temporary Marketing Permits

Bumble Bee Foods, LLC, StarKist Co., and Tri Union Seafoods, LLC (dba Chicken of the Sea) submitted a citizen petition (FDA-2016-P-0147) requesting that we amend § 161.190 to:

- base the standard of fill of container on the product's drained weight rather than the pressed cake weight;
- require that the net contents declaration include both the net weight and drained weight;
- provide that use of a packing medium is optional;

- permit the use of any flavoring;
- limit the amount of vegetable broth that may be added as a flavoring based on the dry weight of the vegetable extractives;
- provide that a label statement about added salt is optional; and
- specify that canned tuna is packed in hermetically sealed rigid metal cans to clarify that pouch tuna products are not covered by the standard of identity. (See Citizen Petition from Steven Mavity, Senior Vice President, Technical Services & Corporate Quality, Bumble Bee Foods, LLC, Nabil Salib, Vice President of Operations, StarKist Co., and John DeBeer, Vice President, Tri-Union Seafoods, LLC (dba Chicken of the Sea International), to Division of Dockets Management, Food and Drug Administration, dated September 3, 2015 ("petition") at page 1.) The proposed rule would revise the canned tuna standard of fill of container and standard of identity in partial response to the petition.

In addition to submitting a citizen petition, the petitioners submitted applications for temporary marketing permits (TMP) to market test products (designated as "canned tuna" products) that deviate from the requirements in § 161.190. We issued the temporary permits to each applicant in accordance with 21 CFR 130.17 (see 79 FR 35362, June 20, 2014). The temporary permits covered limited interstate marketing tests of products identified as "canned tuna." These test products deviated from § 161.190 in that they did not meet the standard of fill of container and were not labeled with the statement "Below Standard in Fill" as required in § 161.190(c)(4) and 21 CFR 130.14(b). The TMPs allowed applicants to test market canned tuna products using a standard fill of container based on the drained weight rather than the pressed cake weight. The TMPs also allowed applicants to provide a net quantity of contents declaration that includes both the net and drained weight. In the **Federal Register** of March 7, 2016 (81 FR 11813), we announced an extension of the temporary permits. The extension allowed the applicants to continue to measure consumer acceptance of the products and assess the commercial feasibility of the products, in support of the petition to amend § 161.190. The new expiration date for the permits is either the effective date of a final rule amending § 161.190 that may result from the petition or 30 days after denial of the petition. All other conditions and terms of the permits remained the same (see 81 FR 11813). In the March 7, 2016, notice, we invited other interested parties to participate in the market test

(id.). To date, FDA has approved several firms to participate in the market test. In the **Federal Register** of March 5, 2021 (86 FR 12954), we published a notice amending StarKist Co.'s temporary permit to add three manufacturing locations and to increase the amount of test product. More recently, in the **Federal Register** of December 28, 2021 (86 FR 73789), we published a notice adding a manufacturing location for both Bumble Bee Foods, LLC and StarKist Co. and to increase the amount of test product that could be marketed by StarKist Co. We also published a notice in the **Federal Register** of December 21, 2022 (87 FR 78110), allowing StarKist Co. to manufacture test product at one additional plant.

These active TMPs for canned tuna products allowed applicants to deviate from § 161.190 so the standard fill of container is based on the drained weight method rather than the pressed cake weight method. Based on input from the industry, we understand that use of the pressed weight method is outdated. Products using the drained weight method appear to have gained consumer acceptance since becoming available. Our proposed amendments to § 161.190 will modernize multiple aspects and requirements of the standards, including allowing use of the drained weight method.

B. FDA's Food Standards Modernization

Section 401 of the FD&C Act specifically states that standards are meant to promote honesty and fair dealing in the interest of the consumer. Food standards typically set forth permitted ingredients, both mandatory and optional, and sometimes specify the amount or proportion of each ingredient. Many food standards also designate the method of production. Since we established many food standards decades ago, various stakeholders have expressed concerns that many food standards are out of date and may impede innovation. The goal in updating or modernizing food standards is to maintain the basic nature and essential characteristics of standardized foods, while permitting flexibility for more modern methods, technologies, or new ingredients, as well as continued innovations (see <https://www.fda.gov/food/food-labeling-nutrition/standards-identity-food>). We seek to modernize food standards in a manner that will: (1) protect consumers against economic adulteration; (2) maintain the food's basic nature, essential characteristics, and nutritional integrity; and (3) promote industry innovation and provide flexibility to encourage manufacturers to produce more healthy

foods (see 84 FR 45497 at 45499, August 29, 2019).

Amending the canned tuna standards may help modernize these food standards and may provide consumers with a wider variety of choices of tuna products. Additional choices of tuna products could lead to increased consumption. The 2020–2025 Dietary Guidelines for Americans (Ref. 1 at page 34) (see also <https://www.dietaryguidelines.gov>) notes almost 90 percent of Americans do not meet the recommendation for seafood intake.

C. Incorporation by Reference

The proposed rule, if finalized, would incorporate by reference Definitions of Terms and Explanatory Notes from Table 1, Nominal Dimensions of Standard Test Sieves (U.S.A. Standard Series), in Official Methods of AOAC INTERNATIONAL, 22nd Ed. (2023). The Office of the Federal Register (OFR) has regulations concerning incorporation by reference (see 1 CFR part 51). These regulations require that, for a final rule, Agencies must discuss in the preamble to the rule the way in which materials that the Agency incorporates by reference are reasonably available to interested persons, and how interested parties can obtain the materials. Additionally, the preamble to the rule must summarize the material (see 1 CFR 51.5(b)).

In accordance with the OFR's requirements, the discussion in section IV.C. of this document summarizes the required provisions of the material that we propose to incorporate by reference. Interested persons may purchase a copy of the material from AOAC INTERNATIONAL (AOAC), 2275 Research Blvd., Suite 300, Rockville, MD 20850–3250, 1–800–379–2622. You may inspect a copy at Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, between 9 a.m. and 4 p.m., Monday through Friday. AOAC INTERNATIONAL provides access to table 1 at <https://academic.oup.com/aoac-publications/book/45491/chapter/392327291>.

III. Legal Authority

We are issuing this proposed rule under section 401 of the FD&C Act, which grants FDA the authority to establish a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container if such actions will promote honesty and fair dealing in the interest of consumers. Canned tuna is among the foods that

FDA has standardized under this authority (see § 161.190). Standards of identity and fill of container were established for canned tuna in 1957 (see 22 FR 892, February 13, 1957). Although the standards have been amended several times, certain requirements appear to be outdated. We tentatively conclude that amending these requirements in the standards will promote honesty and fair dealing in the interest of consumers. Allowing for more flexibility and for the use of modern methods in the standards will allow for production of a wider range of products to meet consumer tastes and preferences.

IV. Description of the Proposed Rule

We are proposing to amend our canned tuna standard of identity and standard of fill of container (§ 161.190). The proposed rule would allow industry to use the internationally accepted drained weight method, further clarify the standards, and permit more flexibility. The proposed rule also would further clarify whether certain ingredients are optional within the standard of identity.

A. Proposed Amendments to the Standard of Fill of Container

The current standard of fill of container for canned tuna requires that the pressed cake weight method be used (see § 161.190(c)(1)). The petition requested, in part, that the pressed cake weight method be replaced with the drained weight method (petition at pages 1 and 9).

We agree that the pressed cake weight method should be replaced with the drained weight method. We do not agree with the petitioners' suggestion to base the drained weight method for canned tuna products solely on the AOAC Official Method 968.30 Canned Vegetables: Drained Weight Procedure (petition at page 7). This method is specific for canned vegetables and requires modification for canned tuna. We propose to use a drained weight method that is based on both the drained weight method specified in the Codex standard for canned tuna and bonito (CODEX STAN 70–1981) (Ref. 2) and the AOAC method 968.30 (Ref. 3). Although both methods are very similar, the Codex standard helps to provide necessary details to modify the AOAC method 968.30 for canned tuna.

The proposed rule would delete the text in § 161.190(c) “*Fill of container*” and replace it with text on the drained weight method. The proposed rule would, however, keep the provision currently at § 161.190(c)(4) for canned tuna that falls below the applicable

standard of fill of container, but would redesignate it as § 161.190(c)(3) to be consistent with other proposed changes to the standard. The proposed rule also would update certain provisions in the canned tuna standard of identity to reflect the proposed change from the pressed cake weight method to the drained weight method. Specifically, the proposed rule would change the specifications for chunk and flake tuna in § 161.190(a)(3)(ii) and (iii), respectively, so they will be based on the “drained weight of the contents of the container” instead of the “pressed contents” of the container. Additionally, the proposed rule would amend § 161.190(a)(7) so that portions of the drained product are combined rather than starting with a pressed cake. To maintain the structure of the standard, the proposed rule would redesignate other sections of the current standard and replace the pressed cake weight method with the drained weight method in the redesignated paragraphs. Specifically, the proposed rule would redesignate the determination of free flakes in § 161.190(c)(2)(xi) as § 161.190(c)(2)(i) and revise the newly designated paragraph (c)(2)(i). The proposed rule would redesignate determination of particle size from § 161.190(c)(2)(xii) to § 161.190(c)(2)(ii) and revise newly designated paragraph (c)(2)(ii). The redesignated paragraphs in paragraphs (c)(2)(i) and (ii) would be revised to incorporate the drained weight method. The proposed rule also would redesignate the paragraph that describes a sieving device used for size separation in § 161.190(c)(3)(iv) as § 161.190(c)(2)(iii).

We are proposing these changes because the pressed cake weight method is only required in the U.S. canned tuna standards and does not align with current industry practice in the United States. For example, the pressed cake weight method relies upon using a 3-piece can, but the current industry practice is to use a 2-piece can. In comparison, the type of packaging is irrelevant when using the drained weight method. The pressed cake weight method relies on more complex instrumentation and requires more steps than the drained weight method, resulting in a more costly procedure with a wider margin of error than the drained weight method. The pressed cake weight method is therefore more difficult to perform, more prone to human error, and may produce inconsistent results compared with the drained weight method. The drained weight method is used in the production of many other foods, both

domestically and internationally. FDA food standards require the drained weight method in production of canned fruit cocktail, canned pineapple, canned green beans and canned wax beans, canned tomatoes, canned mushrooms, and canned oysters (see 21 CFR 145.135, 145.180, 155.120, 155.190, 155.201, and 161.145, respectively). Compared to the pressed cake weight method, the drained weight method is easier to perform, and produces more consistent and reliable results. The drained weight method can be performed using a balance or a food scale and a sieve or strainer.

The proposed amendments to § 161.190(c) differ from what the petition requested because we describe the drained weight method for use with canned tuna products in the standard. The proposed drained weight method is based on both the Codex standard for canned tuna and bonito (Ref. 2) and the AOAC drained weight method for canned vegetables (Ref. 3). Both the proposed drained weight method and the Codex standard contain more details than the AOAC drained weight method requested in the petition. The Codex standard gives clear, easy-to-follow instructions that are specific for canned tuna products. The proposed drained weight method aims for clarity, readability, and ease of implementation. As a result, the proposed canned tuna standard of fill incorporates much of the Codex standard, except the units are changed to include both the imperial system as well as the metric system (for example, including temperature ranges in both Fahrenheit and Celsius, and sieve sizes in inches and centimeters). However, we propose to maintain some components of the current pressed cake weight method, such as the temperature range. We are also proposing to maintain using the average weight from 24 cans but modifying it to use the average weight from a minimum of 24 containers to allow manufacturers to adjust their sampling amount for larger production volumes, if needed.

Additionally, we disagree with the petitioners' request to limit the standard to rigid metal cans (petition at pages 1, 2, and 10). The proposed drained weight method may be used for any type of hermetically sealed container (e.g., can, pouch, jar), in contrast to the pressed cake method, which required the use of rigid metal cans to meet the requirements. Accordingly, we have not proposed any conforming changes to limit the standard of identity to rigid metal containers in § 161.190(a)(1) as the petition requested. In addition, to help make clear that hermetically sealed containers in which canned tuna is

packed may include containers other than rigid metal cans, we are proposing to revise § 161.190(a)(3)(i) to consistently refer to "container" or "containers" rather than "can" or "cans."

Unlike the pressed cake weight method, the drained weight method is simple enough that a consumer could check the amount of tuna at home if they wanted to verify the amount of tuna in the package. The switch from the pressed cake weight method to the drained weight method may promote honesty and fair dealing in the interest of the consumer.

B. Proposed Amendments to the Standard of Identity

1. Clarification That a Packing Medium Is Optional

The petition requested that we provide that the use of a packing medium is optional (petition at pages 1 and 9). Under our current regulations, the use of packing media is optional (§ 161.190(a)(5)); however, to further clarify, the proposed rule would revise the introductory paragraph of § 161.190(a)(5) to read "*Optional packing media*. Canned tuna may be in one or more of the following optional packing media:". We propose to add a paragraph heading to help improve clarity of the section. We also propose a conforming revision to paragraph (a)(1) to read, in relevant part, ". . . may be in one or more of the optional packing media specified in paragraph (a)(5) of this section, . . .".

2. Revocation of the Requirement That Canned Tuna Bear a Label Statement When Salt Is Used as an Optional Ingredient

Under our current regulations, salt is an optional ingredient (see § 161.190(a)(6)(i)). If salt is used as an ingredient, the label of canned tuna must bear the statement "seasoned with salt" (§ 161.190(a)(8)(vi)). Alternatively, the label may bear any of the statements "salted," "with added salt," or "salt added" if salt is the only seasoning ingredient used. The petition requested that we make a label statement about added salt optional (petition at pages 1 and 10).

We agree that a label statement about salt should not be mandatory given that salt must be declared on the label in the ingredient statement (see section 403(i)(2) of the FD&C Act (21 U.S.C. 343(i)(2)) and § 101.4 (21 CFR 101.4(a))). We also note that salt is not a characterizing ingredient that differentiates canned tuna varieties such as those seasoned with flavorings and

spices, vegetable broth, or vegetable oil(s). Consequently, we propose to amend § 161.190(a)(8)(vi) to only apply to the characterizing ingredients in § 161.190(a)(6)(ii) through (iv) and not to salt.

In addition, the proposed rule would clarify § 161.190(a)(6) so it is easily understood that salt is an optional ingredient. The proposed rule would amend the introductory paragraph in § 161.190(a)(6) to include the heading "*Optional Ingredients*. One or more of the following safe and suitable optional ingredients may be used:". This proposed change also would make the format in the canned tuna standard more consistent with other standards, such as the canned Pacific salmon and canned wet pack shrimp standards (see §§ 161.170 and 161.173, respectively).

3. Expand Optional Ingredients To Allow for Safe and Suitable Flavorings and Spices in Accordance With § 101.22

Our current regulations list seasonings and flavorings with which canned tuna may be seasoned or flavored (§ 161.190(a)(6)). The petition requested that FDA permit the use of any flavoring (petition at pages 1 and 9).

We agree that the canned tuna standard is restrictive regarding the use of flavorings. The proposed rule would amend § 161.190(a)(6)(ii) to permit flavorings and spices in accordance with § 101.22 as optional ingredients. The proposed rule would make corresponding revisions to § 161.190(a)(1) by changing "seasonings and flavorings" to "safe and suitable optional ingredients." To avoid redundancy, the proposed rule would remove monosodium glutamate (currently listed in § 161.190(a)(6)(ii)), spices or spice oils or spice extracts (currently listed in § 161.190(a)(6)(iv)), garlic (currently listed in § 161.190(a)(6)(vi)), and lemon flavoring (currently listed in § 161.190(a)(6)(vii)) because these ingredients are covered under § 101.22 (Foods; labeling of spices, flavorings, colorings and chemical preservatives).

The proposed rule would remove spices or spice oils or spice extracts from § 161.190(a)(6)(iv) and would group them with flavorings and spices in § 161.190(a)(6)(ii). Spice oils and spice extracts would still be permitted as optional ingredients in canned tuna because they are covered under proposed § 161.190(a)(6)(ii). Spice oils and spice extracts are covered under natural flavorings as defined in § 101.22(a)(3).

The proposed rule also would remove hydrolyzed protein (currently listed in § 161.190(a)(6)(iii)) because hydrolyzed

protein is a flavor and a flavor enhancer (see § 101.22(h)(7)) and therefore is covered under proposed § 161.190(a)(6)(ii).

The proposed rule would remove the text regarding sodium acid pyrophosphate currently in § 161.190(a)(1) and move it to proposed § 161.190(a)(6)(v). This revision would consolidate the optional ingredients in the standard and better clarify that sodium acid pyrophosphate is also an optional ingredient. The proposed rule would also revise § 161.190(a)(8)(vii) regarding labeling of canned tuna products that contain sodium acid pyrophosphate to update the cross-reference for the new location of the sodium acid phosphate optional ingredient provision from paragraph (a)(1) to paragraph (a)(6)(v). As for lemon flavoring, as stated earlier, the proposed rule would remove the lemon flavoring paragraph in § 161.190(a)(6)(vii), and it also would remove the language specific to lemon flavoring in § 161.190(a)(8)(vi) and (viii) and renumber the remaining paragraphs accordingly.

To further effectuate the changes proposed in § 161.190(a)(6)(ii) through (iv), the proposed rule would include conforming changes to the label declaration provisions in proposed § 161.190(a)(8)(vi). Specifically, we propose revising § 161.190(a)(8)(vi) to state that “[i]f the canned tuna contains one or more of the optional ingredients in paragraphs (a)(6)(ii) through (iv) of this section, the label must appropriately declare the ingredients by the common or usual name in accordance with § 101.22. If the ingredients designated in paragraph (a)(6)(iii) of this section are used, the term ‘vegetable broth’ must be declared.” The proposed rule would also add that the label statements declare the ingredients by the common or usual name “in accordance with 21 CFR 101.22” for clarity and consistency with our other regulations (proposed § 161.190(a)(8)(vi)) (see, for example, 21 CFR 163.111(c)(3) (Chocolate liquor) and 21 CFR 163.124(c) (White chocolate)). In addition, the proposed rule would add a provision in § 161.190(a)(8)(x) that states that “Each of the ingredients used in the food must be declared on the label as required by the applicable sections of parts 101 and 130 of this chapter.” The proposed revision would be consistent with other food standards (see, for example, 21 CFR 145.175(a)(4)(iv) (Canned pears) and 21 CFR 161.145(a)(4) (Canned oysters)).

Use of additional flavor profiles, along with the use of more modern methods,

may help industry in producing canned tuna products that better meet evolving tastes and consumer preferences. This may help encourage tuna consumption consistent with the seafood recommendations outlined in the 2020–2025 Dietary Guidelines for Americans (Ref. 1).

We note that a notice of proposed rulemaking, “Use of Salt Substitutes to Reduce the Sodium Content in Standardized Foods,” proposes additional changes that would amend § 161.190(a)(6)(i) to allow the use of salt substitutes, if finalized (see 88 FR 21148, April 10, 2023). Additionally, we note that a direct final rule, “Revocation of Uses of Partially Hydrogenated Oil in Foods” (see 88 FR 53764, August 9, 2023), and companion notice of proposed rulemaking, “Revocation of Uses of Partially Hydrogenated Oil in Foods; Companion Document to Direct Final Rule” (see 88 FR 53827, August 9, 2023), revised § 161.190(a)(6)(viii) to remove partially hydrogenated vegetable oil. This proposed rulemaking would redesignate § 161.190(a)(6)(viii) as § 161.190(a)(6)(iv) to accommodate other proposed changes to § 161.190(a)(6) and proposes minor editorial changes to the language in the paragraph.

4. Revise the Upper and Lower Limits of Vegetable Extractives for Vegetable Broth Used as an Optional Flavoring Ingredient

Our current regulations state that canned tuna may be seasoned or flavored with vegetable broth in an amount not in excess of 5 percent of the volume capacity of the container, such broth to consist of a minimum of 0.5 percent by weight of vegetable extractives and to be prepared from two more of the following vegetables: beans, cabbage, carrots, garlic, onions, parsley, peas, potatoes, green bell peppers, red bell peppers, spinach, and tomatoes (see § 161.190(a)(6)(v)). The petition requested, among other things, that we revise this paragraph to limit the amount of vegetable broth that may be added as a flavoring based on the dry weight of the vegetable extractives, as well as revise the wording to reflect current industry practices and terminology (petition at pages 1, 3, and 10).

We generally agree with the petitioners’ suggested rephrasing. Vegetable broth is no longer added directly to the can; it is added as extractives and water, separately. Shifting the range of permitted vegetable extractives would result in a reduction in the concentration of permitted

vegetable broth in standardized canned tuna products.

We understand that the current upper limit of 5 percent vegetable extractives is likely not used due to flavor and gelling issues. We support lowering the upper limit of vegetable extractives to 2.5 percent as the petition requested (petition at page 3). However, we seek additional information regarding the rationale for the lower limit of 0.025 percent vegetable extractives requested in the petition (id.). The proposed rule would revise the upper limit range of vegetable extractives to 2.5 percent and remove the lower limit of vegetable extractives. The petition’s requested lower limit of 0.025 percent vegetable extractives would add a small amount of vegetable extractives, similar to tuna packed in water. If a firm adds any vegetable extractives, regardless of the percentage, the firm must disclose the ingredients on the label (§ 101.4). We invite comments on the petitioners’ request for a lower limit of 0.025 percent vegetable extractives (petition at page 3).

The proposed rule also would redesignate § 161.190(a)(6)(v) as § 161.190(a)(6)(iii) to accommodate other proposed changes to paragraph (a)(6) regarding optional ingredients.

5. Revise and Update the Method for Color Determination

The proposed rule would revise and update the method for color determination in § 161.190(a)(7). Currently, the regulation describes use of an optical comparator for determining the Munsell values for the color designations for canned tuna in § 161.190(a)(4). We propose removing the portions of § 161.190(a)(7) that are specific to the use of an optical comparator as this change will accommodate the use of electronic color meters to determine the Munsell values. Electronic color meters are likely faster, more widely used, and more objective than using an optical comparator. These proposed changes would align the level of detail for the canned tuna method for color determination with other regulations that rely on Munsell values (see, e.g., Canned tomatoes (21 CFR 155.190) and Vegetable Juices (21 CFR part 156)).

Additionally, we propose to remove the incorporation by reference in § 161.190(a)(7)(iii) of the 1943 report regarding the spacing of Munsell colors published in the *Journal of the Optical Society of America*. Removing the 1943 *Journal of the Optical Society of America* reference would be consistent with other U.S. food standards, which refer to the Munsell value without citing

a source or otherwise incorporating an article by reference in support.

C. Proposed Update of Incorporation by Reference

To help with readability of the section, we propose to add a new paragraph (d) “*Incorporation by reference.*” for the proposed updates to the IBR paragraphs in § 161.190(a)(7).

Currently, § 161.190(a)(7) incorporates by reference the “Official Methods of Analysis of the Association of Official Analytical Chemists,” 13th Edition (1980), Table 1, “Nominal Dimensions of Standard Test Sieves (U.S.A. Standard Series),” under the heading “Definitions of Terms and Explanatory Notes.” We propose to update the regulation to refer to the 22nd Edition of the same table. Table 1 provides information about international and USA standard sieve sizes, including sieve designations, the nominal sieve opening (in inches), and the nominal wire diameter (in millimeters) for each sieve.

We propose several updates to the contact information for access to the IBR materials. Specifically, we propose updating the National Archives and Records Administration’s (NARA’s) contact information by removing the phone number, revising the URL, and adding an email address. We propose adding FDA’s Dockets Management Staff contact for information regarding the availability of copies of the material incorporated by reference in proposed § 161.190(d). We also propose to update the address and to add a phone number for AOAC INTERNATIONAL.

These proposed changes will ensure that the reference materials are accessible, if needed, and in accordance with the specified requirements for incorporation by reference in the CFR. We note that a notice of proposed rulemaking, “Use of Salt Substitutes to Reduce the Sodium Content in Standardized Foods,” proposes a new section (§ 161.10) for the incorporation by reference information for all of part 161 (see 88 FR 21148). There is no substantive difference between the material we propose to incorporate by reference in this proposal and the proposed material incorporated by reference in the salt substitutes proposed rule.

D. Proposed Additional Revisions

We are proposing additional revisions throughout the section to improve the clarity and readability of the section and to use plain language. For example, we are proposing to add paragraph headings for paragraphs (a)(1) through (8), and we are proposing editorial

changes to simplify phrasing and to use consistent terminology throughout the section.

V. Proposed Effective and Compliance Dates

We propose that any final rule that may be issued based on this proposed rule become effective 30 days after publication of the final rule in the **Federal Register**. The final rule would apply to affected products initially produced or initially delivered for introduction into interstate commerce on or after the effective date. We propose that the compliance date for any final rule that may be issued based on this proposed rule be 1 year after publication of the final rule in the **Federal Register**.

VI. Request for Information

The petition requested that we limit the amount of vegetable broth that may be added as a flavoring based on the dry weight of the vegetable extractives used (petition at page 1). The standard of identity currently states the vegetable extractives are not to exceed 5 percent of the volume capacity of the container, with a minimum broth consisting of 0.5 percent by weight of vegetable extractives (§ 161.190(a)(6)(v)). The petition requested that the dry weight of the vegetable extractives in the aqueous broth is at least 0.025 percent and not more than 2.5 percent of the labeled net weight of the container (petition at pages 3 and 10).

The proposed rule would revise the upper limit range of vegetable extractives to 2.5 percent but remove the lower limit of vegetable extractives (see proposed § 161.190(a)(6)(iii)). Thus, in addition to comments on the proposed rule itself, we request comments on whether there should be a lower limit of vegetable extractives and if so, whether the lower limit should be 0.025 percent as the petition requested (petition at page 3) or another percentage. Please provide data to support a lower limit.

VII. Preliminary Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 14094, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Orders 12866, 13563, and 14094 direct us to assess all benefits, costs, and transfers of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential

economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Rules are “significant” under Executive Order 12866 Section 3(f)(1) (as amended by Executive Order 14094) if they “have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of [the Office of Information and Regulatory Affairs (OIRA)] for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities.” OIRA has determined that this proposed rule is not a significant regulatory action under Executive Order 12866 Section 3(f)(1).

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the proposed rule would not significantly increase costs to manufacturers, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes estimates of anticipated impacts, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

The proposed rule, if finalized, would amend existing requirements for the canned tuna standard of identity and standard of fill of container. These include changes to methods for determining the fill of a container, expanding the list of optional flavorings and spices, and reducing the maximum amount of vegetable broth that can be used as an ingredient. The proposed rule is in partial response to a 2015 citizen petition submitted by Bumble Bee Foods, LLC, StarKist Co., and Tri Union Seafoods, LLC (dba Chicken of the Sea).

To estimate costs and benefits associated with the proposed rule, we assume that the appropriate baseline is the state of the world with the current standard of identity and standard of fill

of container for canned tuna. We then compare the likely impacts of the proposed rule against this baseline. The quantifiable benefits of the proposed rule accrue to canned tuna manufacturers. These firms benefit from switching to a less costly method for determining the fill of a container. We estimate ongoing annual cost savings ranging from approximately \$4 million to \$15.9 million at a 3 percent discount rate, and approximately \$3.9 million to \$15.8 million at a 7 percent discount rate. Our primary annualized estimates are approximately \$7.9 million at both the 3 percent and 7 percent discount rates. The primary estimate of the

present value of total cost savings in the 10 years following any final rule that may be issued based on the proposed rule is \$67.6 million at a 3 percent rate of discount and \$55.4 million at a 7 percent rate of discount. Manufacturers and consumers may benefit from other provisions of the proposed rule, if finalized, but these impacts are harder to quantify. We summarize quantified benefits in table 1.

The costs of the proposed rule, if finalized, are associated with costs to industry for reading and understanding the rule, training employees on new requirements, and the purchase of new equipment. These are one-time costs that industry incurs immediately after

any final rule that may be issued based on the proposed rule passes its compliance date. When annualized over a period of 10 years, we estimate these costs range from approximately \$3,800 to \$6,000 at a 3 percent discount rate, and approximately \$4,500 to \$7,100 at a 7 percent discount rate. Our primary annualized estimates are approximately \$4,900 at a 3 percent discount rate and \$5,800 at a 7 percent discount rate. The primary estimate of the present value of total costs in the 10 years following any final rule that may be issued based on the proposed rule is \$41,600 at a 3 percent discount rate and \$40,600 at a 7 percent discount rate.

TABLE 1—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized Monetized \$millions/year	\$7.9	\$3.9	\$15.8	2022	7	10	
	7.9	4	15.9	2022	3	10	
Annualized Quantified .....	.....	.....	.....	.....	7	.....	
	.....	.....	.....	.....	3	.....	
Qualitative							
Costs:							
Annualized Monetized \$millions/year	0.01	0.00	0.01	2022	7	10	
	0.00	0.00	0.01	2022	3	10	
Annualized Quantified .....	.....	.....	.....	.....	7	.....	
	.....	.....	.....	.....	3	.....	
Qualitative							
Transfers:							
Federal Annualized Monetized \$millions/year .....	.....	.....	.....	.....	7	.....	
	.....	.....	.....	.....	3	.....	
From/To	From:			To:			
Other Annualized Monetized \$millions/year ...	.....	.....	.....	.....	7	.....	
	.....	.....	.....	.....	3	.....	
From/To	From:			To:			
Effects:							
State, Local or Tribal Government: None.							
Small Business: None.							
Wages: None.							
Growth: None.							

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 4) and at <https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations>.

VIII. Analysis of Environmental Impact

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

IX. Paperwork Reduction Act of 1995

While FDA tentatively concludes that this proposed rule contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required. The previously approved collections of information are

subject to review by OMB under the PRA. The collections of information in 21 CFR part 101 have been approved under OMB control number 0910–0381.

X. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that this proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XI. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the proposed rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. FDA solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

XII. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <https://www.regulations.gov>. References without asterisks are not on public display at <https://www.regulations.gov> because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

- * 1. U.S. Department of Agriculture and U.S. Department of Health and Human Services. “Dietary Guidelines of Americans, 2020–2025,” 9th ed.
- * 2. Codex Alimentarius, International Food Standards, Codex standard for canned

tuna and bonito (CODEX STAN 70–1981, R (Adopted in 1981. Revised in 1995. Amended in 2011, 2013, 2016, 2018.).

https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252Fstandards%252FCXS%2B70-1981%252FCXS_070e.pdf. Accessed June 8, 2023.

- 3. Official Methods of Analysis of AOAC INTERNATIONAL (2023, 22nd ed., AOAC INTERNATIONAL, Rockville, MD, Official Method 968.30.
- * 4. Fish and Shellfish; Amendments to the Canned Tuna Standard of Identity and Standard of Fill of Container, Docket No. FDA–2016–P–0147, Preliminary Regulatory Impact Analysis, Initial Regulatory Flexibility Analysis, Unfunded Mandates Reform Act Analysis. <https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations>.

List of Subjects in 21 CFR Part 161

Food grades and standards, Frozen foods, Incorporation by reference, Seafood.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, the FDA proposes that 21 CFR part 161 be amended as follows:

PART 161—FISH AND SHELLFISH

- 1. The authority citation for part 161 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 343, 348, 371, 379e.

- 2. In § 161.190:
 - a. Revise paragraph (a)(1);
 - b. Add a heading to paragraph (a)(2);
 - c. Revise paragraph (a)(3);
 - d. Add a heading to paragraph (a)(4);
 - e. Revise paragraphs (a)(5) through (7);
 - f. Add a heading to paragraph (a)(8);
 - g. Revise paragraphs (a)(8)(i), (iii), and (v) through (ix);
 - h. Add paragraph (a)(8)(x);
 - i. Revise paragraph (c); and
 - j. Add paragraph (d).

The revisions and additions read as follows:

§ 161.190 Canned tuna.

(a) * * *

(1) *Description.* Canned tuna is the food consisting of processed fish of the species listed in paragraph (a)(2) of this section, prepared in one of the optional forms of pack specified in paragraph (a)(3) of this section, conforming to one of the color designations specified in paragraph (a)(4) of this section, may be in one or more of the optional packing media specified in paragraph (a)(5) of this section, and may contain one or

more of the safe and suitable optional ingredients specified in paragraph (a)(6) of this section. It is packed in hermetically sealed containers and processed by heat to prevent spoilage. It is labeled per paragraph (a)(8) of this section.

(2) *Species.* * * *

(3) *Forms of pack.* The optional forms of processed tuna consist of loins and other striated muscular tissue of the fish. The loin is the longitudinal quarter of the great lateral muscle freed from skin, scales, visible blood clots, bones, gills, viscera and from the nonstriated part of the muscle, which part (known anatomically as the median superficial muscle) is highly vascular in structure, dark in color because of the retained blood, and granular in form. Canned tuna is prepared in one of the following forms of pack, determined following the methods prescribed in paragraph (c)(2) of this section.

(i) Solid or solid pack consists of loins freed from any surface tissue discolored by diffused hemolyzed blood, cut in transverse segments to which no free fragments are added. In containers of 1 pound or less of net contents, the segments are cut in lengths suitable for packing in one layer. In containers of more than 1 pound net contents, such segments may be cut in lengths suitable for packing in one or more layers of equal thickness. Segments are placed in the container with the planes of their transverse cut ends parallel to the ends of the container. A piece of a segment may be added if necessary to fill a container. The proportion of free flakes broken from loins in the canning process must not exceed 18 percent.

(ii) Chunk, chunks, chunk style consists of a mixture of pieces of tuna in which the original muscle structure is retained. The pieces may vary in size, but not less than 50 percent of the drained weight of the contents of the container is retained on a ½-inch (or 12.5-millimeter) mesh sieve.

(iii) Flake or flakes consist of a mixture of pieces of tuna in which more than 50 percent of the drained weight of the contents of the container will pass through a ½-inch (or 12.5-millimeter) mesh sieve, but in which the muscular structure of the flesh is retained.

(iv) Grated consists of a mixture of particles of tuna that have been reduced to uniform size, that will pass through a ½-inch (or 12.5-millimeter) mesh sieve, and in which the particles are discrete and do not comprise a paste.

(v) Any of the specified forms of pack of canned tuna may be smoked. Canned smoked tuna must be labeled per paragraph (a)(8)(v) of this section.

(4) *Colors of pack.* * * *

(5) *Optional packing media.* Canned tuna may be in one or more of the following optional packing media:

(i) Any edible vegetable oil other than olive oil, or any mixture of such oils not containing olive oil;

(ii) Olive oil; or

(iii) Water.

(6) *Optional ingredients.* One or more of the following safe and suitable optional ingredients may be used:

(i) Salt.

(ii) Flavorings and spices in accordance with § 101.22 of this chapter.

(iii) Vegetable broth added in an aqueous solution, such that the dry weight of the vegetable extractives in the broth must not be more than 2.5 percent of the labeled net weight of the container. The vegetable broth must be prepared from two or more of the following vegetables: Beans, cabbage, carrots, celery, garlic, onions, parsley, peas, potatoes, green bell peppers, red bell peppers, spinach, and tomatoes.

(iv) Edible vegetable oil, excluding olive oil. The amount of edible vegetable oil must not exceed 5 percent of the volume capacity of the container, with or without any suitable form of emulsifying and suspending ingredients that are generally recognized as safe per § 170.30 of this chapter or approved as a food additive to aid in dispersion of the oil, as seasoning in canned tuna packed in water.

(v) Sodium acid pyrophosphate added for the purpose of inhibiting the development of struvite crystals. Sodium acid pyrophosphate may be added in a quantity that must not exceed 0.5 percent by weight of the finished food.

(7) *Method of color determination.* For the color designations specified in paragraph (a)(4) of this section, the following method must be used: Recombine the separations of drained product resulting from the method prescribed in paragraph (c)(2) of this section. Pass the combined portions through a ¼-inch (or 6.3-millimeter) sieve complying with the specifications set forth in "Official Methods of AOAC INTERNATIONAL," 22nd Ed. (2023), Table 1, "Nominal Dimensions of Standard Test Sieves (U.S.A. Standard Series)," under the heading "Definitions of Terms and Explanatory Notes," (incorporated by reference, see paragraph (d) of this section). Mix the sieved material and place a sufficient quantity into a 307 × 113 size container (bearing a top seam and having a false bottom approximately ½-inch (or 1.3-centimeter) deep and painted flat black inside and outside) so that after tamping and smoothing the surface of the sample

the material will be ⅛-inch (or 0.3-centimeter) to ¼-inch (or 0.6-centimeter) below the top of the container. Within 10 minutes after draining through the ¼-inch (or 6.3-millimeter) sieve, determine the Munsell value of sample surface.

(i) Determine the Munsell value of the sample. The standards with which comparisons are made are essentially neutral matte-finish standards, equivalent in luminous reflectance of light at a wavelength of 555 nanometers and 33.7 percent of the luminous reflectance of magnesium oxide (for Munsell value 6.3); 22.6 percent of the luminous reflectance of magnesium oxide (for Munsell value 5.3). When examining albacore designated as "white", conduct the procedure using standards of Munsell value 6.3.

(ii) For blended tuna, vary the method by first separating the tuna flakes into the different colors before passing them through the ¼-inch (or 6.3-millimeter) sieve, then determining the color value of each portion separately. If necessary, use a sample container with a false bottom greater than ½ -inch (or 1.3 centimeter) deep.

(8) *Labeling.* (i) The specified name of the canned tuna described in this section, except for tuna packed in water or tuna that is smoked, is formed by combining the designation of form of pack with the color designation of the tuna; for example, "Solid pack white tuna", "Grated dark tuna", etc. For blended tuna, use both applicable color designations of the blended flakes with the predominant portion of the container first; for example, "Blended white and dark tuna flakes", "Blended dark and light tuna flakes".

* * * * *

(iii) For canned tuna packed in vegetable oil or olive oil, the label must include the name of any optional packing medium used, as specified in paragraph (a)(5) of this section, preceded by the word "in" or the words "packed in". If the tuna is packed in an optional vegetable oil, as specified in paragraph (a)(5)(i) of this section, the name or names of the oil or the general term "vegetable oil" may be used.

* * * * *

(v) If any of the specified forms of canned tuna are smoked, the word "smoked" must appear as a part of the name on the label, for example, "Smoked light tuna flakes".

(vi) If the canned tuna contains one or more of the optional ingredients in paragraph (a)(6)(ii) through (iv) of this section, the label must appropriately declare the ingredients by the common or usual name in accordance with

§ 101.22 of this chapter. If the ingredients designated in paragraph (a)(6)(iii) of this section are used, the term "vegetable broth" must be declared.

(vii) If the canned tuna contains the optional ingredient sodium acid pyrophosphate as provided in paragraph (a)(6)(v) of this section, the label must bear the statement "pyrophosphate added" or "with added pyrophosphate".

(viii) Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the names of the optional ingredients used, as specified in paragraphs (a)(8)(iii), (vi), and (vii) of this section, must immediately and conspicuously precede or follow such name without intervening, written, printed, or graphic matter except that the common name of the species of tuna fish may so intervene, but the species name "albacore" may be used only for canned tuna of that species which meets the color designation "white" as prescribed by paragraph (a)(4)(i) of this section.

(ix) Statements of optional ingredients present required by paragraph (a)(8)(vi) of this section, but not subject to the provisions of paragraph (a)(8)(viii) of this section, must be included on the label with such prominence and conspicuousness as to render them likely to be read and understood by the ordinary individual under customary conditions of purchase.

(x) Each of the ingredients used in the food must be declared on the label as required by the applicable sections of parts 101 and 130 of this chapter.

* * * * *

(c) *Fill of container.* (1) The standard of fill of container for canned tuna is a fill such that tuna must constitute at least 72 percent of the fill of the container. The general method for determining the fill of containers is specified in § 130.12(b) of this chapter. The drained weight method, as specified in paragraph (c)(2) of this section, must be used to verify the standard fill of container for canned tuna products. The drained weight of each container must be determined individually, and an average value must be determined based on an average taken from a minimum of 24 containers.

(2) Determine the drained weight of the tuna using unopened canned tuna containers left at 75 ± 5°F (or 24 ± 3 °C) for at least 12 hours immediately before testing. Empty the contents of one individual tuna container onto a previously weighed sieve and evenly distribute the contents across the bottom of the sieve. Without shifting any tuna,

tilt the sieve at a 17- to 20-degree angle to help facilitate drainage. Allow the tuna to drain for 2 minutes, starting when the product is applied to the sieve. The sieve containing the drained tuna is then reweighed, after excess packing media is gently removed from the bottom of the sieve with a paper towel. The drained weight is calculated by subtracting the difference in the weights as follows:

Final weight of sieve with tuna—Empty weight of sieve = Drained weight of tuna

If the contents of the tuna container weigh less than 3 pounds (1.36 kilograms), then a sieve with an 8-inch (20-centimeter) diameter must be used. If the contents of the tuna container weigh 3 pounds (1.36 kilograms) or more, then a sieve with a 12-inch (30-centimeter) diameter must be used. The bottom of the sieve has a woven-wire cloth mesh complying with the specifications set forth for the 2.80 mm (No. 7) sieve in the “Official Methods of AOAC INTERNATIONAL,” 22nd Ed. (2023), Table 1, “Nominal Dimensions of Standard Test Sieves (U.S.A. Standard Series),” under the heading “Definitions of Terms and Explanatory Notes,” (incorporated by reference, see paragraph (d) of this section).

(i) Determination of free flakes: If the optional form of tuna ingredient is solid pack, determine the percent of free flakes. Any flakes resulting from the drained weight procedure described in paragraph (c)(2) of this section are to be weighed as free flakes. Only fragments that were broken in the canning process are considered to be free flakes. Using a spatula, scrape free flakes gently from the outside of the drained tuna product. Weigh the aggregate free flakes that were broken from the loin segments in the canning process and calculate their percentage of the total drained weight.

(ii) Determination of particle size: If the optional form of tuna ingredient is chunks, flakes, or grated, the drained tuna product resulting from the drained weight procedure described in paragraph (c)(2) of this section, is gently separated by hand, care being taken to avoid breaking the pieces. The separated pieces are evenly distributed over the top sieve of the screen separation equipment described in paragraph (c)(2)(iii) of this section. Beginning with the top sieve, lift and drop each sieve by its open edge three times. Each time, the open edge of the sieve is lifted the full distance permitted by the device. Combine and weigh the material remaining on the top three sieves (1¼-inch (or 37.5-millimeter), 1-inch (or 25.0-millimeter), ½-inch (or 12.5-

millimeter) meshes) and determine the combined percentage retention by weight in relation to the total drained weight.

(iii) The sieving device referred to in paragraph (c)(2)(ii) of this section consists of three sieves, each approximately 1 foot square, loosely mounted, one above another, in a metal frame. The mesh in the top sieve complies with the specifications for 1¼-inch (or 37.5-millimeter) woven-wire cloth mesh as prescribed in paragraph (a)(7) of this section. The meshes in the sieve below comply with similar specifications for 1-inch (or 25.0-millimeter) and ½-inch (or 12.5-millimeter) mesh as set forth in AOAC Official Methods, Table 1, “Nominal Dimensions of Standard Test Sieves (U.S.A. Standard Series)” (incorporated by reference, see paragraph (d) of this section). The sides of each sieve are formed, in a raised rim, from ¾-inch (or 1.9-centimeters) × ⅛-inch (or 0.3-centimeter) metal strap. The frame has tracks made of ⅜-inch (or 1.0-centimeter) angle metal to support each sieve under each side. The tracks are positioned to permit each sieve a free vertical travel of 1¾-inches (or 4.4-centimeters).

(3) If canned tuna falls below the applicable standard of fill of container prescribed in paragraph (c)(1) of this section, the label must bear the general statement of substandard fill per § 130.14(b) of this chapter.

(d) *Incorporation by reference.* Table 1, Nominal Dimensions of Standard Test Sieves (U.S.A. Standard Series), Definitions of Terms and Explanatory Notes, Official Methods of Analysis of AOAC INTERNATIONAL, 22nd Ed., 2023 is incorporated by reference into this section with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at the Food and Drug Administration (FDA) and at the National Archives and Records Administration (NARA). Contact FDA’s Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or email fr.inspection@nara.gov. The material may be obtained from AOAC INTERNATIONAL, 2275 Research Blvd., Suite 300, Rockville, MD 20850-3250; 1-800-379-2622.

Dated: August 14, 2023.

Robert M. Califf,

Commissioner of Food and Drugs.

[FR Doc. 2023-17916 Filed 8-24-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

28 CFR Part 105

[Docket No. FBI-154; AG Order No. 5736-2023]

RIN 1110-AA33

Child Protection Improvements Act Criteria for Designated Entity Determinations

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice is proposing to promulgate regulations (“proposed rule” or “rule”) concerning the Child Protection Improvements Act of 2018 (“CPIA”). The CPIA provides a means by which authorized qualified entities can have access to national criminal history background checks for determinations of whether covered individuals have been convicted of, or are under pending indictment for, a crime that bears upon their fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities. As required by the CPIA, these proposed regulations would establish the criteria to be utilized by an entity designated by the Federal Bureau of Investigation (FBI) to make these determinations.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before September 25, 2023. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. eastern time on the last day of the comment period.

ADDRESSES: You may review this proposed rule on <https://www.regulations.gov> and use the electronic comment form for these regulations to submit your comments. Submit written comments by U.S. Postal Service or other commercial delivery services, addressing them to FBI, CPIA Comments, Attention, Betsy C. Taylor, Office of the General Counsel (OGC), FBI Criminal Justice Information Services (CJIS) Division, 1000 Custer Hollow Road, Module C3, Clarksburg, West Virginia 26306.

FOR FURTHER INFORMATION CONTACT:

Betsy C. Taylor, Assistant General Counsel, OGC, FBI CJIS Division, 1000 Custer Hollow Road, Module C3, Clarksburg, West Virginia 26306; Telephone: (304) 625-5429. (Note: This is not a toll-free number).

SUPPLEMENTARY INFORMATION:**Electronic Access and Filing**

Electronic comments are preferred. For comments sent via U.S. Postal Service or other commercial delivery, please do not submit duplicate electronic comments. Please confine comments to the proposed rule. All submissions received must include the agency name (FBI) and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <https://www.regulations.gov> as they are received, without change, including any personal identifiers or contact information. It is recommended that your comments not include any personal information such as social security numbers or medical information.

Background

The CPIA, enacted as part of the Consolidated Appropriations Act, 2018 (Pub. L. 115-141) amended the National Child Protection Act/Volunteers for Children Act ("NCPA/VCA") (34 U.S.C. 40101 *et seq.*). The CPIA requires the Attorney General to establish a national program (the "CPIA Program") to provide qualified entities in States that do not have procedures in place to utilize the NCPA/VCA, or in States that do not prohibit the use of the CPIA Program, with access to national criminal history background checks on, and criminal history reviews of, covered individuals. 34 U.S.C. 40102(a)(3)(A).

Under the CPIA, the FBI conducts fingerprint-based national criminal history background checks on covered individuals upon request of a designated entity and provides the resulting information to the designated entity. Reviewing that information, the designated entity determines whether the individual has been convicted of, or is under pending indictment for, a crime bearing on the individual's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities. The designated entity then informs the qualified entity—such as an employer or volunteer organization providing care for children, the elderly, or individuals with disabilities—whether the

designated entity's review has determined that the covered individual's criminal history includes a conviction or pending indictment for a crime bearing on fitness listed in § 105.34 of the proposed rule. 34 U.S.C. 40102(a)(3), (b)(4), (f)(1).

Invoking the processes described in this proposed rule would not be mandatory. Rather, the rule will provide a means for a qualified entity in a State that does not have procedures to utilize the NCPA/VCA or that does not prohibit the CPIA Program to obtain national criminal history background checks of covered individuals. The choice whether to invoke the rule's procedures will be left to the discretion of the qualified entities, subject to any other applicable legal requirements.

Crimes Bearing on Fitness

The CPIA requires the Attorney General to establish by rule the criteria for designated entities to use in making the determination bearing on fitness for covered individuals. 34 U.S.C. 40102(f)(2)(C). The criminal history review criteria must be based on the criteria established pursuant to section 108(a)(3)(G)(i) of the PROTECT Act, Public Law 108-21 (34 U.S.C. 40102 note) and section 658H of the Child Care and Development Block Grant Act ("CCDBG") of 1990 (42 U.S.C. 9858f).

A pilot project established by the PROTECT Act required that the National Center for Missing and Exploited Children ("NCMEC") make a determination whether criminal history record information received in response to a criminal history background check indicated that a provider or volunteer had a criminal history that rendered the individual unfit to provide care to children, based upon criteria established jointly by the NCMEC and three designated nonprofit organizations—the Boys and Girls Clubs of America, the National Mentoring Partnership, and the National Council of Youth Sports. The resulting criteria established pursuant to the PROTECT Act provided that anyone who had been convicted or was under pending indictment for any of the following offenses would be considered unfit to provide care to children: (1) all felonies, (2) any lesser crime of which sexual relations is an element (including pornography); (3) any lesser crime involving cruelty to animals, (4) any lesser crime involving controlled substances, including Driving Under the Influence that may involve drugs; and

(5) any lesser crime involving force or threat of force against a person.¹

The CCDBG provides that a child care staff member shall be ineligible for employment by a child care provider receiving certain federal assistance if such individual:

(A) refuses to consent to the criminal background check;

(B) knowingly makes a materially false statement in connection with such criminal background check;

(C) is registered, or is required to be registered, on a State sex offender registry or repository or the National Sex Offender Registry established under the Adam Walsh Child Protection and Safety Act of 2006;

(D) has been convicted of a felony consisting of:

(1) murder, as described in 18 U.S.C. 1111;

(2) child abuse or neglect;

(3) a crime against children, including child pornography;

(4) spousal abuse;

(5) a crime involving rape or sexual assault;

(6) kidnapping;

(7) arson;

(8) physical assault or battery; or

(9) a drug-related offense committed during the preceding five years; or

(E) has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes:

(1) child abuse;

(2) child endangerment;

(3) sexual assault; or

(4) a misdemeanor involving child pornography.

See 42 U.S.C. 9858f(c)(1). In addition, under the CCDBG, a State may allow for a review process through which the State may determine that a child care staff member, including a prospective child care staff member, disqualified for a drug-related offense committed during the preceding five years is eligible for employment. See 42 U.S.C. 9858f(e)(4).

The CPIA differs from the PROTECT Act pilot program and the CCDBG in that it does not declare covered individuals to be unfit or ineligible to care for children, the elderly, or individuals with disabilities and does not limit the discretion of qualified entities as to who they will employ or allow to participate in their activities. Rather, it provides a mechanism by which qualified entities may obtain from the designated entity a determination whether a covered

¹ See U.S. Dep't of Justice, Office of Legislative Affairs, Interim Report on the Feasibility of Performing Fingerprint-Based Criminal History Background Checks on Individuals That Participate in National Service Programs 27-30 (2009).

individual has a conviction or is under pending indictment for a crime bearing on the covered individual's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities. The CPIA leaves it to the qualified entities themselves to decide what effect they will give to that determination.

Designated Entities

Pursuant to the CPIA, the Attorney General is required to designate one or more non-federal entities to make the determinations bearing on fitness. 34 U.S.C. 40102(f)(2)(A). These designated entities will be authorized to provide national criminal history background checks for qualified entities in States that do not have procedures in place to utilize the NCPA/VCA, or in States that do not prohibit the use of the CPIA Program. The FBI will issue a Request for Proposal ("RFP") to select those to serve as designated entities under the CPIA Program. As noted above, participation in the CPIA Program by qualified entities is voluntary, and they are not required to conduct checks of their covered individuals using these designated entities.

The FBI collects user fees for the fingerprint-based criminal history record information checks it conducts in compliance with Public Law 101–515 (now codified at 34 U.S.C. 41104). The FBI's user fees are set out in a fee schedule routinely published in the **Federal Register**. In accordance with 28 CFR 20.31(e)(1), the FBI reviews its fee schedule at least every four years to determine the current cost of processing fingerprint identification records for noncriminal justice purposes. The FBI's user fee schedule provides for a reduction in the rate it charges for checks of volunteers serving vulnerable populations, such as volunteers who will be covered under the CPIA Program. As published in the **Federal Register**, the current cost for processing the FBI fingerprint check is \$13.25 for employees and \$11.25 for volunteers. See 87 FR 47794 (Aug. 4, 2022).

In accordance with the CPIA, designated entities will be required to adopt a fee schedule for providing their national criminal history background checks and criminal history reviews. See generally 34 U.S.C. 40102(e). These designated entities also are required by the CPIA to remit to the FBI its portion of that fee. *Id.* 40102(e)(2). The CPIA provides that fees collected by a designated entity must be set at a level that will ensure the recovery of the full costs of providing their services. *Id.* However, the CPIA also requires that the fees set by designated entities must be

established in a manner that ensures that volunteers will not be discouraged from participating in programs to care for children, the elderly, or individuals with disabilities. *Id.* 40102(e)(3). In addition, the CPIA requires that a fee charged to a qualified entity that is not organized under section 501(c)(3) of the Internal Revenue Code of 1986 may not be less than the total sum of the costs of the FBI and the designated entity. *Id.*

As part of the evaluation criteria in the RFP, a prospective designated entity will be required to provide information on the methodology it will use to determine the "full costs" of providing the services, how their fee structure will not discourage volunteers, and the profit margin, if any, to be collected for providing these services. This information will be considered by the FBI in evaluating and making decisions regarding prospective designated entities for participation in the CPIA Program.

Discussion

Crimes Bearing on Fitness

As noted above, 34 U.S.C. 40102(f)(2)(C) requires the Attorney General to establish by rule the criteria—based on the criteria used in a PROTECT Act pilot program and the CCDBG— for designated entities to use under the CPIA in determining whether a covered individual's criminal history includes a crime bearing on the individual's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities. The PROTECT Act criteria, described earlier in this preamble, are in some respects most suitable as a model for crimes bearing on fitness under the CPIA because of their greater generality. For example, since the PROTECT Act criteria include all felonies, there is no need to enumerate the CCDBG's particular covered felonies, 42 U.S.C. 9858f(c)(1)(D). However, certain features of the CCDBG are helpful in defining the relevant offenses, including the CCDBG's greater explicitness regarding sex offenses and offenses involving abuse, neglect, or endangerment. In addition, both the PROTECT Act criteria and the CCDBG criteria require some adaptation for purposes of the CPIA, because the CPIA relates to qualified entities serving the elderly and individuals with disabilities, as well as child-serving entities.

The relevant crimes under the CPIA that bear upon the covered individual's fitness to have responsibility for the safety and well-being of children, the

elderly, or individuals with disabilities are set forth in § 105.34 of the proposed regulation. Those crimes are as follows:

Section 105.34(1) refers to "[a]ny felony." This is the same as the first PROTECT Act category.

Section 105.34(2) refers to crimes involving abuse, neglect, or endangerment of children, the elderly, or individuals with disabilities. This is similar to the CCDBG's coverage of offenses of child abuse, neglect, or endangerment, see 42 U.S.C. 9858f(c)(1)(D)(ii) and (E), with the necessary addition of such crimes directed against the elderly or individuals with disabilities for purposes of the CPIA.

Section 105.34(3) refers to crimes involving the use, or attempted or threatened use, of force against a person. This parallels the fifth category under the PROTECT Act pilot program.

Section 105.34(4) refers to crimes involving sexual abuse, assault, or exploitation, including child pornography crimes. This is similar to the second category under the PROTECT Act pilot program, and to CCDBG provisions appearing in 42 U.S.C. 9858f(c)(1)(D)(iii), (v), (E).

Section 105.34(5) refers to crimes on the basis of which the covered individual is registered, or is required to be registered, in the sex offender registry of a jurisdiction, or is included in the National Sex Offender Registry. This parallels the CCDBG provision in 42 U.S.C. 9858f(c)(1)(C).

Section 105.34(6) refers to crimes involving cruelty to animals, parallel to the third PROTECT Act category.

Section 105.34(7) refers to crimes involving controlled substances, including impaired driving offenses involving drugs, which is similar to the fourth PROTECT Act category, and to the CCDBG provision in 42 U.S.C. 9858f(c)(1)(D)(ix).

The proposed rule provides that after a designated entity evaluates a covered individual using the CPIA criteria, one of three determinations is to be returned to the qualified entity under the CPIA Program: (1) the covered individual has a conviction or is under pending indictment for a crime bearing on fitness listed in § 105.34, (2) the covered individual does not have a conviction and is not under pending indictment for a crime bearing on fitness listed in § 105.34, or (3) the covered individual may have a conviction for a crime bearing on fitness listed in § 105.34. A determination that a covered individual "may have a conviction" should be returned by the designated entity if the disposition is missing from an arrest for a crime listed in § 105.34. The "may

have a conviction” determination should be returned only after the designated entity has conducted research to try to locate relevant missing disposition data. The FBI notes that a designated entity’s determination that a covered individual “has,” “does not have,” or “may have” a conviction or pending indictment for a crime bearing on fitness pertains to the national criminal history background check information received from the FBI as part of the CPIA Program. A qualified entity is not prohibited from denying a covered individual an employment or volunteer position based on other evaluation criteria.

Requests for a National Criminal History Background Check

As noted above, the authorized qualified entities themselves will decide whether to invoke the procedures of this proposed rule in order to obtain a criminal history background check on their covered individuals regarding care for children, the elderly, or individuals with disabilities. The following discussion explains the intended process where a qualified entity is seeking such a criminal history background check pursuant to the CPIA.

Under 34 U.S.C. 40102(b), a covered individual must provide to a qualified entity located in a State a set of fingerprints and complete and sign a statement as part of a request for a national criminal history background check, including an attestation that the covered individual has not been convicted of any crime or, if the covered individual has been convicted of a crime, a description of the crime and the particulars of the conviction. In addition, covered individuals must be informed by the qualified entity of the covered individual’s right to obtain a copy of any background check report by the designated entity and the process by which a covered individual may appeal those results. The statement provided by the qualified entity must also notify the covered individual that the qualified entity may elect to deny them access to a person to whom the qualified entity provides care prior to the completion of their background check. As noted above, a qualified entity also may deny a covered individual access to a person to whom the qualified entity provides care at any time based on other evaluation criteria. The designated entity must also have in effect procedures to ensure that the covered individual is notified of their right to obtain a copy of their national criminal history background check report and given notice of the opportunity to appeal and instructions on how to complete the appeals process,

if the covered individual wishes to challenge the accuracy or completeness of the information contained in the background check report.

The FBI is publishing this NPRM to allow interested parties the opportunity to provide comments concerning the criteria bearing on fitness to be established under the CPIA and the procedures for requesting and obtaining the results of criminal history background checks from a designated entity.

Technical Corrections

Finally, the FBI is proposing to update and correct the authority citations in part 105.

Regulatory Certifications

Executive Orders 12866 and 13563

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action under section 3(f) of Executive Order 12866, and accordingly, this rule has been reviewed by the OMB. The current cost of conducting the FBI fingerprint check, as published in the **Federal Register** (83 FR 48335) is \$13.25 for employees and \$11.25 for volunteers. The exact impact of the proposed regulations on covered individuals and qualified entities cannot be calculated due to uncertainty concerning the number of designated entities that will be participating in the CPIA Program; the number of qualified entities that will choose to submit fingerprint-based background checks through the CPIA Program; the geographic locations of the designated entities and the qualified entities; associated costs by the designated entity in establishing a connection to the FBI for the electronic submission of the fingerprints and receipt of criminal history record information; and the number of background check reports on

covered individuals lacking disposition data for which the designated entity must research. However, because the designated entities are required by the CPIA to recoup their full costs, they are not expected to incur any net costs.

This rule will not have an annual effect on the economy of \$100 million, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. Accordingly, this rule is not an economically significant rulemaking as defined by Executive Order 12866.

Although this rule is a significant regulatory action under Executive Order 12866, the fees for providing determinations will be set by the designated entities themselves, under the standards of the CPIA, and they will be collecting those fees for providing a service under the CPIA. There is no change in the fees being charged by the FBI.

Executive Order 13132—Federalism

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

Executive Order 12988—Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Regulatory Flexibility Act

The Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this proposed rule and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The FBI charges a user fee in compliance with Public Law 101–515. This proposed rule imposes minimal costs on businesses, organizations, or governmental jurisdictions (whether large or small) because the submission of fingerprints for these national criminal background checks is voluntary on the part of the qualified entities. Additionally, any costs that may be borne by the current or prospective employee or volunteer

with the qualified entity is not expected to have a significant economic impact.

Unfunded Mandates Reform Act of 1995

This proposed rule does not contain a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Further, the statute authorizes a designated entity through this Federal program to recover only the full costs of providing such services, and the fee system to be established is to ensure that fees to qualified entities do not discourage volunteers from participating in programs to care for children, the elderly, or individuals with disabilities. Finally, fees to qualified entities not organized under section 501(c)(3) of title 26 may not be less than the total sum of the costs of the FBI and the designated entity. Therefore, no action was deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This proposed rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This proposed rule will not result in an annual effect on the U.S. economy of \$100 million or more; a major increase in costs or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The proposed rule does not contain collection of information requirements. Therefore, clearance by the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is not required. Of note, information collection associated with the Civil Applicant Fingerprint Card has been approved by the OMB for review under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The OMB Control Number for this collection is 1110-0046.

List of Subjects in 28 CFR Part 105

Administrative practice and procedure, Law enforcement, Privacy.

Accordingly, for the reasons set forth in the preamble, 28 CFR part 105 is proposed to be amended as follows:

PART 105—CRIMINAL HISTORY BACKGROUND CHECKS

■ 1. The authority citation for part 105 is revised to read as follows:

Authority: Section 113 of Pub. L. 107–71, 115 Stat. 622 (49 U.S.C. 44939); Section 6402 of Pub. L. 108–458, title VI, 118 Stat. 3755 (28 U.S.C. 534 note; editorially reclassified as 34 U.S.C. 41106); Division S, Title I, Section 101 of Pub. L. 115–141, 132 Stat. 1123 (34 U.S.C. 40101 *et seq.*)

■ 2. In subpart B, add an authority citation to read as follows:

Authority: Section 113 of Pub. L. 107–71, 115 Stat. 622 (49 U.S.C. 44939).

■ 3. Revise the authority citation in subpart C to read as follows:

Authority: Section 6402 of Pub. L. 108–458, title VI, 118 Stat. 3755 (28 U.S.C. 534 note; editorially reclassified as 34 U.S.C. 41106).

■ 4. Add a new subpart D to read as follows:

Subpart D—Child Protection Improvements Act Criteria for Designated Entity Determinations

Sec.

105.31 Definitions.

105.32 Request by a qualified entity for a national criminal history background check.

105.33 Receipt by a designated entity of a request from a qualified entity.

105.34 Crimes bearing on fitness.

105.35 Criminal history lacking disposition data.

105.36 Determination by a designated entity.

105.37 Rights of a covered individual.

105.38 Collection of fees.

Authority: Child Protection Improvements Act (Division S, Title I, Section 101 of Pub. L. 115–141, 132 Stat. 1123 (34 U.S.C. 40101 *et seq.*)).

§ 105.31 Definitions.

Authorized agency means a division or office of a State designated by a State to report, receive, or disseminate information under the CPIA.

Care means the provision of care, treatment, education, training, instruction, supervision, or recreation to children, the elderly, or individuals with disabilities.

Child means a person who is a child for purposes of the criminal child abuse law of a State.

Covered individual means an individual—

(1) Who has, seeks to have, or may have access to children, the elderly, or individuals with disabilities, served by a qualified entity; and

(2) Who—

(i) Is employed by or volunteers with, or seeks to be employed by or volunteer with, a qualified entity, or

(ii) Owns or operates, or seeks to own or operate, a qualified entity.

CPIA means the Child Protection Improvements Act of 2018, enacted as part of the Consolidated Appropriations Act, 2018 (Pub. L. 115–141), which amended the National Child Protection Act/Volunteers for Children Act (NCPA/VCA) (34 U.S.C. 40101 *et seq.*).

CPIA Program means the program established by the Federal Bureau of Investigation (FBI) that implements the CPIA under this subpart D.

Designated entity means an entity designated to conduct determinations under the authority of 34 U.S.C. 40102(f)(2)(A), through an agreement with the FBI.

Individuals with disabilities means persons with mental or physical impairment who require assistance to perform one or more daily living tasks.

National criminal history background check system means the criminal history record system maintained by the FBI based on fingerprint identification or any other approved method of positive identification.

Qualified entity means a business or organization, whether public, private, for-profit, not-for-profit, or voluntary, that provides care or care placement services, including a business or organization that licenses or certifies others to provide care or care placement services.

State means a State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

§ 105.32 Request by a qualified entity for a national criminal history background check.

(a) Qualified entities located in States that do not have in effect procedures described in 34 U.S.C. 40102(a)(1), or qualified entities located in States that do not prohibit the use of the program established under the CPIA, may be provided access to national criminal history background checks on, and criminal history reviews of, covered individuals through a designated entity under an agreement with the FBI.

(b) After approval by the designated entity for participation in the CPIA Program, each participating qualified entity will determine which covered individuals will be subject to the background check. The covered individual must provide a complete set of fingerprints to the qualified entity. The covered individual also must provide a signed statement to the qualified entity containing the following:

(1) The name, address, and date of birth appearing on a valid identification document (as defined in 18 U.S.C. 1028) of the covered individual;

(2) An attestation that the covered individual has not been convicted of a crime and, if the covered individual has been convicted of a crime, a description of the crime and the particulars of the conviction;

(3) The statement must notify the covered individual that the qualified entity may request a national criminal history background check;

(4) The statement must notify the covered individual of his or her right to obtain a copy of any background check report, to challenge the accuracy or completeness of the information contained in any such report, and to obtain a prompt determination as to the validity of such challenge before a final determination is made by the designated entity as provided in § 105.37; and

(5) The statement must also notify the covered individual that prior to the completion of the background check the qualified entity may choose to deny the covered individual access to a person to whom the qualified entity provides care.

(c) Based upon the qualified entity's determination that the requirements under the CPIA are met, a qualified entity may submit to the appropriate designated entity a request, to include the fingerprints of the covered individual, for a national criminal history background check on, and a criminal history review of, a covered individual.

§ 105.33 Receipt by a designated entity of a request from a qualified entity.

(a) An entity will be authorized as a designated entity through an agreement with the FBI. This agreement will specify the respective responsibilities of the designated entity and the FBI, including that the designated entity's employees receive a fingerprint-based national criminal history background check in a manner determined by the FBI, prior to access to criminal history record information.

(b) The designated entity will determine if a business or organization, whether public, private, for-profit, not-for-profit, or voluntary, meets the definition of a qualified entity.

(c) The designated entity will determine if a qualified entity is located in a State that does not have in effect procedures requiring qualified entities to contact an authorized agency of the State for a nationwide background check or if the State does not prohibit the use of the national program established under the CPIA, prior to providing access to a national criminal

history background check on, and criminal history reviews of, covered individuals. A State that does not prohibit the use of the national program established under the CPIA is a State that does not have a statute or regulation prohibiting a national criminal history background check of a covered individual or a State that has determined it has procedures in place in statute or regulation but is unable to accommodate the qualified entity's request for a national criminal history background check.

(d) The designated entity national program established under the CPIA also may not be used if a Federal law requires use of a Federal national criminal history background check program.

(e) Upon receipt of an authorized qualified entity request, a designated entity shall forward the request to the FBI and the FBI shall complete a fingerprint-based check of its national criminal history background check system and provide the information received in response to the request to the appropriate designated entity.

(f) The FBI fingerprint-based check of its national criminal history record system will provide outreach to States that support record requests for employment and licensing purposes and will return State criminal history record information from the respective State criminal history database. Upon a request from a qualified entity, the designated entity may conduct a separate check of a State criminal history database. The request for a State check should be submitted by the designated entity to the appropriate State according to the applicable procedures of that State.

§ 105.34 Crimes bearing on fitness.

Upon receipt of the criminal history record information, the designated entity shall make a determination whether the covered individual has been convicted of, or is under pending indictment for, a crime that bears upon the covered individual's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities. The crimes that bear on a covered individual's fitness are:

(a) Any felony.

(b) Any crime involving abuse, neglect, or endangerment of a child, an elderly individual, or an individual with a disability.

(c) Any crime involving the use, or attempted or threatened use, of force against a person.

(d) Any crime involving sexual abuse, assault, or exploitation, including any crime involving child pornography.

(e) Any crime on the basis of which the covered individual is registered, or is required to be registered, in the sex offender registry of a jurisdiction, or is included in the National Sex Offender Registry established by 34 U.S.C. 20921(a).

(f) Any crime involving cruelty to an animal.

(g) Any crime involving a controlled substance, including any impaired driving offense involving a controlled substance.

§ 105.35 Criminal history lacking disposition data.

Upon the designated entity's receipt of criminal history record information from the FBI regarding an arrest for a crime bearing on fitness described in § 105.34 that is lacking disposition data, the designated entity shall conduct research in whatever Federal, State, or local recordkeeping systems are available to obtain complete data. The designated entity also should provide any source documentation containing missing disposition data it obtains from criminal justice or law enforcement agencies to the FBI so that the FBI may update or forward to the State Identification Bureaus for appropriate updating.

§ 105.36 Determination by a designated entity.

(a) The designated entity shall issue one of the following determinations to the qualified entity with respect to a covered individual:

(1) The covered individual has a conviction or is under pending indictment for a crime bearing on fitness listed in § 105.34;

(2) The covered individual does not have a conviction and is not under pending indictment for a crime bearing on fitness listed in § 105.34; or

(3) The covered individual may have a conviction for a crime bearing on fitness listed in § 105.34.

(b) The designated entity shall return a determination that the covered individual may have a conviction if the covered individual has been arrested for a crime bearing on fitness listed in § 105.34 but the disposition information is missing, and there is no other conviction or pending indictment for a crime bearing on fitness listed in § 105.34 in the covered individual's criminal history record information. The "may have a conviction" determination shall be returned after the designated entity conducts its research to try to locate relevant missing disposition data as required in § 105.35.

(c) The criminal history record information provided from the FBI to the designated entity shall not be provided to the qualified entity.

§ 105.37 Rights of a covered individual.

(a) Upon request to the designated entity, the covered individual who is the subject of the background check shall be provided with a copy of any background check report from the designated entity, including a copy of the criminal history record information that the designated entity received from the FBI.

(b) Each designated entity must ensure that the covered individual who is the subject of the background check is provided notice of the opportunity to appeal and instructions on how to complete the appeals process.

(1) Each covered individual may appeal the results of the determination made by the designated entity to challenge the accuracy or completeness of the information contained in the background check report of the covered individual and obtain a prompt determination as to the validity of such challenge before a final determination is made.

(2) Each covered individual may appeal the information contained in the FBI criminal history record information through procedures the FBI has in place pursuant to 28 CFR part 16, subpart C, wherein the subject of a criminal history record may request production of that record to review it or to obtain a change, correction, or update of that record.

§ 105.38 Collection of fees.

(a) Each designated entity shall set the fees to be collected under the CPIA Program at a level that will ensure the recovery of the full costs of providing all such services under the standards of the CPIA. The fee schedule by the designated entity shall be established to ensure that fees to qualified entities for background checks of covered individuals do not discourage volunteers from participating in the programs of qualified entities.

(b) The designated entity shall remit the appropriate portion of such fee to the FBI. That amount shall be the amount published in the **Federal Register** to be collected for the provision of a fingerprint-based criminal history background check conducted by the FBI.

(c) A fee charged to a qualified entity not organized under 26 U.S.C. 501(c)(3) shall not be less than the total sum of the costs of the FBI and the designated entity.

Dated: August 17, 2023.

Merrick B. Garland,
Attorney General.

[FR Doc. 2023–18194 Filed 8–24–23; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Parts 550, 556, and 590

[Docket No. BOEM–2023–0027]

RIN 1010–AE14

Risk Management and Financial Assurance for OCS Lease and Grant Obligations; Extension of Public Comment Period

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of proposed rulemaking; extension of public comment period.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) is extending the public comment period on our notice of proposed rulemaking (NPRM), “Risk Management and Financial Assurance for Outer Continental Shelf Lease and Grant Obligations,” by 10 days. Comments previously submitted do not need to be resubmitted and will be fully considered.

DATES: The comment period for the proposed rule “Risk Management and Financial Assurance for Outer Continental Shelf [OCS] Lease and Grant Obligations,” which was published on June 29, 2023, at 88 FR 42136, is extended by 10 days. Online comments submitted at <https://www.regulations.gov> must be uploaded by 11:59 p.m. eastern daylight time on September 7, 2023. Hardcopy comments submitted by a parcel delivery service must be received by BOEM or postmarked on or before September 7, 2023.

ADDRESSES: The publicly available documents relevant to this action are available for public inspection electronically at <https://www.regulations.gov> in Docket No. BOEM–2023–0027.

Submitting Comments. You may send comments regarding the substance of this proposed rule, identified by Docket No. BOEM–2023–0027 or regulation identifier number (RIN) 1010–AE14, using any of the following methods:

- *Federal e-rulemaking portal:* <https://www.regulations.gov>. Search for and submit comments on Docket No. BOEM–2023–0027.
- *U.S. Postal Service or other parcel delivery service:* Address comments to

the Office of Regulations, Bureau of Ocean Energy Management, Department of the Interior, Attention: Kelley Spence, 45600 Woodland Road, Mailstop: DIR–BOEM, Sterling, VA 20166.

Instructions: All comments submitted regarding this proposed rule should reference Docket No. BOEM–2023–0027 or RIN 1010–AE14. All comments received by BOEM will be reviewed and may be posted to <https://www.regulations.gov>, including any personal information provided with the submission. For further instructions on protecting personally identifiable information, see “Public Availability of Comments” under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Kelley Spence, Office of Regulations, BOEM, at telephone number 984–298–7345 or email address Kelley.Spence@boem.gov; or Karen Thundiyil, Chief, Office of Regulations, BOEM, at telephone number 202–742–0970 or email address Karen.Thundiyil@boem.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: On June 29, 2023, BOEM published the proposed rule “Risk Management and Financial Assurance for [OCS] Lease and Grant Obligations.” 88 FR 42136. That proposed rule would modify the criteria for determining whether oil, gas, and sulfur lessees, right-of-use and easement (RUE) grant holders, and pipeline right-of-way grant holders may be required to provide financial assurance above the current regulatorily prescribed base financial assurance to ensure compliance with their Outer Continental Shelf Lands Act obligations. This proposed rule would also remove existing restrictive provisions for third-party guarantees and decommissioning accounts and would add new criteria under which a bond or third-party guarantee that was provided as supplemental financial assurance may be canceled. Additionally, this proposed rule would clarify financial assurance requirements for RUEs serving Federal leases. With this notice, we are extending the public comment period on the NPRM from August 28, 2023, to September 7, 2023.

Public Availability of Comments

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section of this notice. Before including your name, return address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available. In order for BOEM to withhold from disclosure your personally identifiable information, you must identify, in a cover letter, any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe in such cover letter any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so. Even if BOEM withholds your information in the context of this rulemaking, your submission is subject to the Freedom of Information Act (FOIA) and any relevant court orders. If your submission is requested under the FOIA or such court order, your information will only be withheld if a determination is made that one of the FOIA's exemptions to disclosure applies or if such court order is challenged. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

Elizabeth Klein,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2023-18370 Filed 8-24-23; 8:45 am]

BILLING CODE 4310-MR-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 117**

[Docket No. USCG-2022-0520]

RIN 1625-AA09

Drawbridge Operation Regulation; Mianus River, Greenwich, CT

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the operating schedule that

governs the Metro-North (Cos Cob) Bridge, across Mianus River, mile 1.0, at Greenwich, CT. The bridge owner, Metro-North Railroad (MNR), submitted a request on May 5, 2022 to modify the regulation to align with the Metro-North "WALK" Bridge train schedule and avoid bridge openings during peak transit hours. It is expected that this change to the regulations will better serve the needs of the community while continuing to meet the reasonable needs of navigation. We invite your comments on this proposed rulemaking. The original notice of proposed rulemaking did not accurately reflect the owner's request. As such, the Coast Guard is issuing a supplemental notice of proposed rulemaking to accurately describe the owner's request and proposed changes to the existing regulation.

DATES: Comments and related material must reach the Coast Guard on or before September 25, 2023.

ADDRESSES: You may submit comments identified by docket number USCG-2022-0520 using Federal Decision Making Portal at <https://www.regulations.gov>.

See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212-514-4335, email Stephanie.E.Lopez@uscg.mil.

SUPPLEMENTARY INFORMATION:**I. Table of Abbreviations**

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
SNPRM Supplemental Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code
MNR Metro-North Railroad

II. Background, Purpose and Legal Basis

The Metro-North (Cos Cob) Bridge at mile 1.0, across Mianus River, Greenwich, CT, has a vertical clearance of 20 feet at mean high water and a horizontal clearance of approximately 67 feet. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.209. Under the current regulation, the draw

shall open on signal from 5 a.m. to 9 p.m. but no later than 20 minutes after the signal to open unless a train is scheduled to cross. Once the train scheduled to cross has passed the Greenwich or Riverside stations, the bridge will open once the train has made passage. From April 1 through October 31, from 9 p.m. to 5 a.m., the bridge will open after at least a four-hour advance notice is given. From November 1 through March 30, from 9 p.m. to 5 a.m., the bridge will open after at least a twenty-four-hour advance notice is given.

MNR is requesting the modification of the requirements in 33 CFR part 117.209 to align with the existing requirements for the Metro-North "WALK" Bridge, across the Norwalk River, at mile 0.1.

The Cos Cob Bridge is located at one of the busiest rail segments in the United States and the Northeast Corridor. Openings at Cos Cob Bridge, between the calendar years of 2019 and 2021, resulted in seventy-one (71) delays to MNR train service. A delay due to a bridge opening has cascading affects, resulting in multiple delayed and late trains. Delays due to the openings of Cos Cob Bridge were notably high among the drawbridges on MNR service territory. Aligning the Cos Cob Bridge regulation with the WALK Bridge regulation 33 CFR 117.217 (b) provides a balance between railroad operations and vessels interest in waterway passage.

III. Discussion of Supplemental Proposed Rule

The supplemental proposed rule provides the draw to open on signal between 4:30 a.m. and 9 p.m. after at least a two-hour advance notice is given via marine radio or telephone. The bridge will not open from 5:45 a.m. through 9:45 a.m. and from 4 p.m. through 8 p.m. From 9 p.m. through 4:30 a.m. the draw shall open on signal after at least a four-hour advance notice is given via marine radio or telephone. A delay in opening the draw not to exceed 10 minutes may occur when a train scheduled to cross the bridge without stopping has entered the drawbridge lock. The reason for these changes is to minimize train delays while balancing the interests of vessels in the waterway.

IV. Regulatory Analyses

We developed this supplemental proposed rule after considering numerous statutes and Executive Orders related to rulemaking. A summary of our analysis based on these statutes and Executive Orders follows.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This SNPRM has not been designated a “significant regulatory action,” under Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the SNPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can still transit the bridge given advanced notice.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this supplemental proposed rule would not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of

actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal Decision Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG-2022–0520 in the search box and click “Search.” Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select “Supporting & Related Material” in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked

Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published of any posting or updates to the docket.

We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Revise § 117.209 to read as follows:

§ 117.209 Mianus

The draw of the Metro-North (Cos Cob) bridge, mile 1.0 at Greenwich, will operate as follows:

(a) The draw will open on signal between 4:30 a.m. and 9 p.m. after at least a two-hour advance notice is given; except that, from 5:45 a.m. through 9:45 a.m. and from 4 p.m. through 8 p.m., Monday through Friday excluding holidays, the draw need not open for the passage of vessel traffic unless an emergency exists.

(b) From 9 p.m. through 4:30 a.m. the draw will open on signal after at least a four-hour advance notice is given.

(c) A delay in opening the draw not to exceed 10 minutes may occur when a train scheduled to cross the bridge without stopping has entered the drawbridge lock.

(d) Requests for bridge openings may be made by calling the bridge via marine radio VHF FM Channel 13 or the telephone number posted at the bridge.

Dated: August 20, 2023.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2023–18323 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0854]

RIN 1625–AA09

Drawbridge Operation Regulation; Reynolds Channel, Atlantic Beach, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the operating schedule that governs the Atlantic Beach Bridge across the Reynolds Channel, mile 0.4, at Atlantic Beach, NY. The bridge owner, Nassau County Bridge Authority, submitted a request on September 22, 2022 to modify the regulation to decrease the amount of openings on signal from October through May. It is expected that this change to the regulations will better serve the needs of the community while continuing to meet the reasonable needs of navigation. We invite your comments on this proposed rulemaking.

DATES: Comments and relate material must reach the Coast Guard on or before September 25, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0854 using Federal Decision Making Portal at <https://www.regulations.gov>.

See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email Stephanie.E.Lopez@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code

II. Background, Purpose and Legal Basis

The Atlantic Beach Bridge at mile 0.4, across Reynolds Channel, Atlantic Beach, NY, has a vertical clearance of 25

feet at mean high water and a horizontal clearance of 125 feet. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.799(e). Under the current regulation, the bridge shall open on signal from October 1 through May 14. Nassau County is requesting the bridge shall open on signal from 8 a.m. to midnight October 1 through May 14; and from midnight to 8 a.m. year-round the draw shall open on signal if at least eight hours advance notice is given.

The Reynolds Channel is transited by recreational vessels and commercial vessels. In recent years, a significant amount of industrial and commercial business has closed along the waterfront. This change has caused a decrease in the amount of bridge opening requests from midnight to 8 a.m.

Nassau County Bridge Authority held two public meetings on August 18, 2022 and August 25, 2022. No one from the public attended.

III. Discussion of Proposed Rule

The proposed rule provides the draw to open on signal from 8 a.m. to midnight October 1 through May 14; and from midnight to 8 a.m. year-round the draw shall open on signal if at least eight hours notice is given. The reason for these changes is to reduce openings on signal during off peak hours due to a significant reduction of commercial business on the waterway.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can still transit the bridge given advanced notice.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and

have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this proposed rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal Decision Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG–2022–0854 in the search box and click “Search.” Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select “Supporting & Related Material” in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you click on the “Dockets” tab and then the proposed rule, you should see a “Subscribe” option for email alerts. Selecting this option will enable notifications when comments are posted, or if/when a final rule is published.

We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. For more about privacy and

submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

Part 117—Drawbridge Operation Regulations

- 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; DHS Delegation No. 00170.1, Revision No. 01.3.

- 2. Revise § 117.799(e) to read as follows:

§ 117.799 Long Island, New York Inland Waterway from East Rockaway Inlet to Shinnecock Canal.

* * * * *

(e) The draw of the Atlantic Beach Bridge across Reynolds Channel, mile 0.4, shall operate as follows:

(1) From October 1 through May 14 the draw shall open on signal from 8 a.m. to midnight.

(2) From midnight to 8 a.m. year-round, the draw shall open on signal if at least eight hours notice is given.

(3) From May 15 through September 30, except that it need be opened only on the hour and half-hour from 4 p.m. to 7 p.m. on weekdays and from 11 a.m. to 9 p.m. on Saturdays, Sundays, Memorial Day, Independence Day, and Labor Day.

(4) From May 15 through September 30, from two hours before to one hour after predicted high tide. Predicted high tide occurs 10 minutes earlier than that predicted for Sandy Hook, as given in the tide table published by the National Oceanic and Atmospheric Administration.

* * * * *

Dated: August 20, 2023.

J. W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2023–18322 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2022–0912; FRL–11269–01–R3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Regional Haze State Implementation Plan for the Second Implementation Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the regional haze state implementation plan (SIP) revision submitted by the State of Maryland on February 8, 2022, as satisfying applicable requirements under the Clean Air Act (CAA) and EPA's Regional Haze Rule for the program's second implementation period. Maryland's SIP submission addresses the requirement that states must periodically revise their long-term strategies for making reasonable progress towards the national goal of preventing any future, and remedying any existing, anthropogenic impairment of visibility, including regional haze, in mandatory Class I Federal areas. The SIP submission also addresses other applicable requirements for the second implementation period of the regional haze program. The EPA is taking this action pursuant to sections 110 and 169A of the Clean Air Act.

DATES: Written comments must be received on or before September 25, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2022–0912 at www.regulations.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary

submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT:

Adam Yarina, U.S. Environmental Protection Agency, Region 3, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103–2852, at (215) 814–2108, or by email at yarina.Adam@epa.gov.

Table of Contents

- I. What action is the EPA proposing?
- II. Background and Requirements for Regional Haze Plans
 - A. Regional Haze Background
 - B. Roles of Agencies in Addressing Regional Haze
- III. Requirements for Regional Haze Plans for the Second Implementation Period
 - A. Identification of Class I Areas
 - B. Calculations of Baseline, Current, and Natural Visibility Conditions; Progress to Date; and the Uniform Rate of Progress
 - C. Long-Term Strategy for Regional Haze
 - D. Reasonable Progress Goals
 - E. Monitoring Strategy and Other State Implementation Plan Requirements
 - F. Requirements for Periodic Reports Describing Progress Towards the Reasonable Progress Goals
 - G. Requirements for State and Federal Land Manager Coordination
- IV. EPA's Evaluation of Maryland's Regional Haze Submission for the Second Implementation Period
 - A. Background on Maryland's First Implementation Period SIP Submission
 - B. Maryland's Second Implementation Period SIP Submission and the EPA's Evaluation
 - C. Identification of Class I Areas
 - D. Calculations of Baseline, Current, and Natural Visibility Conditions; Progress to Date; and the Uniform Rate of Progress
 - E. Long-Term Strategy for Regional Haze
 - F. Reasonable Progress Goals
 - G. Monitoring Strategy and Other Implementation Plan Requirements
 - H. Requirements for Periodic Reports Describing Progress Towards the Reasonable Progress Goals
- I. Requirements for State and Federal Land Manager Coordination
- V. Proposed Action
- VI. Statutory and Executive Order Reviews

I. What action is the EPA proposing?

On February 8, 2022, the Maryland Department of the Environment (MDE) submitted a revision to its SIP to address regional haze for the second implementation period. MDE made this SIP submission to satisfy the requirements of the CAA's regional haze

program pursuant to CAA sections 169A and 169B and 40 CFR 51.308. The EPA is proposing to find that the Maryland regional haze SIP submission for the second implementation period meets the applicable statutory and regulatory requirements and thus proposes to approve Maryland's submission into its SIP.

II. Background and Requirements for Regional Haze Plans

A. Regional Haze Background

In the 1977 CAA Amendments, Congress created a program for protecting visibility in the nation's mandatory Class I Federal areas, which include certain national parks and wilderness areas.¹ CAA 169A. The CAA establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." CAA 169A(a)(1). The CAA further directs the EPA to promulgate regulations to assure reasonable progress toward meeting this national goal. CAA 169A(a)(4). On December 2, 1980, the EPA promulgated regulations to address visibility impairment in mandatory Class I Federal areas (hereinafter referred to as "Class I areas") that is "reasonably attributable" to a single source or small group of sources. (45 FR 80084, December 2, 1980). These regulations, codified at 40 CFR 51.300 through 51.307, represented the first phase of the EPA's efforts to address visibility impairment. In 1990, Congress added section 169B to the CAA to further address visibility impairment, specifically, impairment from regional haze. CAA 169B. The EPA promulgated the Regional Haze Rule (RHR), codified at 40 CFR 51.308,² on July 1, 1999. (64 FR 35714, July 1, 1999). These regional haze regulations are a central component of the EPA's comprehensive visibility protection program for Class I areas.

¹ Areas statutorily designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. CAA 162(a). There are 156 mandatory Class I areas. The list of areas to which the requirements of the visibility protection program apply is in 40 CFR part 81, subpart D.

² In addition to the generally applicable regional haze provisions at 40 CFR 51.308, the EPA also promulgated regulations specific to addressing regional haze visibility impairment in Class I areas on the Colorado Plateau at 40 CFR 51.309. The latter regulations are applicable only for specific jurisdictions' regional haze plans submitted no later than December 17, 2007, and thus are not relevant here.

Regional haze is visibility impairment that is produced by a multitude of anthropogenic sources and activities which are located across a broad geographic area and that emit pollutants that impair visibility. Visibility impairing pollutants include fine and coarse particulate matter (PM) (e.g., sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (e.g., sulfur dioxide (SO₂), nitrogen oxides (NO_x), and, in some cases, volatile organic compounds (VOC) and ammonia (NH₃)). Fine particle precursors react in the atmosphere to form fine particulate matter (PM_{2.5}), which impairs visibility by scattering and absorbing light. Visibility impairment reduces the perception of clarity and color, as well as visible distance.³

To address regional haze visibility impairment, the 1999 RHR established an iterative planning process that requires both states in which Class I areas are located and states "the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area to periodically submit SIP revisions to address such impairment. CAA 169A(b)(2); ⁴ see also 40 CFR 51.308(b), (f) (establishing submission dates for iterative regional haze SIP revisions); (64 FR 35714 at 35768, July 1, 1999). Under the CAA, each SIP submission must contain "a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal," CAA 169A(b)(2)(B); the initial round of SIP submissions also

³ There are several ways to measure the amount of visibility impairment, i.e., haze. One such measurement is the deciview, which is the principal metric used by the RHR. Under many circumstances, a change in one deciview will be perceived by the human eye to be the same on both clear and hazy days. The deciview is unitless. It is proportional to the logarithm of the atmospheric extinction of light, which is the perceived dimming of light due to its being scattered and absorbed as it passes through the atmosphere. Atmospheric light extinction (b_{ext}) is a metric used to for expressing visibility and is measured in inverse megameters (Mm⁻¹). The EPA's Guidance on Regional Haze State Implementation Plans for the Second Implementation Period ("2019 Guidance") offers the flexibility for the use of light extinction in certain cases. Light extinction can be simpler to use in calculations than deciviews, since it is not a logarithmic function. See, e.g., 2019 Guidance at 16, 19, <https://www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period>, The EPA Office of Air Quality Planning and Standards, Research Triangle Park (August 20, 2019). The formula for the deciview is $10 \ln(b_{ext})/10 \text{ Mm}^{-1}$. 40 CFR 51.301.

⁴ The RHR expresses the statutory requirement for states to submit plans addressing out-of-state class I areas by providing that states must address visibility impairment "in each mandatory Class I Federal area located outside the State that may be affected by emissions from within the State." 40 CFR 51.308(d), (f).

had to address the statutory requirement that certain older, larger sources of visibility impairing pollutants install and operate the best available retrofit technology (BART). CAA 169A(b)(2)(A); 40 CFR 51.308(d), (e). States' first regional haze SIPs were due by December 17, 2007, 40 CFR 51.308(b), with subsequent SIP submissions containing updated long-term strategies originally due July 31, 2018, and every ten years thereafter. (64 FR 35714 at 35768, July 1, 1999). The EPA established in the 1999 RHR that all states either have Class I areas within their borders or "contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area"; therefore, all states must submit regional haze SIPs.⁵ Id. at 35721.

Much of the focus in the first implementation period of the regional haze program, which ran from 2007 through 2018, was on satisfying states' BART obligations. First implementation period SIPs were additionally required to contain long-term strategies for making reasonable progress toward the national visibility goal, of which BART is one component. The core required elements for the first implementation period SIPs (other than BART) are laid out in 40 CFR 51.308(d). Those provisions required that states containing Class I areas establish reasonable progress goals (RPGs) that are measured in deciviews and reflect the anticipated visibility conditions at the end of the implementation period including from implementation of states' long-term strategies. The first planning period RPGs were required to provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period. In establishing the RPGs for any Class I area in a state, the state was required to consider four statutory factors: the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources. CAA 169A(g)(1); 40 CFR 51.308(d)(1).

States were also required to calculate baseline (using the five year period of 2000–2004) and natural visibility conditions (i.e., visibility conditions without anthropogenic visibility

⁵ In addition to each of the fifty states, the EPA also concluded that the Virgin Islands and District of Columbia must also submit regional haze SIPs because they either contain a Class I area or contain sources whose emissions are reasonably anticipated to contribute regional haze in a Class I area. See 40 CFR 51.300(b) and (d)(3).

impairment) for each Class I area, and to calculate the linear rate of progress needed to attain natural visibility conditions, assuming a starting point of baseline visibility conditions in 2004 and ending with natural conditions in 2064. This linear interpolation is known as the uniform rate of progress (URP) and is used as a tracking metric to help states assess the amount of progress they are making towards the national visibility goal over time in each Class I area.⁶ 40 CFR 51.308(d)(1)(i)(B) and (d)(2). The 1999 RHR also provided that States' long-term strategies must include the "enforceable emissions limitations, compliance, schedules, and other measures as necessary to achieve the reasonable progress goals." 40 CFR 51.308(d)(3). In establishing their long-term strategies, states are required to consult with other states that also contribute to visibility impairment in a given Class I area and include all measures necessary to obtain their shares of the emission reductions needed to meet the RPGs. 40 CFR 51.308(d)(3)(i) and (ii). Section 51.308(d) also contains seven additional factors states must consider in formulating their long-term strategies, 40 CFR 51.308(d)(3)(v), as well as provisions governing monitoring and other implementation plan requirements. 40 CFR 51.308(d)(4). Finally, the 1999 RHR required states to submit periodic progress reports—SIP revisions due every five years that contain information on states' implementation of their regional haze plans and an assessment of whether anything additional is needed to make reasonable progress, see 40 CFR 51.308(g) and (h)—and to consult with the Federal Land Manager(s)⁷ (FLMs)

⁶ EPA established the URP framework in the 1999 RHR to provide "an equitable analytical approach" to assessing the rate of visibility improvement at Class I areas across the country. The start point for the URP analysis is 2004 and the endpoint was calculated based on the amount of visibility improvement that was anticipated to result from implementation of existing CAA programs over the period from the mid-1990s to approximately 2005. Assuming this rate of progress would continue into the future, EPA determined that natural visibility conditions would be reached in 60 years, or 2064 (60 years from the baseline starting point of 2004). However, EPA did not establish 2064 as the year by which the national goal *must* be reached. 64 FR 35714 at 35731–32, July 1, 1999. That is, the URP and the 2064 date are not enforceable targets, but are rather tools that "allow for analytical comparisons between the rate of progress that would be achieved by the state's chosen set of control measures and the URP." (82 FR 3078, 3084, January 10, 2017).

⁷ The EPA's regulations define "Federal Land Manager" as "the Secretary of the department with authority over the Federal Class I area (or the Secretary's designee) or, with respect to Roosevelt-Campobello International Park, the Chairman of the

responsible for each Class I area according to the requirements in CAA 169A(d) and 40 CFR 51.308(i).

On January 10, 2017, the EPA promulgated revisions to the RHR, (82 FR 3078, January 10, 2017), that apply for the second and subsequent implementation periods. The 2017 rulemaking made several changes to the requirements for regional haze SIPs to clarify States' obligations and streamline certain regional haze requirements. The revisions to the regional haze program for the second and subsequent implementation periods focused on the requirement that States' SIPs contain long-term strategies for making reasonable progress towards the national visibility goal. The reasonable progress requirements as revised in the 2017 rulemaking (referred to here as the 2017 RHR Revisions) are codified at 40 CFR 51.308(f). Among other changes, the 2017 RHR Revisions adjusted the deadline for States to submit their second implementation period SIPs from July 31, 2018, to July 31, 2021, clarified the order of analysis and the relationship between RPGs and the long-term strategy, and focused on making visibility improvements on the days with the most *anthropogenic* visibility impairment, as opposed to the days with the most visibility impairment overall. The EPA also revised requirements of the visibility protection program related to periodic progress reports and FLM consultation. The specific requirements applicable to second implementation period regional haze SIP submissions are addressed in detail below.

The EPA provided guidance to the states for their second implementation period SIP submissions in the preamble to the 2017 RHR Revisions as well as in subsequent, stand-alone guidance documents. In August 2019, the EPA issued "Guidance on Regional Haze State Implementation Plans for the Second Implementation Period" ("2019 Guidance").⁸ On July 8, 2021, the EPA issued a memorandum containing "Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period" ("2021 Clarifications Memo").⁹ Additionally,

Roosevelt-Campobello International Park Commission." 40 CFR 51.301.

⁸ Guidance on Regional Haze State Implementation Plans for the Second Implementation Period. www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period. The EPA Office of Air Quality Planning and Standards, Research Triangle Park (August 20, 2019).

⁹ Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period. www.epa.gov/system/files/documents/2021-07/clarifications-regarding-

the EPA further clarified the recommended procedures for processing ambient visibility data and optionally adjusting the URP to account for international anthropogenic and prescribed fire impacts in two technical guidance documents: the December 2018 "Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program" ("2018 Visibility Tracking Guidance"),¹⁰ and the June 2020 "Recommendation for the Use of Patched and Substituted Data and Clarification of Data Completeness for Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program" and associated Technical Addendum ("2020 Data Completeness Memo").¹¹

As previously explained in the 2021 Clarifications Memo, EPA intends the second implementation period of the regional haze program to secure meaningful reductions in visibility impairing pollutants that build on the significant progress states have achieved to date. The Agency also recognizes that analyses regarding reasonable progress are state-specific and that, based on states' and sources' individual circumstances, what constitutes reasonable reductions in visibility impairing pollutants will vary from state-to-state. While there exist many opportunities for states to leverage both ongoing and upcoming emission reductions under other CAA programs, the Agency expects states to undertake rigorous reasonable progress analyses that identify further opportunities to advance the national visibility goal consistent with the statutory and regulatory requirements. See generally 2021 Clarifications Memo. This is consistent with Congress's determination that a visibility protection program is needed in addition to the CAA's National Ambient Air Quality Standards and Prevention of Significant Deterioration programs, as

regional-haze-state-implementation-plans-for-the-second-implementation-period.pdf. The EPA Office of Air Quality Planning and Standards, Research Triangle Park (July 8, 2021).

¹⁰ Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program. www.epa.gov/visibility/technical-guidance-tracking-visibility-progress-second-implementation-period-regional. The EPA Office of Air Quality Planning and Standards, Research Triangle Park. (December 20, 2018).

¹¹ Recommendation for the Use of Patched and Substituted Data and Clarification of Data Completeness for Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program. www.epa.gov/visibility/memo-and-technical-addendum-ambient-data-usage-and-completeness-regional-haze-program. The EPA Office of Air Quality Planning and Standards, Research Triangle Park (June 3, 2020).

further emission reductions may be necessary to adequately protect visibility in Class I areas throughout the country.¹²

B. Roles of Agencies in Addressing Regional Haze

Because the air pollutants and pollution affecting visibility in Class I areas can be transported over long distances, successful implementation of the regional haze program requires long-term, regional coordination among multiple jurisdictions and agencies that have responsibility for Class I areas and the emissions that impact visibility in those areas. In order to address regional haze, states need to develop strategies in coordination with one another, considering the effect of emissions from one jurisdiction on the air quality in another. Five regional planning organizations (RPOs),¹³ which include representation from state and tribal governments, the EPA, and FLMs, were developed in the lead-up to the first implementation period to address regional haze. RPOs evaluate technical information to better understand how emissions from State and Tribal land impact Class I areas across the country, pursue the development of regional strategies to reduce emissions of particulate matter and other pollutants leading to regional haze, and help states meet the consultation requirements of the RHR.

The Mid-Atlantic/Northeast Visibility Union (MANE-VU), one of the five RPOs described above, is a collaborative effort of state governments, tribal governments, and various Federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility, and other air quality issues in the Mid-Atlantic and Northeast corridor of the United States. Member states and tribal governments (listed alphabetically) include: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Penobscot Indian Nation, Rhode Island, St. Regis Mohawk Tribe, and Vermont. The Federal partner members of MANE-VU are EPA, U.S. National Parks Service

(NPS), U.S. Fish and Wildlife Service (FWS), and U.S. Forest Service (USFS).

III. Requirements for Regional Haze Plans for the Second Implementation Period

Under the CAA and EPA's regulations, all 50 states, the District of Columbia, and the U.S. Virgin Islands are required to submit regional haze SIPs satisfying the applicable requirements for the second implementation period of the regional haze program by July 31, 2021. Each state's SIP must contain a long-term strategy for making reasonable progress toward meeting the national goal of remedying any existing and preventing any future anthropogenic visibility impairment in Class I areas. CAA 169A(b)(2)(B). To this end, 40 CFR 51.308(f) lays out the process by which states determine what constitutes their long-term strategies, with the order of the requirements in 40 CFR 51.308(f)(1) through (3) generally mirroring the order of the steps in the reasonable progress analysis¹⁴ and 40 CFR 51.308(f)(4) through (6) containing additional, related requirements. Broadly speaking, a state first must identify the Class I areas within the state and determine the Class I areas outside the state in which visibility may be affected by emissions from the state. These are the Class I areas that must be addressed in the state's long-term strategy. See 40 CFR 51.308(f) and (f)(2). For each Class I area within its borders, a state must then calculate the baseline, current, and natural visibility conditions for that area, as well as the visibility improvement made to date and the URP. See 40 CFR 51.308(f)(1). Each state having a Class I area and/or emissions that may affect visibility in a Class I area must then develop a long-term strategy that includes the enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress in such areas. A reasonable progress determination is based on applying the four factors in CAA section 169A(g)(1) to sources of visibility-impairing pollutants that the state has selected to assess for controls for the second implementation period. Additionally, as further explained below, the RHR at 40 CFR 51.3108(f)(2)(iv) separately provides five "additional factors"¹⁵ that states must

consider in developing their long-term strategies. See 40 CFR 51.308(f)(2). A state evaluates potential emission reduction measures for those selected sources and determines which are necessary to make reasonable progress. Those measures are then incorporated into the state's long-term strategy. After a state has developed its long-term strategy, it then establishes RPGs for each Class I area within its borders by modeling the visibility impacts of all reasonable progress controls at the end of the second implementation period, *i.e.*, in 2028, as well as the impacts of other requirements of the CAA. The RPGs include reasonable progress controls not only for sources in the state in which the Class I area is located, but also for sources in other states that contribute to visibility impairment in that area. The RPGs are then compared to the baseline visibility conditions and the URP to ensure that progress is being made towards the statutory goal of preventing any future and remedying any existing anthropogenic visibility impairment in Class I areas. 40 CFR 51.308(f)(2) and (3).

In addition to satisfying the requirements at 40 CFR 51.308(f) related to reasonable progress, the regional haze SIP submissions revisions due by July 31, 2021, for the second implementation period must address the requirements in 40 CFR 51.308(g)(1) through (5) pertaining to periodic reports describing progress towards the RPGs, 40 CFR 51.308(f)(5), as well as requirements for FLM consultation that apply to all visibility protection SIPs and SIP revisions. 40 CFR 51.308(i).

A state must submit its regional haze SIP and subsequent SIP revisions to the EPA according to the requirements applicable to all SIP revisions under the CAA and EPA's regulations. See CAA 169(b)(2); CAA 110(a). Upon EPA approval, a SIP is enforceable by the Agency and the public under the CAA. If EPA finds that a state fails to make a required SIP revision, or if the EPA finds that a state's SIP is incomplete or if disapproves the SIP, the Agency must promulgate a federal implementation plan (FIP) that satisfies the applicable requirements. CAA 110(c)(1).

A. Identification of Class I Areas

The first step in developing a regional haze SIP is for a state to determine which Class I areas, in addition to those within its borders, "may be affected" by emissions from within the state. In the 1999 RHR, the EPA determined that all

¹² See, *e.g.*, H.R. Rep. No. 95–294 at 205 ("In determining how to best remedy the growing visibility problem in these areas of great scenic importance, the committee realizes that as a matter of equity, the national ambient air quality standards cannot be revised to adequately protect visibility in all areas of the country."), ("the mandatory class I increments of [the PSD program] do not adequately protect visibility in class I areas").

¹³ RPOs are sometimes also referred to as "multi-jurisdictional organizations," or MJOs. For the purposes of this document, the terms RPO and MJO are synonymous.

¹⁴ EPA explained in the 2017 RHR Revisions that we were adopting new regulatory language in 40 CFR 51.308(f) that, unlike the structure in 51.308(d), "tracked the actual planning sequence." (82 FR 3091, January 10, 2017).

¹⁵ The five "additional factors" for consideration in section 51.308(f)(2)(iv) are distinct from the four

factors listed in CAA section 169A(g)(1) and 40 CFR 51.308(f)(2)(i) that states must consider and apply to sources in determining reasonable progress.

states contribute to visibility impairment in at least one Class I area, 64 FR 35720–22, July 1, 1999, and explained that the statute and regulations lay out an “extremely low triggering threshold” for determining “whether States should be required to engage in air quality planning and analysis as a prerequisite to determining the need for control of emissions from sources within their State.” *Id.* at 35721.

A state must determine which Class I areas must be addressed by its SIP by evaluating the total emissions of visibility impairing pollutants from all sources within the state. While the RHR does not require this evaluation to be conducted in any particular manner, EPA’s 2019 Guidance provides recommendations for how such an assessment might be accomplished, including by, where appropriate, using the determinations previously made for the first implementation period. 2019 Guidance at 8–9. In addition, the determination of which Class I areas may be affected by a state’s emissions is subject to the requirement in 40 CFR 51.308(f)(2)(iii) to “document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which the State is relying to determine the emission reduction measures that are necessary to make reasonable progress in each mandatory Class I Federal area it affects.”

B. Calculations of Baseline, Current, and Natural Visibility Conditions; Progress to Date; and the Uniform Rate of Progress

As part of assessing whether a SIP submission for the second implementation period is providing for reasonable progress towards the national visibility goal, the RHR contains requirements in 40 CFR 51.308(f)(1) related to tracking visibility improvement over time. The requirements of this subsection apply only to states having Class I areas within their borders; the required calculations must be made for each such Class I area. EPA’s 2018 Visibility Tracking Guidance¹⁶ provides recommendations to assist states in satisfying their obligations under 40 CFR 51.308(f)(1); specifically, in developing information on baseline, current, and natural visibility conditions, and in making optional adjustments to the URP to account for the impacts of international

anthropogenic emissions and prescribed fires. See 82 FR 3078 at 3103–05, January 10, 2017.

The RHR requires tracking of visibility conditions on two sets of days: the clearest and the most impaired days. Visibility conditions for both sets of days are expressed as the average deciview index for the relevant five-year period (the period representing baseline or current visibility conditions). The RHR provides that the relevant sets of days for visibility tracking purposes are the 20% clearest (the 20% of monitored days in a calendar year with the lowest values of the deciview index) and 20% most impaired days (the 20% of monitored days in a calendar year with the highest amounts of anthropogenic visibility impairment).¹⁷ 40 CFR 51.301. A state must calculate visibility conditions for both the 20% clearest and 20% most impaired days for the baseline period of 2000–2004 and the most recent five-year period for which visibility monitoring data are available (representing current visibility conditions). 40 CFR 51.308(f)(1)(i) and (iii). States must also calculate natural visibility conditions for the clearest and most impaired days,¹⁸ by estimating the conditions that would exist on those two sets of days absent anthropogenic visibility impairment. 40 CFR 51.308(f)(1)(ii). Using all these data, states must then calculate, for each Class I area, the amount of progress made since the baseline period (2000–2004) and how much improvement is left to achieve in order to reach natural visibility conditions.

Using the data for the set of most impaired days only, states must plot a line between visibility conditions in the baseline period and natural visibility conditions for each Class I area to determine the URP—the amount of visibility improvement, measured in deciviews, that would need to be achieved during each implementation period in order to achieve natural visibility conditions by the end of 2064. The URP is used in later steps of the

reasonable progress analysis for informational purposes and to provide a non-enforceable benchmark against which to assess a Class I area’s rate of visibility improvement.¹⁹ Additionally, in the 2017 RHR Revisions, the EPA provided states the option of proposing to adjust the endpoint of the URP to account for impacts of anthropogenic sources outside the United States and/or impacts of certain types of wildland prescribed fires. These adjustments, which must be approved by the EPA, are intended to avoid any perception that states should compensate for impacts from international anthropogenic sources and to give states the flexibility to determine that limiting the use of wildland-prescribed fire is not necessary for reasonable progress. 82 FR 3078 at 3107 footnote 116, January 10, 2017.

EPA’s 2018 Visibility Tracking Guidance can be used to help satisfy the 40 CFR 51.308(f)(1) requirements, including in developing information on baseline, current, and natural visibility conditions, and in making optional adjustments to the URP. In addition, the 2020 Data Completeness Memo provides recommendations on the data completeness language referenced in 40 CFR 51.308(f)(1)(i) and provides updated natural conditions estimates for each Class I area.

C. Long-Term Strategy for Regional Haze

The core component of a regional haze SIP submission is a long-term strategy that addresses regional haze in each Class I area within a state’s borders and each Class I area that may be affected by emissions from the state. The long-term strategy “must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv).” 40 CFR 51.308(f)(2). The amount of progress that is “reasonable progress” is based on applying the four statutory factors in CAA section 169A(g)(1) in an evaluation of potential control options for sources of visibility impairing pollutants, which is referred to as a “four-factor” analysis. The outcome of that analysis is the emission reduction measures that a particular source or group of sources needs to implement in order to make reasonable progress

¹⁷ This document also refers to the 20% clearest and 20% most anthropogenically impaired days as the “clearest” and “most impaired” or “most anthropogenically impaired” days, respectively.

¹⁸ The RHR at 40 CFR 51.308(f)(1)(ii) contains an error related to the requirement for calculating two sets of natural conditions values. The rule says “most impaired days or the clearest days” where it should say “most impaired days and clearest days.” This is an error that was intended to be corrected in the 2017 RHR Revisions but did not get corrected in the final rule language. This is supported by the preamble text at 82 FR 3098, January 10, 2017: “In the final version of 40 CFR 51.308(f)(1)(ii), an occurrence of “or” has been corrected to “and” to indicate that natural visibility conditions for both the most impaired days and the clearest days must be based on available monitoring information.”

¹⁹ Being on or below the URP is not a “safe harbor”; *i.e.*, achieving the URP does not mean that a Class I area is making “reasonable progress” and does not relieve a state from using the four statutory factors to determine what level of control is needed to achieve such progress. *See, e.g.*, 82 FR 3078 at 3093, January 10, 2017.

¹⁶ The 2018 Visibility Tracking Guidance references and relies on parts of the 2003 Tracking Guidance: “Guidance for Tracking Progress Under the Regional Haze Rule,” which can be found at <https://www3.epa.gov/ttnamti1/files/ambient/visible/tracking.pdf>.

towards the national visibility goal. See 40 CFR 51.308(f)(2)(i). Emission reduction measures that are necessary to make reasonable progress may be either new, additional control measures for a source, or they may be the existing emission reduction measures that a source is already implementing. See 2019 Guidance at 43; 2021 Clarifications Memo at 8–10. Such measures must be represented by “enforceable emissions limitations, compliance schedules, and other measures” (*i.e.*, any additional compliance tools) in a state’s long-term strategy in its SIP. 40 CFR 51.308(f)(2).

Section 51.308(f)(2)(i) provides the requirements for the four-factor analysis. The first step of this analysis entails selecting the sources to be evaluated for emission reduction measures; to this end, the RHR requires states to consider “major and minor stationary sources or groups of sources, mobile sources, and area sources” of visibility impairing pollutants for potential four-factor control analysis. 40 CFR 51.308(f)(2)(i). A threshold question at this step is which visibility impairing pollutants will be analyzed. As EPA previously explained, consistent with the first implementation period, EPA generally expects that each state will analyze at least SO₂ and NO_x in selecting sources and determining control measures. See 2019 Guidance at 12, 2021 Clarifications Memo at 4. A state that chooses not to consider at least these two pollutants should demonstrate why such consideration would be unreasonable. 2021 Clarifications Memo at 4.

While states have the option to analyze *all* sources, the 2019 Guidance explains that “an analysis of control measures is not required for every source in each implementation period,” and that “[s]electing a set of sources for analysis of control measures in each implementation period is . . . consistent with the Regional Haze Rule, which sets up an iterative planning process and anticipates that a state may not need to analyze control measures for all its sources in a given SIP revision.” 2019 Guidance at 9. However, given that source selection is the basis of all subsequent control determinations, a reasonable source selection process “should be designed and conducted to ensure that source selection results in a set of pollutants and sources the evaluation of which has the potential to meaningfully reduce their contributions to visibility impairment.” 2021 Clarifications Memo at 3.

EPA explained in the 2021 Clarifications Memo that each state has an obligation to submit a long-term strategy that addresses the regional haze

visibility impairment that results from emissions from within that state. Thus, source selection should focus on the in-state contribution to visibility impairment and be designed to capture a meaningful portion of the state’s total contribution to visibility impairment in Class I areas. A state should not decline to select its largest in-state sources on the basis that there are even larger out-of-state contributors. 2021 Clarifications Memo at 4.²⁰

Thus, while states have discretion to choose any source selection methodology that is reasonable, whatever choices they make should be reasonably explained. To this end, 40 CFR 51.308(f)(2)(i) requires that a state’s SIP submission include “a description of the criteria it used to determine which sources or groups of sources it evaluated.” The technical basis for source selection, which may include methods for quantifying potential visibility impacts such as emissions divided by distance metrics, trajectory analyses, residence time analyses, and/or photochemical modeling, must also be appropriately documented, as required by 40 CFR 51.308(f)(2)(iii).

Once a state has selected the set of sources, the next step is to determine the emissions reduction measures for those sources that are necessary to make reasonable progress for the second implementation period.²¹ This is accomplished by considering the four factors—“the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements.” CAA 169A(g)(1). The EPA has explained that the four-factor analysis is an assessment of potential emission reduction measures (*i.e.*, control options) for sources; “use of the terms ‘compliance’ and ‘subject to such requirements’ in section 169A(g)(1) strongly indicates that Congress

intended the relevant determination to be the requirements with which sources would have to comply in order to satisfy the CAA’s reasonable progress mandate.” 82 FR 3078 at 3091, January 10, 2017. Thus, for each source it has selected for four-factor analysis,²² a state must consider a “meaningful set” of technically feasible control options for reducing emissions of visibility impairing pollutants. *Id.* at 3088. The 2019 Guidance provides that “[a] state must reasonably pick and justify the measures that it will consider, recognizing that there is no statutory or regulatory requirement to consider all technically feasible measures or any particular measures. A range of technically feasible measures available to reduce emissions would be one way to justify a reasonable set.” 2019 Guidance at 29.

EPA’s 2021 Clarifications Memo provides further guidance on what constitutes a reasonable set of control options for consideration: “A reasonable four-factor analysis will consider the full range of potentially reasonable options for reducing emissions.” 2021 Clarifications Memo at 7. In addition to add-on controls and other retrofits (*i.e.*, new emission reduction measures for sources), EPA explained that states should generally analyze efficiency improvements for sources’ existing measures as control options in their four-factor analyses, as in many cases such improvements are reasonable given that they typically involve only additional operation and maintenance costs. Additionally, the 2021 Clarifications Memo provides that states that have assumed a higher emission rate than a source has achieved or could potentially achieve using its existing measures should also consider lower emission rates as potential control options. That is, a state should consider a source’s recent actual and projected emission rates to determine if it could

²⁰ Similarly, in responding to comments on the 2017 RHR Revisions EPA explained that “[a] state should not fail to address its many relatively low-impact sources merely because it only has such sources and another state has even more low-impact sources and/or some high impact sources.” Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule (81 FR 26942, May 4, 2016) at 87–88.

²¹ The CAA provides that, “[i]n determining reasonable progress there shall be taken into consideration” the four statutory factors. CAA 169A(g)(1). However, in addition to four-factor analyses for selected sources, groups of sources, or source categories, a state may also consider additional emission reduction measures for inclusion in its long-term strategy, *e.g.*, from other newly adopted, on-the-books, or on-the-way rules and measures for sources not selected for four-factor analysis for the second planning period.

²² “Each source” or “particular source” is used here as shorthand. While a source-specific analysis is one way of applying the four factors, neither the statute nor the RHR requires states to evaluate individual sources. Rather, states have “the flexibility to conduct four-factor analyses for specific sources, groups of sources or even entire source categories, depending on state policy preferences and the specific circumstances of each state.” 82 FR 3078 at 3088, January 10, 2017. However, not all approaches to grouping sources for four-factor analysis are necessarily reasonable; the reasonableness of grouping sources in any particular instance will depend on the circumstances and the manner in which grouping is conducted. If it is feasible to establish and enforce different requirements for sources or subgroups of sources, and if relevant factors can be quantified for those sources or subgroups, then states should make a separate reasonable progress determination for each source or subgroup. 2021 Clarifications Memo at 7–8.

reasonably attain lower emission rates with its existing measures. If so, the state should analyze the lower emission rate as a control option for reducing emissions. 2021 Clarifications Memo at 7. The EPA's recommendations to analyze potential efficiency improvements and achievable lower emission rates apply to both sources that have been selected for four-factor analysis and those that have forgone a four-factor analysis on the basis of existing "effective controls." See 2021 Clarifications Memo at 5, 10.

After identifying a reasonable set of potential control options for the sources it has selected, a state then collects information on the four factors with regard to each option identified. The EPA has also explained that, in addition to the four statutory factors, states have flexibility under the CAA and RHR to reasonably consider visibility benefits as an additional factor alongside the four statutory factors.²³ The 2019 Guidance provides recommendations for the types of information that can be used to characterize the four factors (with or without visibility), as well as ways in which states might reasonably consider and balance that information to determine which of the potential control options is necessary to make reasonable progress. See 2019 Guidance at 30–36. The 2021 Clarifications Memo contains further guidance on how states can reasonably consider modeled visibility impacts or benefits in the context of a four-factor analysis. 2021 Clarifications Memo at 12–13, 14–15. Specifically, EPA explained that while visibility can reasonably be used when comparing and choosing between multiple reasonable control options, it should not be used to summarily reject controls that are reasonable given the four statutory factors. 2021 Clarifications Memo at 13. Ultimately, while states have discretion to reasonably weigh the factors and to determine what level of control is needed, 40 CFR 51.308(f)(2)(i) provides that a state "must include in its implementation plan a description of . . . how the four factors were taken into consideration in selecting the measure for inclusion in its long-term strategy."

As explained above, 40 CFR 51.308(f)(2)(i) requires states to determine the emission reduction measures for sources that are necessary to make reasonable progress by considering the four factors. Pursuant to

40 CFR 51.308(f)(2), measures that are necessary to make reasonable progress towards the national visibility goal must be included in a state's long-term strategy and in its SIP.²⁴ If the outcome of a four-factor analysis is a new, additional emission reduction measure for a source, that new measure is necessary to make reasonable progress towards remedying existing anthropogenic visibility impairment and must be included in the SIP. If the outcome of a four-factor analysis is that no new measures are reasonable for a source, continued implementation of the source's existing measures is generally necessary to prevent future emission increases and thus to make reasonable progress towards the second part of the national visibility goal: preventing future anthropogenic visibility impairment. See CAA 169A(a)(1). That is, when the result of a four-factor analysis is that no new measures are necessary to make reasonable progress, the source's existing measures are generally necessary to make reasonable progress and must be included in the SIP. However, there may be circumstances in which a state can demonstrate that a source's existing measures are *not* necessary to make reasonable progress. Specifically, if a state can demonstrate that a source will continue to implement its existing measures and will not increase its emission rate, it may not be necessary to have those measures in the long-term strategy in order to prevent future emission increases and future visibility impairment. EPA's 2021 Clarifications Memo provides further explanation and guidance on how states may demonstrate that a source's existing measures are not necessary to make reasonable progress. See 2021 Clarifications Memo at 8–10. If the state can make such a demonstration, it need not include a source's existing measures in the long-term strategy or its SIP.

As with source selection, the characterization of information on each of the factors is also subject to the documentation requirement in 40 CFR 51.308(f)(2)(iii). The reasonable progress

analysis, including source selection, information gathering, characterization of the four statutory factors (and potentially visibility), balancing of the four factors, and selection of the emission reduction measures that represent reasonable progress, is a technically complex exercise, but also a flexible one that provides states with bounded discretion to design and implement approaches appropriate to their circumstances. Given this flexibility, 40 CFR 51.308(f)(2)(iii) plays an important function in requiring a state to document the technical basis for its decision making so that the public and the EPA can comprehend and evaluate the information and analysis the state relied upon to determine what emission reduction measures must be in place to make reasonable progress. The technical documentation must include the modeling, monitoring, cost, engineering, and emissions information on which the state relied to determine the measures necessary to make reasonable progress. This documentation requirement can be met through the provision of and reliance on technical analyses developed through a regional planning process, so long as that process and its output has been approved by all state participants. In addition to the explicit regulatory requirement to document the technical basis of their reasonable progress determinations, states are also subject to the general principle that those determinations must be reasonably moored to the statute.²⁵ That is, a state's decisions about the emission reduction measures that are necessary to make reasonable progress must be consistent with the statutory goal of remedying existing and preventing future visibility impairment.

The four statutory factors (and potentially visibility) are used to determine what emission reduction measures for selected sources must be included in a state's long-term strategy for making reasonable progress. Additionally, the RHR at 40 CFR 51.3108(f)(2)(iv) separately provides five "additional factors"²⁶ that states must consider in developing their long-term

²³ See, e.g., Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule (81 FR 26942, May 4, 2016), Docket Number EPA–HQ–OAR–2015–0531, U.S. Environmental Protection Agency at 186; 2019 Guidance at 36–37.

²⁴ States may choose to, but are not required to, include measures in their long-term strategies beyond just the emission reduction measures that are necessary for reasonable progress. See 2021 Clarifications Memo at 16. For example, states with smoke management programs may choose to submit their smoke management plans to EPA for inclusion in their SIPs but are not required to do so. See, e.g., 82 FR 3078 at 3108–09, January 10, 2017 (requirement to consider smoke management practices and smoke management programs under 40 CFR 51.308(f)(2)(iv) does not require states to adopt such practices or programs into their SIPs, although they may elect to do so).

²⁵ See *Arizona ex rel. Darwin v. U.S. EPA*, 815 F.3d 519, 531 (9th Cir. 2016); *Nebraska v. U.S. EPA*, 812 F.3d 662, 668 (8th Cir. 2016); *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013); *Oklahoma v. EPA*, 723 F.3d 1201, 1206, 1208–10 (10th Cir. 2013); cf. also *Nat'l Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 165 (3d Cir. 2015); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 485, 490 (2004).

²⁶ The five "additional factors" for consideration in section 51.308(f)(2)(iv) are distinct from the four factors listed in CAA section 169A(g)(1) and 40 CFR 51.308(f)(2)(i) that states must consider and apply to sources in determining reasonable progress.

strategies: (1) emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment; (2) measures to reduce the impacts of construction activities; (3) source retirement and replacement schedules; (4) basic smoke management practices for prescribed fire used for agricultural and wildland vegetation management purposes and smoke management programs; and (5) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy. The 2019 Guidance provides that a state may satisfy this requirement by considering these additional factors in the process of selecting sources for four-factor analysis, when performing that analysis, or both, and that not every one of the additional factors needs to be considered at the same stage of the process. See 2019 Guidance at 21. EPA provided further guidance on the five additional factors in the 2021 Clarifications Memo, explaining that a state should generally not reject cost-effective and otherwise reasonable controls merely because there have been emission reductions since the first planning period owing to other ongoing air pollution control programs or merely because visibility is otherwise projected to improve at Class I areas. Additionally, states generally should not rely on these additional factors to summarily assert that the state has already made sufficient progress and, therefore, no sources need to be selected or no new controls are needed regardless of the outcome of four-factor analyses. 2021 Clarifications Memo at 13.

Because the air pollution that causes regional haze crosses state boundaries, 40 CFR 51.308(f)(2)(ii) requires a state to consult with other states that also have emissions that are reasonably anticipated to contribute to visibility impairment in a given Class I area. Consultation allows for each state that impacts visibility in an area to share whatever technical information, analyses, and control determinations may be necessary to develop coordinated emission management strategies. This coordination may be managed through inter- and intra-RPO consultation and the development of regional emissions strategies; additional consultations between states outside of RPO processes may also occur. If a state, pursuant to consultation, agrees that certain measures (e.g., a certain emission limitation) are necessary to make reasonable progress at a Class I

area, it must include those measures in its SIP. 40 CFR 51.308(f)(2)(ii)(A). Additionally, the RHR requires that states that contribute to visibility impairment at the same Class I area consider the emission reduction measures the other contributing states have identified as being necessary to make reasonable progress for their own sources. 40 CFR 51.308(f)(2)(ii)(B). If a state has been asked to consider or adopt certain emission reduction measures, but ultimately determines those measures are not necessary to make reasonable progress, that state must document in its SIP the actions taken to resolve the disagreement. 40 CFR 51.308(f)(2)(ii)(C). The EPA will consider the technical information and explanations presented by the submitting state and the state with which it disagrees when considering whether to approve the state's SIP. See *id.*; 2019 Guidance at 53. Under all circumstances, a state must document in its SIP submission all substantive consultations with other contributing states. 40 CFR 51.308(f)(2)(ii)(C).

D. Reasonable Progress Goals

Reasonable progress goals “measure the progress that is projected to be achieved by the control measures states have determined are necessary to make reasonable progress based on a four-factor analysis.” 82 FR 3078 at 3091, January 10, 2017. Their primary purpose is to assist the public and the EPA in assessing the reasonableness of states' long-term strategies for making reasonable progress towards the national visibility goal. See 40 CFR 51.308(f)(3)(iii) and (iv). States in which Class I areas are located must establish two RPGs, both in deciviews—one representing visibility conditions on the clearest days and one representing visibility on the most anthropogenically impaired days—for each area within their borders. 40 CFR 51.308(f)(3)(i). The two RPGs are intended to reflect the projected impacts, on the two sets of days, of the emission reduction measures the state with the Class I area, as well as all other contributing states, have included in their long-term strategies for the second implementation period.²⁷ The RPGs also account for the

²⁷ RPGs are intended to reflect the projected impacts of the measures all contributing states include in their long-term strategies. However, due to the timing of analyses and of control determinations by other states, other on-going emissions changes, a particular state's RPGs may not reflect all control measures and emissions reductions that are expected to occur by the end of the implementation period. The 2019 Guidance provides recommendations for addressing the timing of RPG calculations when states are developing their long-term strategies on disparate

projected impacts of implementing other CAA requirements, including non-SIP based requirements. Because RPGs are the modeled result of the measures in states' long-term strategies (as well as other measures required under the CAA), they cannot be determined before states have conducted their four-factor analyses and determined the control measures that are necessary to make reasonable progress. See 2021 Clarifications Memo at 6.

For the second implementation period, the RPGs are set for 2028. Reasonable progress goals are not enforceable targets, 40 CFR 51.308(f)(3)(iii); rather, they “provide a way for the states to check the projected outcome of the [long-term strategy] against the goals for visibility improvement.” 2019 Guidance at 46. While states are not legally obligated to achieve the visibility conditions described in their RPGs, 40 CFR 51.308(f)(3)(i) requires that “[t]he long-term strategy and the reasonable progress goals must provide for an improvement in visibility for the most impaired days since the baseline period and ensure no degradation in visibility for the clearest days since the baseline period.” Thus, states are required to have emission reduction measures in their long-term strategies that are projected to achieve visibility conditions on the most impaired days that are better than the baseline period and shows no degradation on the clearest days compared to the clearest days from the baseline period. The baseline period for the purpose of this comparison is the baseline visibility condition—the annual average visibility condition for the period 2000–2004. See 40 CFR 51.308(f)(1)(i), 82 FR 3078 at 3097–98, January 10, 2017.

So that RPGs may also serve as a metric for assessing the amount of progress a state is making towards the national visibility goal, the RHR requires states with Class I areas to compare the 2028 RPG for the most impaired days to the corresponding point on the URP line (representing visibility conditions in 2028 if visibility were to improve at a linear rate from conditions in the baseline period of 2000–2004 to natural visibility conditions in 2064). If the most impaired days RPG in 2028 is above the URP (*i.e.*, if visibility conditions are improving more slowly than the rate described by the URP), each state that contributes to visibility impairment in the Class I area must demonstrate, based on the four-factor analysis required

schedules, as well as for adjusting RPGs using a post-modeling approach. 2019 Guidance at 47–48.

under 40 CFR 51.308(f)(2)(i), that no additional emission reduction measures would be reasonable to include in its long-term strategy. 40 CFR 51.308(f)(3)(ii). To this end, 40 CFR 51.308(f)(3)(ii) requires that each state contributing to visibility impairment in a Class I area that is projected to improve more slowly than the URP provide “a robust demonstration, including documenting the criteria used to determine which sources or groups [of] sources were evaluated and how the four factors required by paragraph (f)(2)(i) were taken into consideration in selecting the measures for inclusion in its long-term strategy.” The 2019 Guidance provides suggestions about how such a “robust demonstration” might be conducted. See 2019 Guidance at 50–51.

The 2017 RHR, 2019 Guidance, and 2021 Clarifications Memo also explain that projecting an RPG that is on or below the URP based on only on-the-books and/or on-the-way control measures (*i.e.*, control measures already required or anticipated before the four-factor analysis is conducted) is not a “safe harbor” from the CAA’s and RHR’s requirement that all states must conduct a four-factor analysis to determine what emission reduction measures constitute reasonable progress. The URP is a planning metric used to gauge the amount of progress made thus far and the amount left before reaching natural visibility conditions. However, the URP is not based on consideration of the four statutory factors and therefore cannot answer the question of whether the amount of progress being made in any particular implementation period is “reasonable progress.” See 82 FR 3078 at 3093, 3099–3100, January 10, 2017; 2019 Guidance at 22; 2021 Clarifications Memo at 15–16.

E. Monitoring Strategy and Other State Implementation Plan Requirements

Section 51.308(f)(6) requires states to have certain strategies and elements in place for assessing and reporting on visibility. Individual requirements under this subsection apply either to states with Class I areas within their borders, states with no Class I areas but that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area, or both. A state with Class I areas within its borders must submit with its SIP revision a monitoring strategy for measuring, characterizing, and reporting regional haze visibility impairment that is representative of all Class I areas within the state. SIP revisions for such states must also provide for the establishment of any additional monitoring sites or

equipment needed to assess visibility conditions in Class I areas, as well as reporting of all visibility monitoring data to the EPA at least annually. Compliance with the monitoring strategy requirement may be met through a state’s participation in the Interagency Monitoring of Protected Visual Environments (IMPROVE) monitoring network, which is used to measure visibility impairment caused by air pollution at the 156 Class I areas covered by the visibility program. 40 CFR 51.308(f)(6), (f)(6)(i) and (iv). The IMPROVE monitoring data is used to determine the 20% most anthropogenically impaired and 20% clearest sets of days every year at each Class I area and tracks visibility impairment over time.

All states’ SIPs must provide for procedures by which monitoring data and other information are used to determine the contribution of emissions from within the state to regional haze visibility impairment in affected Class I areas. 40 CFR 51.308(f)(6)(ii) and (iii). Section 51.308(f)(6)(v) further requires that all states’ SIPs provide for a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area; the inventory must include emissions for the most recent year for which data are available and estimates of future projected emissions. States must also include commitments to update their inventories periodically. The inventories themselves do not need to be included as elements in the SIP and are not subject to EPA review as part of the Agency’s evaluation of a SIP revision.²⁸ All states’ SIPs must also provide for any other elements, including reporting, recordkeeping, and other measures, that are necessary for states to assess and report on visibility. 40 CFR 51.308(f)(6)(vi). Per the 2019 Guidance, a state may note in its regional haze SIP that its compliance with the Air Emissions Reporting Rule (AERR) in 40 CFR part 51 Subpart A satisfies the requirement to provide for an emissions inventory for the most recent year for which data are available. To satisfy the requirement to provide estimates of future projected emissions, a state may explain in its SIP how projected emissions were developed for use in establishing RPGs for its own and nearby Class I areas.²⁹

Separate from the requirements related to monitoring for regional haze

purposes under 40 CFR 51.308(f)(6), the RHR also contains a requirement at 40 CFR 51.308(f)(4) related to any additional monitoring that may be needed to address visibility impairment in Class I areas from a single source or a small group of sources. This is called “reasonably attributable visibility impairment.”³⁰ Under this provision, if the EPA or the FLM of an affected Class I area has advised a state that additional monitoring is needed to assess reasonably attributable visibility impairment, the state must include in its SIP revision for the second implementation period an appropriate strategy for evaluating such impairment.

F. Requirements for Periodic Reports Describing Progress Towards the Reasonable Progress Goals

Section 51.308(f)(5) requires a state’s regional haze SIP revision to address the requirements of paragraphs 40 CFR 51.308(g)(1) through (5) so that the plan revision due in 2021 will serve also as a progress report addressing the period since submission of the progress report for the first implementation period. The regional haze progress report requirement is designed to inform the public and the EPA about a state’s implementation of its existing long-term strategy and whether such implementation is in fact resulting in the expected visibility improvement. See 81 FR 26942, 26950 (May 4, 2016), (82 FR 3078 at 3119, January 10, 2017). To this end, every state’s SIP revision for the second implementation period is required to describe the status of implementation of all measures included in the state’s long-term strategy, including BART and reasonable progress emission reduction measures from the first implementation period, and the resulting emissions reductions. 40 CFR 51.308(g)(1) and (2).

A core component of the progress report requirements is an assessment of changes in visibility conditions on the clearest and most impaired days. For second implementation period progress reports, 40 CFR 51.308(g)(3) requires states with Class I areas within their borders to first determine current visibility conditions for each area on the most impaired and clearest days, 40 CFR 51.308(g)(3)(i)(B), and then to calculate the difference between those current conditions and baseline (2000–2004) visibility conditions in order to assess progress made to date. See 40 CFR 51.308(g)(3)(ii)(B). States must also

²⁸ See “Step 8: Additional requirements for regional haze SIPs” in 2019 Regional Haze Guidance at 55.

²⁹ *Id.*

³⁰ EPA’s visibility protection regulations define “reasonably attributable visibility impairment” as “visibility impairment that is caused by the emission of air pollutants from one, or a small number of sources.” 40 CFR 51.301.

assess the changes in visibility impairment for the most impaired and clearest days since they submitted their first implementation period progress reports. See 40 CFR 51.308(g)(3)(iii)(B) and (f)(5). Since different states submitted their first implementation period progress reports at different times, the starting point for this assessment will vary state by state.

Similarly, states must provide analyses tracking the change in emissions of pollutants contributing to visibility impairment from all sources and activities within the state over the period since they submitted their first implementation period progress reports. See 40 CFR 51.308(g)(4) and (f)(5). Changes in emissions should be identified by the type of source or activity. Section 51.308(g)(5) also addresses changes in emissions since the period addressed by the previous progress report and requires states' SIP revisions to include an assessment of any significant changes in anthropogenic emissions within or outside the state. This assessment must include an explanation of whether these changes in emissions were anticipated and whether they have limited or impeded progress in reducing emissions and improving visibility relative to what the state projected based on its long-term strategy for the first implementation period.

G. Requirements for State and Federal Land Manager Coordination

Clean Air Act section 169A(d) requires that before a state holds a public hearing on a proposed regional haze SIP revision, it must consult with the appropriate FLM or FLMs; pursuant to that consultation, the state must include a summary of the FLMs' conclusions and recommendations in the notice to the public. Consistent with this statutory requirement, the RHR also requires that states "provide the [FLM] with an opportunity for consultation, in person and at a point early enough in the State's policy analyses of its long-term strategy emission reduction obligation so that information and recommendations provided by the [FLM] can meaningfully inform the State's decisions on the long-term strategy." 40 CFR 51.308(i)(2). Consultation that occurs 120 days prior to any public hearing or public comment opportunity will be deemed "early enough," but the RHR provides that in any event the opportunity for consultation must be provided at least 60 days before a public hearing or comment opportunity. This consultation must include the opportunity for the FLMs to discuss their assessment of

visibility impairment in any Class I area and their recommendations on the development and implementation of strategies to address such impairment. 40 CFR 51.308(i)(2). In order for the EPA to evaluate whether FLM consultation meeting the requirements of the RHR has occurred, the SIP submission should include documentation of the timing and content of such consultation. The SIP revision submitted to the EPA must also describe how the state addressed any comments provided by the FLMs. 40 CFR 51.308(i)(3). Finally, a SIP revision must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas. 40 CFR 51.308(i)(4).

IV. EPA's Evaluation of Maryland's Regional Haze Submission for the Second Implementation Period

A. Background on Maryland's First Implementation Period SIP Submission

MDE submitted its regional haze SIP for the first implementation period to the EPA on February 13, 2012. The EPA approved Maryland's first implementation period regional haze SIP submission on July 6, 2012 (77 FR 39938, July 6, 2012), effective August 6, 2012. EPA's approval included the portions of the plan that addressed the reasonable progress requirements and Maryland's implementation of Best Available Retrofit Technologies (BART) on eligible sources. The requirements for regional haze SIPs for the first implementation period are contained in 40 CFR 51.308(d) and (e). 40 CFR 51.308(b). Pursuant to 40 CFR 51.308(g), Maryland was also responsible for submitting a five-year progress report as a SIP revision for the first implementation period, which it did on August 9, 2017. The EPA approved the progress report on November 26, 2018 (83 FR 60363, November 26, 2018), effective December 26, 2018.

B. Maryland's Second Implementation Period SIP Submission and the EPA's Evaluation

In accordance with CAA sections 169A and the RHR at 40 CFR 51.308(f), on February 8, 2022, MDE submitted a revision to the Maryland SIP to address its regional haze obligations for the second implementation period, which runs through 2028. Maryland made its 2020 Regional Haze SIP submission available for public comment on

December 1, 2021 through January 4, 2022. MDE received and responded to public comments and included the comments and responses to those comments in their submission.

The following sections describe Maryland's SIP submission, including analyses conducted by MANE-VU and Maryland's determinations based on those analyses, Maryland's assessment of progress made since the first implementation period in reducing emissions of visibility impairing pollutants, and the visibility improvement progress at nearby Class I areas. This document also contains EPA's evaluation of Maryland's submission against the requirements of the CAA and RHR for the second implementation period of the regional haze program.

C. Identification of Class I Areas

Section 169A(b)(2) of the CAA requires each state in which any Class I area is located or "the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area to have a plan for making reasonable progress toward the national visibility goal. The RHR implements this statutory requirement at 40 CFR 51.308(f), which provides that each state's plan "must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State that may be affected by emissions from within the State," and 40 CFR 51.308(f)(2), which requires each state's plan to include a long-term strategy that addresses regional haze in such Class I areas.

The EPA explained in the 1999 RHR preamble that the CAA section 169A(b)(2) requirement that states submit SIPs to address visibility impairment establishes "an 'extremely low triggering threshold' in determining which States should submit SIPs for regional haze." 64 FR 35714 at 35721, July 1, 1999. In concluding that each of the contiguous 48 states and the District of Columbia meet this threshold,³¹ the EPA relied on "a large body of evidence demonstrat[ing] that long-range transport of fine PM contributes to regional haze," *id.*, including modeling studies that "preliminarily

³¹ EPA determined that "there is more than sufficient evidence to support our conclusion that emissions from each of the 48 contiguous states and the District of Columbia may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area." 64 FR 35714 at 35721, July 1, 1999. Hawaii, Alaska, and the U.S. Virgin Islands must also submit regional haze SIPs because they contain Class I areas.

demonstrated that each State not having a Class I area had emissions contributing to impairment in at least one downwind Class I area.” *Id.* at 35722. In addition to the technical evidence supporting a conclusion that each state contributes to *existing* visibility impairment, the EPA also explained that the second half of the national visibility goal—preventing *future* visibility impairment—requires having a framework in place to address future growth in visibility-impairing emissions and makes it inappropriate to “establish criteria for excluding States or geographic areas from consideration as potential contributors to regional haze visibility impairment.” *Id.* at 35721. Thus, the EPA concluded that the agency’s “statutory authority and the scientific evidence are sufficient to require all States to develop regional haze SIPs to ensure the prevention of any future impairment of visibility, and to conduct further analyses to determine whether additional control measures are needed to ensure reasonable progress in remedying existing impairment in downwind Class I areas.” *Id.* at 35722. EPA’s 2017 revisions to the RHR did not disturb this conclusion. See 82 FR 3078 at 3094, January 10, 2017.

Maryland has no mandatory Class I Federal area within its borders, but has previously been shown to have sources with emissions that impact visibility at downwind mandatory Class I Federal areas. For the second implementation period, MANE–VU performed technical analyses³² to help assess source and state-level contributions to visibility impairment and the need for interstate consultation. MANE–VU used the results of these analyses to determine which states’ emissions “have a high likelihood of affecting visibility in MANE–VU’s Class I areas.”³³ Similar to metrics used in the first implementation period,³⁴ MANE–VU used a greater than 2 percent of sulfate plus nitrate emissions contribution criteria to determine whether emissions from individual jurisdictions within the region affected visibility in any Class I areas. The MANE–VU analyses for the second implementation period used a combination of data analysis techniques, including emissions data, distance from Class I areas, wind trajectories, and CALPUFF dispersion modeling. Although many of the

analyses focused only on SO₂ emissions and resultant particulate sulfate contributions to visibility impairment, some also incorporated NO_x emissions to estimate particulate nitrate contributions.

One MANE–VU analysis used for contribution assessment was CALPUFF air dispersion modeling. The CALPUFF model was used to estimate sulfate and nitrate formation and transport in MANE–VU and nearby regions originating from large electric generating unit (EGU) point sources and other large industrial and institutional sources in the eastern and central United States. Information from an initial round of CALPUFF modeling was collated for the 444 EGUs that were determined to warrant further scrutiny based on their emissions of SO₂ and NO_x. The list of EGUs was based on an enhanced “Q/d” analysis³⁵ that considered recent SO₂ emissions in the eastern United States and an analysis that adjusted previous 2002 MANE–VU CALPUFF modeling by applying a ratio of 2011 to 2002 SO₂ emissions. This list of sources was then enhanced by including the top five SO₂ and NO_x emission sources for 2011 for each state included in the modeling domain. A total of 311 EGU stacks (as opposed to individual units) were included in the CALPUFF modeling analysis. Initial information was also collected on the 50 industrial and institutional sources that, according to 2011 Q/d analysis, contributed the most to visibility impact in each Class I area. The ultimate CALPUFF modeling run included a total of 311 EGU stacks and 82 industrial facilities. The summary report for the CALPUFF modeling included the top 10 most impacting EGUs and the top 5 most impacting industrial/institutional sources for each Class I area and compiled those results into a ranked list of the most impacting EGUs and industrial sources at MANE–VU Class I areas.³⁶

Maryland had ten EGU sources³⁷ and six industrial/institutional sources³⁸

that were included in the MANE–VU CALPUFF modeling analysis.³⁹ The EGU facilities Brandon Shores, Chalk Point, Herbert Wagner, and Morgantown were identified as among the Top 25 most impactful EGU facilities for Shenandoah National Park Class I area, and EGU facility CP Crane was also identified as among the Top 25 most impactful EGU facilities for Dolly Sods Wilderness Class I area. EGU facilities Brandon Shores, Chalk Point, CP Crane, Herbert Wagner, and Morgantown were also among the EGU facilities identified as having the Top Impacting EGU stacks. The Luke Paper Company and Sparrows Point industrial facilities were identified as among the Top 25 visibility impacting industrial/institutional sources for Acadia National Park, Brigantine National Wilderness Area, Great Gulf Wilderness, Lye Brook Wilderness, Dolly Sods Wilderness, and Shenandoah National Park Class I areas. The Indian Head Naval Support Facility was also identified as among the Top 25 visibility impacting industrial/institutional sources for Dolly Sods Wilderness and Shenandoah National Park.

In its submittal, Maryland indicates that Brandon Shores Generating Station has agreed via legal consent agreement to cease coal combustion at the site by 2026.⁴⁰ Maryland indicates that Chalk Point Generation Station ceased coal operations in 2021 and closed, and that Maryland subsequently filed a Retired Unit Exemption form with EPA, specifying that the Chalk Point units identified are permanently shut down and cannot be restarted, and that a new owner would be required to obtain all new permits.⁴¹ Maryland also indicates that Herbert Wagner Generating Station has agreed to cease coal combustion by 2026; MDE and Herbert Wagner owner/operator Raven Power, Fort Smallwood LLC, entered into a legal consent order requiring Raven Power to cease coal combustion at Herbert Wager no later than January 1, 2026.⁴² Maryland

Head, and Sparrows Point, LLC (Unit 0939 and Unit 0941).

³⁹ See docket document, “2016 MANE VU Source Contribution Modeling Report (CALPUFF Modeling of Large EGUs and Industrial Sources) (April 4, 2017)”.

⁴⁰ See Section 2.4 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022), and docket documents “MDE SO₂ 2010 NAAQS SIP for Baltimore and Anne Arundel NA (January 31, 2020)” and “MDE SO₂ 2010 NAAQS SIP for Baltimore and Anne Arundel NA (January 31, 2020)—Appendix B—Consent Orders, Permits, and Plan Approvals”.

⁴¹ See docket document, “MDE EPA Chalk Point Units 1&2 Retired Unit Exemption Forms 6–4–21 (June 4, 2021)”.

⁴² See Appendix 19, “Herbert A. Wagner Generating Station Consent Order”.

³² The contribution assessment methodologies for MANE–VU Class I areas are summarized in Appendix 1 of Maryland’s SIP submittal, which can be found in the docket, “Selection of States for MANE–VU Regional Haze Consultation (2018).”

³³ *Id.*

³⁴ See docket EPA–R03–OAR–2022–0912 for MANE–VU supporting materials.

³⁵ “Q/d” is emissions (Q) in tons per year, typically of one or a combination of visibility-impairing pollutants, divided by distance to a class I area (d) in kilometers. The resulting ratio is commonly used as a metric to assess a source’s potential visibility impacts on a particular class I area.

³⁶ See docket document, “2016 MANE VU Source Contribution Modeling Report (CALPUFF Modeling of Large EGUs and Industrial Sources) (April 4, 2017)”.

³⁷ Brandon Shores (Unit 1 & Unit 2), CP Crane (Unit 1 & Unit 2), Chalk Point (Units 1 & 2), Dickerson (Units 1–3), Herbert Wager (Unit 3 & Units 1, 2, and 4), and Morgantown (Unit 1 and Unit 2).

³⁸ Luke Paper Company (Unit 0018, Unit 0019, and Unit 0235), Naval Support Facility Indian

included the consent order as part of its SIP submittal. Maryland also indicates that CP Crane Generating Station has disabled its coal boilers and agreed via legal consent agreement to never again stockpile or burn coal at the facility.⁴³ Maryland further indicates that the Luke Paper Company industrial facility has ceased operations, closed and relinquished their air permits as of May 29, 2020;⁴⁴ that the Sparrows Point industrial facility was retired as of December 31, 2012;⁴⁵ and that the primary emissions units at the Indian Head Naval Support Facility, which consisted of three coal- and No. 6 fuel oil-fired boilers at the Goddard Steam Plant, were permanently shut down in 2014.⁴⁶

The second MANE-VU contribution analysis used a meteorologically weighted Q/d calculation to assess states' contributions to visibility impairment at MANE-VU Class I areas.⁴⁷ This analysis focused predominantly on SO₂ emissions and used cumulative SO₂ emissions from a source and a state for the variable "Q," and the distance of the source or state to the IMPROVE monitor receptor at a Class I area as "d." The result is then multiplied by a constant (C_i), which is determined based on the prevailing wind patterns. MANE-VU selected a meteorologically weighted Q/d analysis as an inexpensive initial screening tool that could easily be repeated to determine which states, sectors, or sources have a larger relative impact and warrant further analysis. MANE-VU updated its analysis in 2016 using 2011 emissions and 2018 projected emissions, which Maryland included as part of its submittal. MANE-VU's analysis estimated Maryland's 2018 sulfate contribution at 3.77% at Acadia National Park, 8.89% at Brigantine Wilderness, 3.36% at Great Gulf 3.80% at Lye Brook, and 3.35% at Moosehorn Class I areas based on maximum daily

impact.⁴⁸ Although MANE-VU did not originally estimate nitrate impacts, the MANE-VU Q/d analysis was subsequently extended to account for nitrate contributions from NO_x emissions and to approximate the nitrate impacts from area and mobile sources. MANE-VU therefore developed a ratio of nitrate to sulfate impacts based on the previously described CALPUFF modeling and applied those to the sulfate Q/d results in order to derive nitrate contribution estimates. Several states did not have CALPUFF nitrate to sulfate ratio results, however, because there were no point sources modeled with CALPUFF.

In order to develop a final set of contribution estimates, MANE-VU weighted the results from both the Q/d and CALPUFF analyses. The MANE-VU mass-weighted sulfate and nitrate contribution results were reported for the MANE-VU Class I areas (the Q/d summary report included results for several non-MANE-VU areas as well). If a state's contribution to sulfate and nitrate concentrations at a particular Class I area was 2 percent or greater, MANE-VU regarded that state as contributing to visibility impairment in that area. According to MANE-VU's analyses, sources in Maryland were found to contribute to visibility impairment at all seven downwind MANE-VU Class I areas,⁴⁹ as well as VISTA Class I areas including James River Face and Shenandoah National Park in Virginia and Dolly Sods Wilderness and Otter Creek Wilderness in West Virginia.⁵⁰ MANE-VU determined that modeled emissions sources that have the potential for 3.0 Mm⁻¹ or greater visibility impacts at any MANE-VU Class I area should perform a four-factor analysis for reasonable installation or upgrade to emissions controls. Maryland indicated in its submittal that it agrees with MANE-VU's approach and assessment.

As explained above, the EPA concluded in the 1999 RHR that "all [s]tates contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area," 64 FR 35714 at 35721, July 1, 1999, and this determination was not

changed in the 2017 RHR. Critically, the statute and regulation both require that the cause-or-contribute assessment consider all emissions of visibility-impairing pollutants from a state, as opposed to emissions of a particular pollutant or emissions from a certain set of sources. Consistent with these requirements, the 2019 Guidance makes it clear that "all types of anthropogenic sources are to be included in the determination" of whether a state's emissions are reasonably anticipated to result in any visibility impairment. 2019 Guidance at 8.

First, the screening analyses on which MANE-VU relied are useful for certain purposes. MANE-VU used information from its technical analysis to rank the largest contributing states to sulfate and nitrate impairment in five Class I areas within MANE-VU states and three additional, nearby Class I areas.⁵¹ The rankings were used to determine upwind states that were deemed important to include in state-to-state consultation (based on an identified impact screening threshold). Additionally, large individual source impacts were used to target MANE-VU control analysis "Asks"⁵² of states and sources both within and upwind of MANE-VU.⁵³ The EPA finds the nature of the analyses generally appropriate to support decisions on states with which to consult. However, we have cautioned that source selection methodologies that target the largest regional contributors to visibility impairment across multiple states may not be reasonable for a particular state if it results in few or no sources being selected for subsequent analysis. 2021 Clarifications Memo at 3.

With regard to the analysis and determinations regarding Maryland's contribution to visibility impairment at out-of-state Class I areas, the MANE-VU technical work focuses on the magnitude of visibility impacts from certain Maryland emissions on downwind Class I areas. However, the analyses did not account for all

⁴³ See Section 2.6.1 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022), and docket documents "MDE SO₂ 2010 NAAQS SIP for Baltimore and Anne Arundel NA (January 31, 2020)", and "MDE SO₂ 2010 NAAQS SIP for Baltimore and Anne Arundel NA (January 31, 2020)—Appendix B—Consent Orders, Permits, and Plan Approvals".

⁴⁴ See docket documents, "Verso Luke Paper—Luke MD Title V Permit Termination (May 7, 2020)" and "Verso Luke Paper—Verso Luke Close Out Letter (May 8, 2020)".

⁴⁵ See docket document, "MDE Sparrows Point Administrative Consent Order (September 12, 2014)".

⁴⁶ See docket document, "MDE EPA Indian Head Boiler Decommission letter (January 29, 2016)".

⁴⁷ See docket document, "MANE-VU Contributions to Regional Haze in the Northeast and Mid-Atlantic United States (August 2006)".

⁴⁸ See "Table 2–2: Q/d results using 2011 and 2018 inventory data for 32 states", of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁴⁹ Acadia National Park, Moosehorn National Wildlife Refuge, and Roosevelt Campobello International Park in Maine; Brigantine Wilderness in New Jersey; Great Gulf Wilderness and Presidential Range-Dry River Wilderness in New Hampshire; and Lye Brook Wilderness in Vermont.

⁵⁰ See docket document, "2016 MANE-VU Source Contribution Modeling Report (April 4, 2017)," Tables 1 through 33.

⁵¹ The Class I areas analyzed were Acadia National Park in Maine, Brigantine Wilderness in New Jersey, Great Gulf Wilderness in New Hampshire, Lye Brook Wilderness in Vermont, Moosehorn Wilderness in Maine, Shenandoah National Park in Virginia, James River Face Wilderness in Virginia, and Dolly Sods/Otter Creek Wildernesses in West Virginia.

⁵² As explained more fully in Section IV.E.1 of this document, MANE-VU refers to each of the components of its overall strategy as an "Ask" of its member states.

⁵³ The MANE-VU Consultation Report (Appendix 7) explains that "[t]he objective of this technical work was to identify states and sources from which MANE-VU will pursue further analysis. This screening was intended to identify which states to invite to consultation, not a definitive list of which states are contributing."

emissions and all components of visibility impairment (e.g., primary PM emissions, and impairment from fine PM, elemental carbon, and organic carbon). In addition, Q/d analyses with a relatively simplistic accounting for wind trajectories and CALPUFF applied to a very limited set of EGUs and major industrial sources of SO₂ and NO_x are not scientifically rigorous tools capable of evaluating contribution to visibility impairment from *all* emissions in a state. While Maryland noted that contributions from other states are larger than its own, we again clarify that each state is obligated under the CAA and RHR to address regional haze visibility impairment resulting from emissions from within the state, irrespective of whether another state's contribution is greater. See 2021 Clarifications Memo at 3. Additionally, we note that the 2 percent or greater sulfate-plus-nitrate threshold used to determine whether Maryland emissions contribute to visibility impairment at a particular Class I area may be higher than what EPA believes is an "extremely low triggering threshold" intended by the statute and regulations. In sum, based on the information provided, it is clear that emissions from Maryland contribute to visibility impairment at out-of-state Class I areas.

Regardless, we note that Maryland did determine that sources and emissions within the state contribute to visibility impairment at out-of-state Class I areas. Furthermore, the state took part in the emission control strategy consultation process as a member of MANE-VU. As part of that process, MANE-VU developed a set of emissions reduction measures identified as being necessary to make reasonable progress in the five MANE-VU Class I areas. This strategy consists of six Asks for states within MANE-VU and five Asks for states outside the region that were found to impact visibility at Class I areas within MANE-VU.⁵⁴ Maryland's submittal discusses each of the Asks and explains why or why not each is applicable and how it has complied with the relevant components of the emissions control strategy MANE-VU has laid out for its states. Maryland worked with MANE-VU to determine potential reasonable measures that could be implemented by 2028, considering the cost of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts, and the remaining useful life of any potentially

affected sources. As discussed in further detail below, the EPA is proposing to find that Maryland has submitted a regional haze plan that meets the requirements of 40 CFR 51.308(f)(2) related to the development of a long-term strategy. Although we have concerns regarding some aspects of MANE-VU's technical analyses supporting states' contribution determinations, we propose to find that Maryland has satisfied the applicable requirements for making reasonable progress towards natural visibility conditions in Class I areas that may be affected by emissions from the state.

D. Calculations of Baseline, Current, and Natural Visibility Conditions; Progress to Date; and the Uniform Rate of Progress

Section 51.308(f)(1) requires states to determine the following for "each mandatory Class I Federal area located within the State": baseline visibility conditions for the most impaired and clearest days, natural visibility conditions for the most impaired and clearest days, progress to date for the most impaired and clearest days, the differences between current visibility conditions and natural visibility conditions, and the URP. This section also provides the option for states to propose adjustments to the URP line for a Class I area to account for visibility impacts from anthropogenic sources outside the United States and/or the impacts from wildland prescribed fires that were conducted for certain, specified objectives. 40 CFR 51.308(f)(1)(vi)(B).

Maryland does not have any mandatory Class I areas within its borders; therefore, Section 51.308(f)(1) and its requirements do not apply.

E. Long-Term Strategy for Regional Haze

1. Maryland's Response to the Six MANE-VU Asks

Each state having a Class I area within its borders or emissions that may affect visibility in a Class I area must develop a long-term strategy for making reasonable progress towards the national visibility goal. CAA 169A(b)(2)(B). As explained in the Background section of this document, reasonable progress is achieved when all states contributing to visibility impairment in a Class I area are implementing the measures determined—through application of the four statutory factors to sources of visibility impairing pollutants—to be necessary to make reasonable progress. 40 CFR 51.308(f)(2)(i). Each state's long-term strategy must include the

enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress. 40 CFR 51.308(f)(2). All new (i.e., additional) measures that are the outcome of four-factor analyses are necessary to make reasonable progress and must be in the long-term strategy. If the outcome of a four-factor analysis and other measures necessary to make reasonable progress is that no new measures are reasonable for a source, that source's existing measures are necessary to make reasonable progress, unless the state can demonstrate that the source will continue to implement those measures and will not increase its emission rate. Existing measures that are necessary to make reasonable progress must also be in the long-term strategy. In developing its long-term strategies, a state must also consider the five additional factors in 40 CFR 51.308(f)(2)(iv). As part of its reasonable progress determinations, the state must describe the criteria used to determine which sources or group of sources were evaluated (i.e., subjected to four-factor analysis) for the second implementation period and how the four factors were taken into consideration in selecting the emission reduction measures for inclusion in the long-term strategy. 40 CFR 51.308(f)(2)(iii).

The following section summarizes how Maryland's SIP submission addressed the requirements of 40 CFR 51.308(f)(2)(i); specifically, it describes MANE-VU's development of the six Asks and how Maryland addressed each. The EPA's evaluation of Maryland's SIP revision with regard to the same is contained in the following Section IV.E.2 of this document. Maryland's SIP submission describes how it plans to meet the long-term strategy requirements defined by the state and MANE-VU and provides that "[t]hese long-term strategies are referred to as the 'Asks'."⁵⁵

States may rely on technical information developed by the RPOs of which they are members to select sources for four-factor analysis and to conduct that analysis, as well as to satisfy the documentation requirements under 40 CFR 51.308(f). Where an RPO has performed source selection and/or four-factor analyses (or considered the five additional factors in 40 CFR 51.308(f)(2)(iv)) for its member states, those states may rely on the RPO's analyses for the purpose of satisfying the requirements of 40 CFR 51.308(f)(2)(i) so long as the states have

⁵⁵ See MD Regional Haze SIP submission Section 2.3 (Page 8).

⁵⁴ See docket documents, "MANE-VU Intra-Regional Ask Final 8–25–2017 (August 25, 2017)" and "MANE-VU Inter-Regional Ask Final 8–25–2017 (August 25, 2017)."

a reasonable basis to do so and all state participants in the RPO process have approved the technical analyses. 40 CFR 51.308(f)(3)(iii). States may also satisfy the requirement of 40 CFR

51.308(f)(2)(ii) to engage in interstate consultation with other states that have emissions that are reasonably anticipated to contribute to visibility impairment in a given Class I area under the auspices of intra- and inter-RPO engagement.

Maryland is a member of the MANE-VU RPO and participated in the RPO's regional approach to developing a strategy for making reasonable progress towards the national visibility goal in the MANE-VU Class I areas. MANE-VU's strategy includes a combination of: (1) measures for certain source sectors and groups of sectors that the RPO determined were reasonable for states to pursue, and (2) a request for member states to conduct four-factor analyses for individual sources that it identified as contributing to visibility impairment. MANE-VU refers to each of the components of its overall strategy as an Ask of its member states. On August 25, 2017, the Executive Director of MANE-VU, on behalf of the MANE-VU states and tribal nations, signed a statement that identifies six emission reduction measures that comprise the Asks for the second implementation period.⁵⁶ The Asks were "designed to identify reasonable emission reduction strategies that must be addressed by the states and tribal nations of MANE-VU through their regional haze SIP updates."⁵⁷ The statement explains that "[i]f any State cannot agree with or complete a Class I State's Asks, the State must describe the actions taken to resolve the disagreement in the Regional Haze SIP."⁵⁸

MANE-VU's recommendations as to the appropriate control measures were based on technical analyses documented in the RPO's reports and included as appendices to or referenced in Maryland's regional haze SIP submission. One of the initial steps of MANE-VU's technical analysis was to determine which visibility-impairing pollutants should be the focus of its efforts for the second implementation period. In the first implementation period, MANE-VU determined that

sulfates were the most significant visibility impairing pollutant at the region's Class I areas. To determine the impact of certain pollutants on visibility at Class I areas for the purpose of second implementation period planning, MANE-VU conducted an analysis comparing the pollutant contribution on the clearest and most impaired days in the baseline period (2000–2004) to the most recent period (2012–2016)⁵⁹ at MANE-VU and nearby Class I areas. MANE-VU found that while SO₂ emissions were decreasing and visibility was improving, sulfates still made up the most significant contribution to visibility impairment at MANE-VU and nearby Class I areas. According to the analysis, NO_x emissions have begun to play a more significant role in visibility impacts in recent years. The technical analyses used by Maryland are included or referenced in their submission, and are as follows:

- Selection of States for MANE-VU Regional Haze Consultation (2018) (MANE-VU, September 2017) (Appendix 1);
- Contributions to Regional Haze in the Northeast and Mid-Atlantic United States: Preliminary Update through 2007 (NESCAUM, March 2012);⁶⁰
- MANE-VU Updated Q/d*²C Contribution Assessment (MANE-VU, April 2016) (Appendix 3);
- 2016 MANE-VU Source Contribution Modeling Report—CALPUFF Modeling of Large Electrical Generating Units and Industrial Sources (MANE-VU, May 2006) (Appendix 4);
- Assessment of Reasonable Progress for Regional Haze in MANE-VU Class I areas (referred to as the MACTEC Report) MACTEC (July 2007);⁶¹
- Statement of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Concerning a Course of Action within MANE-VU toward Assuring Reasonable Progress for the Second Regional Haze Implementation Period (2018–2028) (August 2017);⁶²
- Statement of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Concerning a Course of Action In Contributing States Located Upwind of MANE-VU Toward Assuring Reasonable Progress for the Second

Regional Haze Implementation Period (2018–2028) (Appendix 8);

- Technical Support Document for the 2011 Northeastern U.S. Gamma Emission Inventory (January 2018) (Appendix 10);
 - Ozone Transport Commission/Mid-Atlantic Northeastern Visibility Union 2011 Based Modeling Platform Support Document—October 2018 Update (October 2018) (Appendix 11);
 - The Nature of Fine Particle and Regional Haze Air Quality Problems in the MANE-VU Region: A Conceptual Description (NESCAUM, November 2006, Revised August 2010) (Appendix 12);
 - Mid-Atlantic/Northeast U.S. Visibility Data 2004–2017 (2nd RH SIP Metrics) (MANE-VU, December 2018) (Appendix 13);
 - Additional MANE-VU documentation for establishing 3.0 Mm^{−1} Threshold (Appendix 17);
 - 20% Most Impaired Days Based on Deciviews, as Detailed in Recommendation on Approaches to Selecting the 20% Most Impaired Days (March 2, 2017) (Appendix 18);
 - Technical Support Document on Measures to Mitigate the Visibility Impacts of Construction Activities in the MANE-VU Region (MANE-VU, September 2006);⁶³
 - Baseline and Natural Background Visibility Conditions (NESCAUM, December 2006);⁶⁴
 - 2016 Updates to the Assessment of Reasonable Progress for Regional Haze in MANE-VU Class I Areas, January 31, 2016 (MARAMA, January 31, 2016);⁶⁵
- To support development of the Asks, MANE-VU gathered information on the four statutory factors for six source sectors it determined, based on an examination of annual emission inventories, "had emissions that were reasonable[y] anticipated to contribute to visibility degradation in MANE-VU:" electric generating units (EGUs), industrial/commercial/institutional boilers (ICI boilers), cement kilns, heating oil, residential wood combustion, and outdoor wood combustion.⁶⁶ MANE-VU also collected data on individual sources within the EGU, ICI boiler, and cement kiln

⁵⁶ See Appendix 8, "Statement of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Concerning a Course of Action within MANE-VU toward Assuring Reasonable Progress for the Second Regional Haze Implementation Period (2018–2028), (August 2017); and Appendix 7 "MANE-VU Regional Haze Consultation Report" (July 27, 2018)."

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The period of 2012–2016 was the most recent period for which data was available at the time of analysis.

⁶⁰ See docket document, NESCAUM—Contributions to Regional Haze Preliminary Update Through 2007 (March 21, 2012)

⁶¹ See docket document, "Assessment of Reasonable Progress for Regional Haze in MANE-VU Class I Areas (July 2007) (MACTEC Reasonable Progress Report)"

⁶² See docket document, "MANE-VU Intra-Regional Ask Final (August 25, 2017)".

⁶³ See docket document, "MANE-VU TSD on Measures to Mitigate the Visibility Impacts of Construction Activities in the MANE-VU Region (September 2006)."

⁶⁴ See docket document "NESCAUM—Baseline and Natural Background Visibility Conditions (December 2006)."

⁶⁵ See docket document, "2016 Updates to the Assessment of Reasonable Progress for Regional Haze in MANE-VU Class I Areas (January 31, 2016)."

⁶⁶ See docket document "MANE-VU Four Factor Data Collection Memo (March 30, 2017)" at 1.

sectors.⁶⁷ Information for the six sectors included explanations of technically feasible control options for SO₂ or NO_x, illustrative cost-effectiveness estimates for a range of model units and control options, sector-wide cost considerations, potential time frames for compliance with control options, potential energy and non-air-quality environmental impacts of certain control options, and how the remaining useful lives of sources might be considered in a control analysis.⁶⁸ Source-specific data included SO₂ emissions⁶⁹ and existing controls⁷⁰ for certain existing EGUs, ICI boilers, and cement kilns. MANE-VU considered this information on the four factors as well as the analyses developed by the RPO's Technical Support Committee when it determined specific emission reduction measures that were found to be reasonable for certain sources within two of the sectors it had examined—EGUs and ICI boilers. The Asks were based on this analysis and looked to either optimize the use of existing controls, have states conduct further analysis on EGU or ICI boilers with considerable visibility impacts, implement low sulfur fuel standards, or lock-in lower emission rates.

MANE-VU Ask 1 requests that states “ensure the most effective use of control technologies on a year-round basis to consistently minimize emissions of haze precursors, or obtain equivalent alternative emission reductions” at EGUs “with a nameplate capacity larger than or equal to 25 MW with already installed NO_x and/or SO₂ controls”.⁷¹ In its submission, Maryland stated that COMAR 21.11.27—*Emission Limitations for Power Plants (Maryland Healthy Air Act)* “caps NO_x emissions on an ozone season and annual basis for each coal-fired EGU in Maryland.” In addition, Maryland also stated that COMAR 26.11.40—*NO_x Ozone Season Emission Caps for Non-trading Large NO_x Units* “assures optimization of post-combustion (Selective Catalytic Reduction (SCR) and Selective Non-Catalytic Reduction (SNCR)) NO_x controls on coal-fired EGUs and sets NO_x Indicator Rates for each unit to

assure optimization.”⁷² Maryland credited these regulations with “reducing annual NO_x mass emissions by almost 95% compared to 2002 levels.”⁷³ Regarding SO₂ emission controls, Maryland stated that COMAR 21.11.27—*Emission Limitations for Power Plants (Maryland Healthy Air Act)* “caps SO₂ emissions limits on an annual basis for each coal-fired EGU in Maryland. All non-fluidized bed base load coal-fired units are equipped with Flue Gas Desulfurization (FGD) except one. H.A. Wagner Unit 3 is the only coal-fired EGU not equipped with an FGD. H.A. Wagner Unit 3 is named as a unit requiring a four-factor analysis and is analyzed further in Section 2.5.2.” Maryland also stated that permit limits associated with a federally enforceable consent order for the Anne Arundel and Baltimore County SO₂ nonattainment area include SO₂ emission limits. Taken together, Maryland credited these requirements with “reducing the annual SO₂ mass emissions by over 95% compared to 2002 levels”.⁷⁴ Maryland therefore concluded it is meeting Ask 1.

MANE-VU Ask 2 requests that states “perform a four-factor analysis for reasonable installation or upgrade to emissions controls” at “emission sources modeled by MANE-VU that have the potential for 3.0 Mm⁻¹ or greater visibility impacts at any MANE-VU Class I area, as identified by MANE-VU contribution analyses”. MANE-VU developed its Ask 2 list of sources for analysis by performing modeling and identifying facilities with the potential for 3.0 inverse megameters (Mm⁻¹) or greater impacts on visibility at any Class I area in the MANE-VU region. MANE-VU identified emission sources at the Herbert A. Wagner Generating Facility in Anne Arundel County, Maryland and at the Verso Luke Paper Company facility in Allegany County, Maryland as having the potential for 3.0 Mm⁻¹ or greater visibility impacts at any MANE-VU Class I area;⁷⁵ specifically, Unit 3 at Herbert A. Wagner Generating Facility and Units 001–0011–3–0018 and 001–0011–3–0019 at Verso Luke Paper Company. Maryland stated that “Luke

Paper Company ceased operations, closed, and relinquished their air permits”, and that this information was shared in a transmittal letter to EPA dated May 29, 2020 and included in an attainment designation request letter.⁷⁶ In addition, Maryland also stated that, after requesting a four-factor analysis for Herbert A. Wagner Unit 3 from the facility's owner/operator, “the parent company to the H.A. Wagner Generating Station publicly announced a strategic repositioning of the facility that would eliminate the use of coal. The owners of the H.A. Wagner Generating Station have agreed and signed a legal consent order with [MDE] to cease the combustion of coal by 2026 Therefore, according to the statutory factor of remaining useful life for this facility, further control is not reasonable A four-factor analysis of H.A. Wagner Unit 3 similarly concludes that no additional controls would effectively control SO₂ and NO_x emissions at this facility since the remaining useful life of the coal-fired unit is approximately 4½ years”.⁷⁷ Given the remaining useful life of this source, and the closure of Luke Paper Company, Maryland concluded that no further action is necessary to satisfy Ask 2.⁷⁸

MANE-VU Ask 3 requests that, for “each MANE-VU state that has not yet fully adopted an ultra-low fuel oil standard as requested by MANE-VU in 2007”, to “pursue this standard as expeditiously as possible and before 2028, depending on supply availability”. The Ask includes percent by weight standards for #2 distillate oil (0.0015% sulfur by weight or 15 ppm), #4 residual oil (0.25–0.5% sulfur by weight), and #6 residual oil (0.3–0.5% sulfur by weight). On October 3, 2014, Maryland adopted a rule⁷⁹ to modify the sulfur-in-fuel limits in accordance with the MANE-VU Ask. This rule lowered the sulfur content of all distillate fuel oils (#2 fuel oil and lighter) to 500 ppm (0.05% by mass) on and after July 1, 2016; this rule was subsequently amended⁸⁰ to lower the required sulfur content of all distillate fuel oils (#2 fuel oil and lighter) to 15

⁶⁷ See docket document, “2016 Updates to the Assessment of Reasonable Progress for Regional Haze in MANE-VU Class I Areas (January 31, 2016).”

⁶⁸ *Id.*

⁶⁹ See docket document “MANE-VU Four Factor Data Collection Memo (March 30, 2017).”

⁷⁰ See docket document “MANE-VU Status of the Top 167 Stacks from the 2008 MANE-VU Ask (July 2016).”

⁷¹ See Appendix 7, “MANE-VU Regional Haze Consultation Report (July 27, 2018),” of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁷² See Section 2.5.1 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁷³ See Table 2–8, Figure 2–3, and Figure 2–4 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁷⁴ See Table 2–7 and Figure 2–3 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁷⁵ See Appendix 4, “2016 MANE VU Source Contribution Modeling Report: CALPUFF Modeling of Large Electrical Generating Units and Industrial Sources (April 4, 2017).”

⁷⁶ See docket documents, “Verso Luke Paper—Luke MD Title V Permit Termination (May 7, 2020)” and “Verso Luke Paper—Verso Luke Close Out Letter (May 8, 2020).”

⁷⁷ See Appendix 19, Herbert A. Wagner Generating Station Consent Order.

⁷⁸ See Section 2.5.2 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁷⁹ 41:20 Md. R. 1111 (Maryland Register, Volume 41, Issue 20, dated October 3, 2014), effective October 13, 2014.

⁸⁰ 45:24 Md. R. 1162 (Maryland Register, Volume 45, Issue 24, dated November 26, 2018), effective December 6, 2018.

ppm (0.0015% by mass) on and after July 1, 2019. Maryland therefore concluded that it is meeting Ask 3.

MANE-VU Ask 4 requests that states “pursue updating permits, enforceable agreements, and/or rules to lock-in lower emission rates for SO₂, NO_x, and PM” at “EGUs and other large point emission sources larger than 250 MMBTU per hour heat input that have switched to lower emitting fuels”. Ask 4 also states that “the permit, enforceable agreement, and/or rule can allow for suspension of the lower emission rate during natural gas curtailment”. Maryland’s SIP submittal states that “EGUs and other large point emission sources that have switched operations to lower emitting fuels are already locked into the lower emission rates for NO_x, SO₂, and PM by permits, enforceable agreements, and/or rules. These units are required to amend their permits through the New Source Review (NSR) process if they plan to switch back to coal or another fuel that will increase emissions. A change in fuel, unless already allowed in the permit, would be a modification.”⁸¹ Maryland’s submittal also states that “COMAR 26.11.02.02 requires that a permit to construct and an approval from MDE is required before construction or modification of a source.” Maryland therefore concluded it is meeting Ask 4.

MANE-VU Ask 5 requests that MANE-VU states, “where emission rules have not been adopted, control NO_x emissions for peaking combustion turbines that have the potential to operate on high electric demand days” by either: “(a) Striving to meet NO_x emissions standards of no greater than 22 ppm at 15% O₂ for natural gas and 42 ppm at 15% O₂ for fuel oil but at a minimum meet NO_x emission standards of no greater than 42 ppm at 15% O₂ for natural gas and 96 ppm at 15% O₂ for fuel oil”, or “(b) Performing a four-factor analysis for reasonable installation of or upgrade to emission controls”, or “(c) Obtaining equivalent emission reductions on high electric demand days.”⁸² Maryland elected to perform a four-factor analysis for reasonable

installation of or upgrade to emission controls for sources that met the definition of combustion turbines that have the potential to operate on high electric demand days (HEDD),⁸³ and determined that it would not be technically feasible or cost effective to implement additional controls at this time. Maryland therefore concluded it is meeting Ask 5.

MANE-VU Ask 6, the last Ask, requests that “each State should consider and report in their SIP measures or programs to: a) decrease energy demand through the use of energy efficiency, and b) increase the use within their state of Combined Heat and Power (CHP) and other clean Distributed Generation technologies including fuel cells, wind, and solar”.⁸⁴ Maryland stated in its SIP submittal that the electricity generation strategy in the state’s 2030 Greenhouse Gas Reduction Act (GGRA) Plan^{85 86} is designed to achieve 100% Clean and Renewable Electricity by 2040 by both deploying energy through the existing Renewable Portfolio Standard (RPS) and the proposed Clean and Renewable Energy Standard (CARES), and by capping and reducing emissions through the Regional Greenhouse Gas Initiative (RGGI).^{87 88} Maryland’s RPS requires Maryland electric utilities to purchase increasingly large proportions of Maryland’s electricity from renewable energy sources like solar, wind, hydropower, and qualifying biomass, with a current RPS goal of 50% clean electricity by 2030 and 100% clean electricity by 2040. Maryland states that these goals rely on both renewable energy and additional zero- and low-carbon electricity sources to meet that goal where most cost-effective, including Maryland solar power beyond current RPS requirements, new efficient CHP systems in Maryland buildings, new nuclear power, and natural gas or qualifying biomass power plants with carbon capture and storage. Maryland further states that, although RGGI is designed to reduce carbon dioxide emissions, other benefits in terms of NO_x and SO₂ are realized through

energy efficiency promotion, CHP deployment, and additional deployment of renewable energy sources, including offshore wind power and community solar generation.⁸⁹ Maryland therefore concludes that it is meeting Ask 6.

2. The EPA’s Evaluation of Maryland’s Response to the Six MANE-VU Asks and Compliance With § 51.308(f)(2)(i)

The EPA is proposing to find that Maryland has satisfied the requirements of 40 CFR 51.308(f)(2)(i) related to evaluating sources and determining the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors. We are proposing to find that Maryland has satisfied the four-factor analysis requirement through its analysis and actions to address MANE-VU Ask 2 and Ask 5. We also propose to find that Maryland reasonably concluded that it satisfied all six Asks.

As explained above, Maryland relied on MANE-VU’s technical analyses and framework (*i.e.*, the Asks) to select sources and form the basis of its long-term strategy. MANE-VU conducted an inventory analysis to identify the source sectors that produced the greatest amount of SO₂ and NO_x emissions in 2011; inventory data were also projected to 2018. Based on this analysis, MANE-VU identified the top-emitting sectors for each of the two pollutants, which for SO₂ include coal-fired EGUs, industrial boilers, oil-fired EGUs, and oil-fired area sources including residential, commercial, and industrial sources. Major-emitting sources of NO_x include on-road vehicles, non-road vehicles, and EGUs.⁹⁰ The RPO’s documentation explains that “[EGUs] emitting SO₂ and NO_x and industrial point sources emitting SO₂ were found to be sectors with high emissions that warranted further scrutiny. Mobile sources were not considered in this analysis because any ask concerning mobile sources would be made to EPA and not during the intra-RPO and inter-RPO consultation process among the states and tribes.”⁹¹ EPA proposes to find that Maryland reasonably evaluated the two pollutants—SO₂ and NO_x—that currently drive visibility impairment within the MANE-VU region and that it adequately explained and supported its decision to focus on these two

⁸¹ See COMAR 26.11.01.01, defining “Modify” or “Modification” to mean “any physical change in, or change in the operation of, a source or installation which causes a change in the quantity, nature or characteristics of emissions from the source or installation. However, this term excludes routine maintenance and routine repair, and increases in the hours of operation or in the production rate, unless these increases would be prohibited under any permit or approval conditions adopted by the Department.”

⁸² See Appendix 7, “MANE-VU Regional Haze Consultation Report (July 27, 2018),” of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁸³ See Section 2.5.5 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁸⁴ See Appendix 7, “MANE-VU Regional Haze Consultation Report (July 27, 2018),” of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁸⁵ See docket document, “MDE The 2030 Greenhouse Gas Emissions Reduction Act (GGRA) Plan (February 19, 2021)”.

⁸⁶ [mde.maryland.gov/programs/air/ClimateChange/Pages/Greenhouse-Gas-Emissions-Reduction-Act-\(GGRA\)-Plan.aspx](https://mde.maryland.gov/programs/air/ClimateChange/Pages/Greenhouse-Gas-Emissions-Reduction-Act-(GGRA)-Plan.aspx).

⁸⁷ www.rggi.org/.

⁸⁸ www.rggiprojectseries.org/.

⁸⁹ See Section 2.5.6 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁹⁰ See Appendix 3 “MANE-VU Updated Q/d°C Contribution Assessment (MANE-VU, April 2016).

⁹¹ See docket documents, “MANE-VU Inter-Regional Ask Final 8–25–2017 (August 25, 2017)” and MANE-VU Intra-Regional Ask Final 8–25–2017 (August 25, 2017).

pollutants through its reliance on the MANE-VU technical analyses cited in its submission.

Section 51.308(f)(2)(i) requires states to evaluate and determine the emission reduction measures that are necessary to make reasonable progress by applying the four statutory factors to sources in a control analysis. As explained previously, the MANE-VU Asks are a mix of measures for sectors and groups of sources identified as reasonable for states to address in their regional haze plans. While MANE-VU formulated the Asks to be “reasonable emission reduction strategies” to control emissions of visibility impairing pollutants,⁹² EPA believes that Maryland’s responses to two of the Asks, in particular, engage with the requirement that states determine the emission reduction measures that are necessary to make reasonable progress through consideration of the four factors. As laid out in further detail below, the EPA is proposing to find that MANE-VU’s four-factor analysis conducted to support the emission reduction measures in Ask 3 (ultra-low sulfur fuel oil Ask), in conjunction with Maryland’s supplemental analysis and explanation of how it has complied with Ask 2 (perform four-factor analyses for sources with potential for $\geq 3.0 \text{ Mm}^{-1}$ impacts) satisfy the requirement of 40 CFR 51.308(f)(2)(i). The emission reduction measures that are necessary to make reasonable progress must be included in the long-term strategy, *i.e.*, in Maryland’s SIP. 40 CFR 51.308(f)(2).

Maryland asserted that it satisfies Ask 1 because it has SIP-approved regulations applicable to EGU boilers that include annual emission limits for both NO_x ^{93 94} and SO_2 ,⁹⁵ and require the most effective use of emission control technologies on a year-round basis. Maryland also claimed additional SIP-approved SO_2 emission reductions as a result of the consent order for the Anne Arundel County and Baltimore County SO_2 nonattainment area for the 2010 SO_2 NAAQS.⁹⁶ As a reminder,

⁹² *Id.*

⁹³ See COMAR 26.11.27, “Emission Limitations for Power Plants”, also at www.epa.gov/sips-md/maryland-sip-emission-limitations-power-plants.

⁹⁴ See COMAR 26.11.40, “ NO_x Ozone Season Emission Caps for Non-trading Large NO_x Units” also at www.epa.gov/sips-md/maryland-sip-nox-ozone-season-emission-caps-non-trading-large-nox-units.

⁹⁵ See COMAR 26.11.27, “Emission Limitations for Power Plants”, also at www.epa.gov/sips-md/maryland-sip-emission-limitations-power-plants.

⁹⁶ See 87 FR 66086, November 2, 2022, and docket documents “MDE SO_2 2010 NAAQS SIP for Baltimore and Anne Arundel NA (January 31, 2020)”, and “MDE SO_2 2010 NAAQS SIP for Baltimore and Anne Arundel NA (January 31,

MANE-VU Ask 1 requests that states “ensure the most effective use of control technologies on a year-round basis to consistently minimize emissions of haze precursors, or obtain equivalent alternative emission reductions” at EGUs “with a nameplate capacity larger than or equal to 25 MW with already installed NO_x and/or SO_2 controls”.⁹⁷ Therefore, EPA finds it reasonable to conclude that Maryland has satisfied Ask 1.

Ask 2 addresses the sources MANE-VU determined have the potential for larger than, or equal to, 3.0 Mm^{-1} visibility impact at any MANE-VU Class I area; the Ask requests MANE-VU states to conduct four-factor analyses for the specified sources within their borders. This Ask explicitly engages with the statutory and regulatory requirement to determine reasonable progress based on the four factors; MANE-VU considered it “reasonable to have the greatest contributors to visibility impairment conduct a four-factor analysis that would determine whether emission control measures should be pursued and what would be reasonable for each source.”⁹⁸

As an initial matter, EPA does not necessarily agree that 3.0 Mm^{-1} visibility impact is a reasonable threshold for source selection. The RHR recognizes that, due to the nature of regional haze visibility impairment, numerous and sometimes relatively small sources may need to be selected and evaluated for control measures in order to make reasonable progress. See 2021 Clarifications Memo at 4.⁹⁹ As explained in the 2021 Clarifications Memo, while states have discretion to choose any source selection threshold that is reasonable, “[a] state that relies on a visibility (or proxy for visibility impact) threshold to select sources for four-factor analysis should set the threshold at a level that captures a meaningful portion of the state’s total contribution to visibility impairment to Class I areas.” 2021 Memo at 3.¹⁰⁰ In this case, the 3.0 Mm^{-1} threshold identified only two sources in Maryland (and only 22 across the entire MANE-VU region), indicating that they may be

2020)—Appendix B—Consent Orders, Permits, and Plan Approvals”.

⁹⁷ See Appendix 7, “MANE-VU Regional Haze Consultation Report (July 27, 2018),” of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁹⁸ See Appendix 7, “MANE-VU Regional Haze Consultation Report (July 27, 2018),” of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

⁹⁹ See docket document, “EPA 2021 Regional Haze Clarifications Memo (July 8, 2021)”.

¹⁰⁰ *Id.*

unreasonably high. Maryland selected all sources identified by MANE-VU as being above MANE-VU’s 3.0 Mm^{-1} threshold for four-factor analysis.

MANE-VU identified one unit at the Herbert A. Wagner Generating Facility,¹⁰¹ a coal-fired EGU, and two units at Verso Luke Paper Company,¹⁰² a large industrial source, as having a greater than 3.0 Mm^{-1} visibility impact and thus meeting the threshold for four-factor analyses. Maryland’s SIP submittal indicates that it sent a letter requesting a four-factor analysis to Herbert A. Wagner Facility’s owner/operator,¹⁰³ who subsequently announced that it would eliminate the use of coal at the facility. This was codified into a consent order between Maryland and the owner/operator to cease coal combustion at the facility by January 1, 2026.¹⁰⁴ Maryland has requested that the entire consent order be incorporated into Maryland’s SIP and made federally enforceable upon EPA’s approval;¹⁰⁵ EPA intends to incorporate this consent order into the Maryland SIP by reference as a source-specific requirement upon final approval of this proposed rulemaking. Maryland’s subsequent four-factor analysis for the facility concluded that no further control was necessary. Regarding the Verso Luke Paper industrial source, Maryland stated that this facility ceased operations, shut down and surrendered their existing air permits as of May 7, 2020.¹⁰⁶ Informed in part by this development, EPA found that the area was monitoring air quality consistent with achieving the 2010 1-Hour SO_2 Primary NAAQS. See 87 FR 66086, November 2, 2022. Maryland therefore concluded that no further action was necessary for this facility. Given that no other sources in Maryland met the 3.0 Mm^{-1} threshold for visibility impacts in MANE-VU’s analysis,¹⁰⁷ Maryland concluded that it had met the requirements for Ask 2.

The EPA proposes to find that Maryland reasonably determined it has satisfied Ask 2. As explained above, we

¹⁰¹ H.A. Wagner Unit 3.

¹⁰² Luke Paper Unit 001–0011–3–0018 & Unit 001–0011–3–0019.

¹⁰³ Raven Power Fort Smallwood, LLC.

¹⁰⁴ See Appendix 19, “Herbert A. Wagner Generating Station Consent Order”.

¹⁰⁵ See Section 2.5.2 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁰⁶ See docket documents, “Verso Luke Paper—Luke MD Title V Permit Termination (May 7, 2020)” and “Verso Luke Paper—Verso Luke Close Out Letter (May 8, 2020)”.

¹⁰⁷ See Appendix 4, “2016 MANE VU Source Contribution Modeling Report: CALPUFF Modeling of Large Electrical Generating Units and Industrial Sources (April 4, 2017)”.

do not necessarily agree that a 3.0 Mm^{-1} threshold for selecting sources for four-factor analysis results in a set of sources the evaluation of which has the potential to meaningfully reduce the state's contribution to visibility impairment. MANE-VU's threshold identified only two sources in Maryland for four-factor analysis. However, in this instance we propose to find that Maryland's additional information and explanation indicates that the state has in fact examined a reasonable set of sources; Maryland chose to address 12 of the 13 sources identified by FLMs, including 10 that went beyond the MANE-VU source selection process, and reasonably concluded that four-factor analyses for its top-impacting sources are not necessary because the outcome would be that no further emission reductions would be reasonable. EPA is basing this proposed finding on the state's examination of its largest operating EGU and ICI sources, at the time of SIP submission, and on the emissions from and controls that apply to those sources, as well as on Maryland's existing SIP-approved NO_x and SO_2 rules that effectively control emissions from the largest contributing stationary-source sectors. Maryland's submittal includes additional information on and analysis of 13 Maryland facilities, which was provided in response a National Park Service (NPS) analysis that identified these facilities as contributing to "80% of the Q/d total" visibility impact at downwind NPS Class I Federal areas based on 2014 emissions data and requested that states "review and consider these sources for inclusion in their long term strategies".^{108 109} Maryland provided the NPS with additional information on these 13 facilities, including facility descriptions, current control devices/technologies for NO_x , SO_2 , and PM, current monitoring devices, regulations/consent orders/permit conditions that limit emissions, and analysis and documentation of historical emissions to demonstrate control strategy effectiveness.

Maryland also examined the 13 facilities identified by NPS as a percent of their total Q/d contribution. This included Luke Paper Company, which comprised 54.71% of the Q/d total; Maryland stated that this facility ceased operations, shut down and surrendered their existing air permits as of May 7,

2020.¹¹⁰ When combined with Brandon Shores Generating Station, H.A. Wagner Generating Station, Chalk Point Generating Station, C.P. Crane Generating Station, and Naval Support Facility Indian Head, all of which have closed, will close by 2026, or have switched or will switch fuels, and Morgantown Generating Station, which is considered by Maryland as effectively controlled through SCR, these facilities comprised 75.57% of the Q/d total. When adding the two municipal solid waste combustor facilities identified by the NPS (Wheelabrator and Montgomery County RRF) both of which are considered by Maryland as well-controlled, these facilities comprise 82.22% of the Q/d total. Finally, Maryland also provided additional information on the remaining three sources identified by the NPS (Holcim Cement, Lehigh Cement, and the AES Warrior Run EGU).¹¹¹ Therefore, EPA finds it reasonable to conclude that Maryland has satisfied Ask 2.

Ask 3, which addresses the sulfur content of heating oil used in MANE-VU states, is based on a four-factor analysis for the heating oil sulfur reduction regulations contained in that Ask;¹¹² specifically, for the control strategy of reducing the sulfur content of distillate oil to 15 ppm. The analysis started with an assessment of the costs of retrofitting refineries to produce 15 ppm heating oil in sufficient quantities to support implementation of the standard, as well as the impacts of requiring a reduction in sulfur content on consumer prices. The analysis noted that, as a result of previous EPA rulemakings to reduce the sulfur content of on-road and non-road-fuels to 15 ppm, technologies are currently available to achieve sulfur reductions and many refiners are already meeting this standard, meaning that the capital investments for further reductions in the sulfur content of heating oil are expected to be relatively low compared to costs incurred in the past. The analysis also examined, by way of example, the impacts of New York's existing 15 ppm sulfur requirements on heating oil prices and concluded that the cost associated with reducing sulfur was relatively small in terms of the absolute price of heating oil compared

to the magnitude of volatility in crude oil prices. It also noted that the slight price premium is compensated by cost savings due to the benefits of lower-sulfur fuels in terms of equipment life and maintenance and fuel stability. Consideration of the time necessary for compliance with a 15 ppm sulfur standard was accomplished through a discussion of the amount of time refiners had needed to comply with the EPA's on-road and non-road fuel 15 ppm requirement, and the implications existing refinery capacity and distribution infrastructure may have for compliance times with a 15 ppm heating oil standard. The analysis concluded that with phased-in timing for states that have not yet adopted a 15 ppm heating oil standard there "appears to be sufficient time to allow refiners to add any additional heating oil capacity that may be required."¹¹³ The analysis further noted the beneficial energy and non-air quality environmental impacts of a 15 ppm sulfur heating oil requirement and that reducing sulfur content may also have a salutary impact on the remaining useful life of residential furnaces and boilers.¹¹⁴

EPA proposes to find that Maryland reasonably relied on MANE-VU's four-factor analysis for a low-sulfur fuel oil regulation, which engaged with each of the statutory factors and explained how the information supported a conclusion that a 15 ppm sulfur fuel oil standard is reasonable; as a reminder, MANE-VU Ask 3 requests that, for "each MANE-VU state that has not yet fully adopted an ultra-low fuel oil standard as requested by MANE-VU in 2007", to "pursue this standard as expeditiously as possible and before 2028, depending on supply availability". Maryland's ultra-low sulfur fuel oil regulations¹¹⁵ are consistent with Ask 3. EPA therefore proposes to find that Maryland reasonably determined that it has satisfied Ask 3.

Maryland concluded that no additional updates were needed to meet Ask 4, which requests that MANE-VU states pursue updating permits, enforceable agreements, and/or rules to lock-in lower emission rates for sources larger than 250 MMBtu per hour that have switched to lower emitting fuels. As explained above, Maryland has asserted that EGUs and other large point emission sources that have switched operations to lower emitting fuels are already locked into the lower emission rates for NO_x , SO_2 , and PM by permits,

¹⁰⁸ See Section 2.6.1 and Table 2–12 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁰⁹ See docket document, "NPS Letter—MANE-VU draft Statement on source screening (April 12, 2018)".

¹¹⁰ See docket documents, "Verso Luke Paper—Luke MD Title V Permit Termination (May 7, 2020)" and "Verso Luke Paper—Verso Luke Close Out Letter (May 8, 2020)".

¹¹¹ See Section 2.6.1 and Table 2–13 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹¹² See docket document, "2016 Updates to the Assessment of Reasonable Progress for Regional Haze in MANE-VU Class I Areas (January 31, 2016)" at 8–4.

¹¹³ *Id.* see 8–7.

¹¹⁴ *Id.* see 8–8.

¹¹⁵ See COMAR 03.03.05.04, "Specifications for No. 1 and No. 2 Fuel Oil (ASTM D-396)".

enforceable agreements and/or rules. In addition, modified units in Maryland are required to amend their permits through the New Source Review (NSR) process if they plan to switch back to coal or a fuel that will increase emissions. A change in fuel, unless already allowed in the permit, would be a modification,¹¹⁶ and Maryland's regulations require that an application to modify the permit be submitted prior to a change in fuel.¹¹⁷ As a reminder, MANE-VU Ask 4 requests that states "pursue updating permits, enforceable agreements, and/or rules to lock-in lower emission rates for SO₂, NO_x, and PM" at "EGUs and other large point emission sources larger than 250 MMBTU per hour heat input that have switched to lower emitting fuels". Ask 4 also states that "the permit, enforceable agreement, and/or rule can allow for suspension of the lower emission rate during natural gas curtailment". EPA proposes to find that Maryland reasonably determined it has satisfied Ask 4. This is because the permitting and regulatory requirements outlined above, including the fact that sources that have switched fuel are generally required to revise their permits to reflect the change, and because the state rules make any proposed reversion difficult by requiring permitting and other control analyses, including NSR.

Ask 5 addresses NO_x emissions from peaking combustion turbines¹¹⁸ that have the potential to operate on high electric demand days (HEDD).¹¹⁹ Maryland conducted a four-factor analysis to evaluate potential control

options for HEDD units. For one potentially technically feasible control option, Selective Catalytic Reduction (SCR), Maryland estimated compliance costs as ranging from \$6 million to \$15.7 million per unit.¹²⁰ These cost estimates are similar to those found in EPA's Combustion Turbine NO_x Control Technology Memo published in January 2022.¹²¹ Due to the relatively low level of reported annual NO_x emissions from these units within the state (*i.e.*, less than 10 tons of NO_x emitted per unit per year), Maryland concluded that SCR was not an economically feasible control option due to the high cost of control. Maryland also evaluated the cost of water/steam injection as a potentially technically feasible control option, but found that the cost of control (\$87,906.95 per ton of NO_x removed) was not economically feasible.¹²² As a reminder, MANE-VU Ask 5 requests that MANE-VU states, "where emission rules have not been adopted, control NO_x emissions for peaking combustion turbines that have the potential to operate on high electric demand days" by either: "(a) Striving to meet NO_x emissions standards of no greater than 22 ppm at 15% O₂ for natural gas and 42 ppm at 15% O₂ for fuel oil but at a minimum meet NO_x emission standards of no greater than 42 ppm at 15% O₂ for natural gas and 96 ppm at 15% O₂ for fuel oil", or "(b) Performing a four-factor analysis for reasonable installation of or upgrade to emission controls", or "(c) Obtaining equivalent emission reductions on high electric demand days." ¹²³ Because Maryland evaluated multiple technically feasible controls, the high cost of controls, and the relatively low level of reported annual NO_x emissions from peaking combustion turbines with the potential to operate on HEDD days, EPA proposes to find that Maryland reasonably concluded that it has satisfied Ask 5.

Finally, regarding Ask 6, Maryland explains the greenhouse gas initiatives and clean energy requirements within the state, including promulgation of the state's 2030 Greenhouse Gas Reduction Act (GGRA) Plan, RPS, and participation in RGGI. As a reminder, MANE-VU Ask 6, the last Ask, requests

that "each State should consider and report in their SIP measures or programs to: (a) decrease energy demand through the use of energy efficiency, and (b) increase the use within their state of Combined Heat and Power (CHP) and other clean Distributed Generation technologies including fuel cells, wind, and solar".¹²⁴ The EPA is therefore proposing to find that Maryland has satisfied Ask 6's request to consider and report in its SIP measures or programs related to energy efficiency, cogeneration, and other clean distributed generation technologies.

In sum, the EPA is proposing to find that—based on Maryland's participation in the MANE-VU planning process, how it has addressed each of the Asks, its supplemental information and explanation regarding NO_x sources and emissions, and the EPA's additional assessment of Maryland's emissions and point sources—Maryland has complied with the requirements of 40 CFR 51.308(f)(2)(i). Specifically, MANE-VU Asks 2 and 3 engage with the requirement that states evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors. EPA is proposing to find Maryland's approach to Ask 2 reasonable because it demonstrated that the sources with the greatest modeled impacts on visibility either have federally-enforceable shut downs, have reduced their emissions so significantly that it is clear a four-factor analysis would not yield further reasonable emission reductions, or are subject to stringent emission control measures. Maryland's SIP-approved control measures, emissions inventory¹²⁵ and information provided in response to comments¹²⁶ demonstrate that the sources of SO₂ and NO_x within the state that would be expected to contribute to visibility impairment have small emissions of NO_x and SO₂, are well controlled, or both. Maryland's sulfur in fuel limits sets stringent limits for sulfur content and SO₂ emissions for non-solid fuels.¹²⁷ Therefore, it is reasonable to assume that selecting additional sources from MANE-VU's or FLMS' lists for four-factor analysis would not have resulted in additional emission

¹¹⁶ See COMAR 26.11.01.01, defining "Modify" or "Modification" to mean "any physical change in, or change in the operation of, a source or installation which causes a change in the quantity, nature or characteristics of emissions from the source or installation. However, this term excludes routine maintenance and routine repair, and increases in the hours of operation or in the production rate, unless these increases would be prohibited under any permit or approval conditions adopted by the Department."

¹¹⁷ See COMAR 26.11.02.02., "General Provisions", which states that "A permit to construct and an approval from the Department is required before construction or modification of a source".

¹¹⁸ Peaking combustion turbine is defined for the purpose of this Ask as a turbine capable of generating 15 megawatts or more, that commenced operation prior to May 1, 2007, is used to generate electricity all or part of which is delivered to electric power distribution grid for commercial sale and that operated less than or equal to an average of 1,752 hours (or 20%) per year during 2014 to 2016.

¹¹⁹ High electric demand days are days when higher than usual electrical demands bring additional generation units online, many of which are infrequently operated and may have significantly higher emissions rates of the generation fleet.

¹²⁰ See Section 2.5.5 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹²¹ See docket document, "EPA Combustion Turbine NO_x Control Technology Memo (January 2022)".

¹²² See Section 2.5.5 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹²³ See Appendix 7, "MANE-VU Regional Haze Consultation Report (July 27, 2018)," of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹²⁴ See Appendix 7, "MANE-VU Regional Haze Consultation Report (July 27, 2018)," of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹²⁵ See Appendix 1, "Selection of States for MANE-VU Regional Haze Consultation (2018)—Final".

¹²⁶ See Appendix 20, "Public Hearing Notices, Comments, and Responses—Regional Haze Second Implementation Period Plan (2018–2028)".

¹²⁷ See COMAR 03.03.05.04, "Specifications for No. 1 and No. 2 Fuel Oil (ASTM D-396)".

reduction measures being determined to be necessary to make reasonable progress for the second implementation period.

Additionally, MANE-VU conducted a four-factor analysis to support Ask 3, which requests that states pursue ultra-low sulfur fuel oil standards to address SO₂ emissions. Maryland has done so. This also contributes to satisfying the requirements that states determine the emission reduction measures that are necessary to make reasonable progress by considering the four factors, and that their long-term strategies include the enforceable emission limitations, compliance schedules, and other measures necessary to make reasonable progress. To the extent that MANE-VU and Maryland regard the measures in Asks 1 and 4 through 6 as being part of the region's strategy for making reasonable progress, we propose to find it reasonable for Maryland to address these Asks by pointing to existing measures that satisfy each.

3. Additional Long-Term Strategy Requirements

The consultation requirements of 40 CFR 51.308(f)(2)(ii) provides that states must consult with other states that are reasonably anticipated to contribute to visibility impairment in a Class I area to develop coordinate emission management strategies containing the emission reductions measures that are necessary to make reasonable progress. Section 51.308(f)(2)(ii)(A) and (B) require states to consider the emission reduction measures identified by other states as necessary for reasonable progress and to include agreed upon measures in their SIPs, respectively. Section 51.308(f)(2)(ii)(C) speaks to what happens if states cannot agree on what measures are necessary to make reasonable progress.

Maryland participated in and provided documentation of the MANE-VU intra- and inter-RPO consultation processes and addressed the MANE-VU Asks by providing information on the measures it has in place that satisfy each Ask.^{128 129} MANE-VU also documented disagreements that occurred during

consultation. MANE-VU noted in their Consultation Report that upwind states expressed concern regarding the analyses the RPO utilized for the selection of states for the consultation. MANE-VU agreed that these tools, as all models, have their limitations, but nonetheless deemed them appropriate. Additionally, there were several comments regarding the choice of the 2011 modeling base year. MANE-VU agreed that the choice of base year is critical to the outcome of the study. MANE-VU acknowledged that there were newer versions of the emission inventories and the need to use the best available inventory for each analysis. However, MANE-VU disagreed that the choice of these inventories was not appropriate for the analysis. Upwind states also suggested that MANE-VU states adopt the 2021 timeline for regional haze SIP submissions for the second planning period. MANE-VU agreed with the reasons the comments provided, such as collaboration with data and planning efforts. However, MANE-VU disagreed that the 2018 timeline would prohibit collaboration. Additionally, upwind states noted that they would not be able to address the MANE-VU Asks until they finalize their SIPs. MANE-VU believed the assumption of the implementation of the Asks from upwind states in its 2028 control case modeling was reasonable.

In sum, Maryland participated in the MANE-VU intra- and inter-RPO consultation and satisfied the MANE-VU Asks, satisfying 40 CFR 51.308(f)(2)(ii)(A) and (B). Maryland satisfied 40 CFR 51.308(f)(2)(ii)(C) by participating in MANE-VU's consultation process, which documented the disagreements between the upwind states and MANE-VU and explained MANE-VU's reasoning on each of the disputed issues. Based on the entirety of MANE-VU's intra- and inter-RPO consultation and both MANE-VU's and Maryland's responses to states' comments on the SIP submission and various technical analyses therein, we propose to determine that Maryland has satisfied the consultation requirements of 40 CFR 51.308(f)(2)(ii).

The documentation requirement of 40 CFR 51.308(f)(2)(iii) provides that states may meet their obligations to document the technical bases on which they are relying to determine the emission reductions measures that are necessary to make reasonable progress through an RPO, as long as the process has been "approved by all State participants." As explained above, Maryland chose to rely on MANE-VU's technical information, modeling, and analysis to support

development of its long-term strategy. The MANE-VU technical analyses on which Maryland relied are listed in the state's SIP submission and include source contribution assessments, information on each of the four factors and visibility modeling information for certain EGUs, and evaluations of emission reduction strategies for specific source categories. Maryland also provided supplemental information to further demonstrate the technical bases and emission information on which it relied on to determine the emission reductions measures that are necessary to make reasonable progress. Based on the documentation provided by the state, we propose to find Maryland satisfies the documentation requirements of 40 CFR 51.308(f)(2)(iii).

Section 51.308(f)(2)(iii) also requires that the emissions information considered to determine the measures that are necessary to make reasonable progress include information on emissions for the most recent year for which the state has submitted triennial emissions data to the EPA (or a more recent year), with a 12-month exemption period for newly submitted data. Maryland's SIP submission included 2017 NEI emission data for NO_x, SO₂, PM, and NH₃ and 2017 Air Markets Program Data (AMPD) emissions for NO_x and SO₂. Maryland's SIP submission also included 2019 AMPD for NO_x and SO₂.¹³⁰ Based on Maryland's consideration and analysis of the 2017 and 2019 emission data in their SIP submittal and supplemental documentation, the EPA proposes to find that Maryland has satisfied the emissions information requirement in 40 CFR 51.308(f)(2)(iii).

We also propose to find that Maryland reasonably considered the five additional factors in 40 CFR 51.308(f)(2)(iv) in developing its long-term strategy. Pursuant to 40 CFR 51.308(f)(2)(iv)(A), Maryland noted that existing and ongoing state and Federal emission control programs that contribute to emission reductions through 2028 would impact emissions of visibility impairing pollutants from point and nonpoint sources in the second implementation period. Maryland included in their SIP comprehensive lists of control measures with their effective dates, pollutants addressed, and corresponding Code of Maryland Regulations provisions.¹³¹

¹²⁸ See Appendix 5, "Inter-RPO Consultation Briefing Book"; Appendix 7, "MANE-VU Regional Haze Consultation Report"; Appendix 9, "National Park Service Letter to MANE-VU (April 2018)"; and Appendix 17, "Additional MANE-VU documentation for establishing 3.0 Mm-1 Threshold".

¹²⁹ See Appendix 14, "FLM Consultation Initiation Letter (April 2019)"; Appendix 15, "National Park Service Correspondence with Maryland"; Appendix 16, "US Forest Service Consultation Response Letter"; and Appendix 20, "Public Hearing Notices, Comments, and Responses—Regional Haze Second Implementation Period Plan (2018–2028)".

¹³⁰ See Section 2.21 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹³¹ See Section 2.8.1 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

Maryland's consideration of measures to mitigate the impacts of construction activities as required by 40 CFR 51.308(f)(2)(iv)(B) includes, in section 2.8.2 of its SIP submission, a list of measures that Maryland has implemented to mitigate the impacts from such activities. Maryland has implemented standards that reduce fugitive dust emissions from construction,¹³² rules to address exhaust emissions,^{133 134 135} including rules to limit the idling of vehicles and equipment and rules to reduce allowable smoke from on-road diesel engines,¹³⁶ and general conformity rules.^{137 138}

Pursuant to 40 CFR 51.308(f)(2)(iv)(C), source retirements and replacement schedules are addressed in section 2.8.3 of Maryland's submission. Source retirements and replacements were considered in developing the 2028 emission projections, with on the books/on the way retirements and replacements included in the 2028 projections. The EGU point sources included in the inventories used in the MANE-VU contribution assessment and that were subsequently retired are identified in Table 2–14.¹³⁹ No non-EGU point source retirements in Maryland were considered when developing the 2028 emissions projections.

In considering smoke management as required in 40 CFR 51.308(f)(2)(iv)(D), Maryland explained, in section 2.8.4 of its submission, that emissions from agricultural and prescribed burning for forestry smoke management within the state are low; PM_{2.5} statewide emissions from prescribed fires were 1,349.18 tons (4.13% of Maryland's overall PM_{2.5} emissions inventory) and emissions from agricultural burning were 1.5 tons (<1% of Maryland's overall PM_{2.5} emissions inventory). Maryland

therefore concludes that it is unlikely that fires in Maryland for agricultural or forestry management cause impacts on visibility in the MANE-VU and nearby Class I areas, including Shenandoah, Dolly Sods, Otter Creek, and James River Face. Maryland states that Smoke Management Plans is a required element of a SIP only if it is required to make reasonable progress, and that although Maryland does not need an official Smoke Management Plan, it has the legal authority to manage burning through a formal permitting system if necessary.

Maryland considered the anticipated net effect of projected changes in emissions as required by 40 CFR 51.308(f)(2)(iv)(E) by discussing, in section 2.8.5 of its submission, the photochemical modeling for the 2018–2028 period it conducted in collaboration with MANE-VU. The two modeling cases run were a 2028 base case, which considered only on-the-books controls, and a 2028 control case that considered implementation of the MANE-VU Ask. Maryland presented the differences between the base and control cases on the 20% most impaired and 20% clearest days for each MANE-VU Class I area.¹⁴⁰

Because Maryland has reasonably considered each of the five additional factors the EPA proposes to find that Maryland has satisfied the requirements of 40 CFR 51.308(f)(2)(iv).

F. Reasonable Progress Goals

Section 51.308(f)(3) contains the requirements pertaining to RPGs for each Class I area. Section 51.308(f)(3)(i) requires a state in which a Class I area is located to establish RPGs—one each for the most impaired and clearest days—reflecting the visibility conditions that will be achieved at the end of the implementation period as a result of the emission limitations, compliance schedules and other measures required under paragraph (f)(2) to be in states' long-term strategies, as well as implementation of other CAA requirements. The long-term strategies as reflected by the RPGs must provide for an improvement in visibility on the most impaired days relative to the baseline period and ensure no degradation on the clearest days relative to the baseline period. Section 51.308(f)(3)(ii) applies in circumstances in which a Class I area's RPG for the most impaired days represents a slower rate of visibility improvement than the uniform rate of progress calculated

under 40 CFR 51.308(f)(1)(vi). Under 40 CFR 51.308(f)(3)(ii)(A), if the state in which a mandatory Class I area is located establishes an RPG for the most impaired days that provides for a slower rate of visibility improvement than the URP, the state must demonstrate that there are no additional emission reduction measures for anthropogenic sources or groups of sources in the state that would be reasonable to include in its long-term strategy. Section 51.308(f)(3)(ii)(B) requires that if a state contains sources that are reasonably anticipated to contribute to visibility impairment in a Class I area in another state, and the RPG for the most impaired days in that Class I area is above the URP, the upwind state must provide the same demonstration. Because Maryland has no Class I areas within its borders, it is subject only to 40 CFR 51.308(f)(3)(ii)(B).

Under 40 CFR 51.308(f)(3)(ii)(B), a state that contains sources that are reasonably anticipated to contribute to visibility impairment in a Class I area in another state for which a demonstration by the other state is required under 40 CFR 51.308(f)(3)(ii)(B) must demonstrate that there are no additional emission reduction measures that would be reasonable to include in its long-term strategy. Maryland's SIP submittal included MANE-VU's glidepath checks for nearby downwind Class I areas,^{141 142} which show that the RPG for the 20 percent most anthropogenically impaired days for the affected downwind Class I areas (Acadia, Brigantine, Great Gulf, Lye Brook, Moosehorn, Dolly Sods and Shenandoah) are not above the URP glidepath, and that the RPG for the 20 percent clearest days shows no degradation. In addition, the modeled MANE-VU 2028 visibility projections at nearby Class I areas¹⁴³ show that the base case 2028 projections for the most impaired days at these areas are below the respective 2028 points on the URPs. Therefore, we propose it is reasonable to assume that the demonstration requirement under 40 CFR 51.308(f)(3)(ii)(B) as it pertains to these areas will not be triggered.

The EPA proposes to determine that Maryland has satisfied the applicable requirements of 40 CFR 51.308(f)(3) relating to RPGs.

¹³² COMAR 26.11.06.03. "Particulate Matter", subsection D; State Effective Date November 11, 2002 (29:22 Md. R. 1724) (68 FR 46487).

¹³³ COMAR 11.14. "MOTOR VEHICLE ADMINISTRATION—VEHICLE INSPECTIONS", .01, .06, and .08.

¹³⁴ COMAR. 11.21.02. "Diesel Vehicle Emissions Control Program"; State Effective Date July 10, 2000 (27:13 Md. R. 1212).

¹³⁵ Md. Code, Transp. § 23–401 through 23–404.

¹³⁶ Md. Code, Transp. § 21–1101.

¹³⁷ The authority to address General Conformity is set forth in Section 176(c) of the Clean Air Act and the requirements to demonstrate conformity are found in the EPA's implementing regulation (40 CFR part 93, subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans).

¹³⁸ COMAR 26.11.26. "Conformity"; State Effective Date June 5, 1995 (22:11 Md. R. 825).

¹³⁹ See "Table 2–14: Units Retired in the Regional Haze Inventories" of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁴⁰ See Figures 2–7 through 2–10 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁴¹ See docket document, "TD MANE-VU 2000–19 RH METRICS COMPARISON PLOTS 12–19–20.xlsx".

¹⁴² See docket document, "TD MANE-VU 2000–19 RHII & III Metrics Trends Plots 12–19–20.xlsx".

¹⁴³ See docket document, "MANE-VU Trends 2004–17 Report 2nd SIP Metrics—December 2018 Update—Final".

G. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(f)(6) specifies that each comprehensive revision of a state's regional haze SIP must contain or provide for certain elements, including monitoring strategies, emissions inventories, and any reporting, recordkeeping and other measures needed to assess and report on visibility. A main requirement of this subsection is for states with Class I areas to submit monitoring strategies for measuring, characterizing, and reporting on visibility impairment. Compliance with this requirement may be met through participation in the Interagency Monitoring of Protected Visual Environments (IMPROVE) network.

Section 51.308(f)(6)(i) requires SIPs to provide for the establishment of any additional monitoring sites or equipment needed to assess whether reasonable progress goals to address regional haze for all mandatory Class I Federal areas within the state are being achieved. Section 51.308(f)(6)(ii) requires SIPs to provide for procedures by which monitoring data and other information are used in determining the contribution of emissions from within the state to regional haze visibility impairment at mandatory Class I Federal areas both within and outside the state. Because Maryland does not have any Class I Federal areas located within its borders, Section 51.308(f)(6)(i) and (ii) do not apply.

Section 51.308(f)(6)(iii) requires states with no Class I areas to include procedures by which monitoring data and other information are used in determining the contribution of emissions from within the State to regional haze visibility impairment at Class I areas in other states. States with Class I areas must establish a monitoring program and report data to EPA that is representative of visibility at the Class I Federal areas. The IMPROVE network meets this requirement. Maryland stated that, as a participant in MANE-VU, it reviewed information about the chemical composition of baseline monitoring data at Class I Federal areas in and near MANE-VU in order to understand the sources of haze causing pollutants. Maryland commits to continuing support of ongoing visibility monitoring in Class I Federal areas, agrees that the IMPROVE network is an appropriate monitoring network to track regional haze progress, and commits to working with neighboring states and FLMs to meet the goals of the IMPROVE program. Maryland also commits to using monitoring data and procedures consistent with US EPA guidance to

review progress and trends in visibility at Class I Federal areas that may be affected by emissions from Maryland, both for comprehensive periodic revisions of this implementation plan and for periodic reports describing progress towards the reasonable progress goals for those areas.¹⁴⁴

Section 51.308(f)(6)(iv) requires the SIP to provide for the reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state. As noted above, Maryland does not have any Class I Federal areas located within its borders, therefore this requirement does not apply.

Section 51.308(f)(6)(v) requires SIPs to provide for a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment, including emissions for the most recent year for which data are available and estimates of future projected emissions. It also requires a commitment to update the inventory periodically. Maryland provides for emissions inventories and estimates for future projected emissions by participating in the MANE-VU RPO and complying with EPA's Air Emissions Reporting Rule (AERR). In 40 CFR part 51, subpart A, the AERR requires states to submit updated emissions inventories for criteria pollutants to EPA's Emissions Inventory System (EIS) every three years. The emission inventory data is used to develop the NEI, which provides for, among other things, a triennial statewide inventory of pollutants that are reasonably anticipated to cause or contribute to visibility impairment.

Section 2.21 of Maryland's submission includes tables of NEI data. The source categories of the emissions inventories included are: (1) point sources, (2) nonpoint sources, (3) non-road mobile sources, and (4) on-road mobile sources. The point source category is further divided into AMPD point sources and non-AMPD point sources.¹⁴⁵ Maryland included NEI emissions inventories for the following years: 2002 (one of the regional haze program baseline years), 2008, 2011, 2014, and 2017; and for the following pollutants: SO₂, NO_x, PM₁₀, PM_{2.5}, VOCs, and NH₃. Maryland also provided a summary of SO₂ and NO_x emissions for AMPD sources for the years of 2016, 2017, 2018, and 2019.

¹⁴⁴ See Section 2.16 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁴⁵ AMPD sources are facilities that participate in EPA's emission trading programs. The majority of AMPD sources are electric generating units (EGUs).

Section 51.308(f)(6)(v) also requires states to include estimates of future projected emissions and include a commitment to update the inventory periodically. Maryland relied on the MANE-VU 2028 emissions projections for MANE-VU states. MANE-VU completed two 2028 projected emissions modeling cases—a 2028 base case that considers only on-the-books controls and a 2028 control case that considers implementation of the MANE-VU Asks.¹⁴⁶

EPA proposes to find that Maryland has met the requirements of 40 CFR 51.308(f)(6) as described above, including through its continued participation in the IMPROVE network and the MANE-VU RPO and its ongoing compliance with the AERR, and that no further elements are necessary at this time for Maryland to assess and report on visibility pursuant to 40 CFR 51.308(f)(6)(vi).

H. Requirements for Periodic Reports Describing Progress Towards the Reasonable Progress Goals

Section 51.308(f)(5) requires that periodic comprehensive revisions of states' regional haze plans also address the progress report requirements of 40 CFR 51.308(g)(1) through (5). The purpose of these requirements is to evaluate progress towards the applicable RPGs for each Class I area within the state and each Class I area outside the state that may be affected by emissions from within that state. Section 51.308(g)(1) and (2) apply to all states and require a description of the status of implementation of all measures included in a state's first implementation period regional haze plan and a summary of the emission reductions achieved through implementation of those measures. Section 51.308(g)(3) applies only to states with Class I areas within their borders and requires such states to assess current visibility conditions, changes in visibility relative to baseline (2000–2004) visibility conditions, and changes in visibility conditions relative to the period addressed in the first implementation period progress report. Section 51.308(g)(4) applies to all states and requires an analysis tracking changes in emissions of pollutants contributing to visibility impairment from all sources and sectors since the period addressed by the first implementation period progress report. This provision further specifies the year

¹⁴⁶ See Appendix 11 "Ozone Transport Commission/Mid-Atlantic Northeastern Visibility Union 2011 Based Modeling Platform Support Document—October 2018 Update (October 2018)".

or years through which the analysis must extend depending on the type of source and the platform through which its emission information is reported. Finally, 40 CFR 51.308(g)(5), which also applies to all states, requires an assessment of any significant changes in anthropogenic emissions within or outside the state have occurred since the period addressed by the first implementation period progress report, including whether such changes were anticipated and whether they have limited or impeded expected progress towards reducing emissions and improving visibility.

Maryland's submission describes the status of measures of the long-term strategy from the first implementation period. As a member of MANE-VU, Maryland considered the MANE-VU Asks and adopted corresponding measures into its long-term strategy for the first implementation period. The MANE-VU Asks were: (1) Timely implementation of Best Available Retrofit Technology (BART) requirements; (2) EGU controls including Controls at 167 Key Sources that most affect MANE-VU Class I areas; (3) Low sulfur fuel oil strategy; and (4) Continued evaluation of other control measures. Maryland met all the identified reasonable measures requested during the first implementation period. During the first planning period for regional haze, programs that were put in place focused on reducing sulfur dioxide (SO₂) emissions. The reductions achieved led to vast improvements in visibility at the MANE-VU Federal Class I Areas due to reduced sulfates formed from SO₂ emissions. Maryland describes in Section 2.18 of its submittal control measures put in place during the first implementation period to help reduce the emissions of visibility-impairing pollutants, including NO_x and SO₂. This includes the Maryland Healthy Air Act (HAA), which covered Maryland emission sources named in MANE-VU's "167 Stacks"; the HAA was implemented in 2010 and further tightened SO₂ emission control requirements in 2013, resulting in significant reductions in visibility-impairing pollutants throughout the state that exceeded MANE-VU target goals. Maryland also described its implementation of low sulfur fuel oil standards for the state, and the status of the remaining emissions sources in the state subject to BART requirements, which included emission reductions for Portland cement plants to satisfy Reasonably Available Control

Technology (RACT) requirements for ozone.¹⁴⁷

EPA proposes to find that Maryland has met the requirements of 40 CFR 51.308(g)(1) and (2) because its SIP submission describes the measures included in the long-term strategy from the first implementation period, as well as the status of their implementation and the emission reductions achieved through such implementation.

Section 51.308(g)(3) requires states to assess Reasonable Progress Goals, including current visibility conditions and changes, for any Class I areas within the state. As described above, Maryland does not have any Class I areas within its borders, therefore 40 CFR 51.308(g)(3) does not apply.

Pursuant to 40 CFR 51.308(g)(4), in Section 2.21 of their submittal, Maryland provided a summary of emissions of NO_x, SO₂, PM₁₀, PM_{2.5}, VOCs, and NH₃ from all sources and activities, including from point, nonpoint, non-road mobile, and on-road mobile sources, for the time period from 2002 to 2017. Maryland also included AMPD data for SO₂ and NO_x emissions for 2016, 2017, 2018, and 2019 in their submission.

The reductions achieved through Maryland emission control measures are seen in the emissions inventory. Based on Maryland's SIP submittal, NO_x emissions have continuously declined in Maryland from 2002 through 2017, especially in the point, nonroad and onroad mobile sectors. During that period, onroad sources contributed almost half of the emissions at 47%, followed by point sources at 27%. Nonroad sources contributed 13% and area sources contributed 13%. Table 2–20 of Maryland's SIP submittal also shows additional NO_x emissions data from 2016 to 2019 for Maryland's point sources that report to EPA's AMPD. NO_x emissions are expected to continue to decrease as fleet turnover occurs and the older more polluting vehicles and equipment are replaced by newer, cleaner ones.¹⁴⁸

Emissions of SO₂ have shown a significant decline in Maryland from 2002 to 2017 across multiple sectors; see Section 2.21.3 and Table 2–28 of Maryland's SIP submittal.¹⁴⁹ Reductions in point emissions are primarily due to

the acid rain program, Maryland power plant consent decrees and regulations including the Maryland Health Air Act, and Federal and State low sulfur fuel regulations. Additionally, some of these decreases may be attributable to the MANE-VU low sulfur fuel strategy and the 90% or greater reduction in SO₂ emissions at 167 EGU stacks, both inside and outside of MANE-VU, requested in the "Non-MANE-VU Ask" for states within MANE-VU for the first regional haze planning period.¹⁵⁰

Emissions of PM₁₀ have steadily decreased in Maryland from 2002 to 2017, particularly in the point and nonroad sectors; see Section 2.21.2 and Table 2–25 of Maryland's SIP submittal.¹⁵¹ The variations in the onroad sector are likely due to changes in emission inventory calculation methodologies, which resulted in higher particulate matter estimates in the other years than in 2002. The large variation in emissions in the nonpoint category is likely due to changes in calculation methodologies for residential wood burning and fugitive dust categories, which have varied significantly.

Emissions of ammonia (NH₃) have shown declines in Maryland from 2002 to 2017; see Section 2.21.4 and Table 2–33 of Maryland's SIP submittal.¹⁵² Ammonia decreases were achieved in the onroad sector due to Federal new engine standards for vehicles and equipment. Nonpoint increases and decreases from 2002 to 2014 are due to reporting, grouping and methodology changes. While ammonia emissions grew slightly between the 2002 and 2008 emission inventories, ammonia emissions have decreased from 2011 to 2017.

The EPA is proposing to find that Maryland has satisfied the requirements of 40 CFR 51.308(g)(4) by providing emissions information for NO_x, SO₂, PM₁₀, PM_{2.5}, VOCs, and NH₃ broken down by type of source.

Maryland uses the emissions trend data in the SIP submission¹⁵³ and supporting MANE-VU information¹⁵⁴ provided to support the assessment that

¹⁵⁰ See "Statement of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Concerning a Course of Action within MANE-VU Toward Assuring Reasonable Progress" in the docket.

¹⁵¹ See Section 2.21.2 and Table 2–25 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵² See Section 2.21.4 and Table 2–33 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵³ See Section 2.21 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵⁴ See docket document, "MANE-VU Trends 2004–17 Report 2nd SIP Metrics - December 2018 Update—Final".

¹⁴⁷ COMAR 26.11.30—Control of Portland Cement Manufacturing Plants. Effective date: July 20, 2015 (42:Md. R. 884). www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=26.11.30. * Approved by EPA March 28, 2018, 83 FR 13192

¹⁴⁸ See Section 2.21.1 and Table 2–20 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022)

¹⁴⁹ See Section 2.21.3 and Table 2–28 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

anthropogenic haze-causing pollutant emissions in Maryland have decreased during the reporting period and that changes in emissions have not limited or impeded progress in reducing pollutant emissions and improving visibility, Maryland 2017 emission inventories for NO_x, SO₂, PM₁₀, PM_{2.5}, VOCs, and NH₃ were lower than their 2014 emission inventories for those same pollutants emissions.¹⁵⁵ The EPA is proposing to find that Maryland has met the requirements of 40 CFR 51.308(g)(5).

I. Requirements for State and Federal Land Manager Coordination

Section 169A(d) of the Clean Air Act requires states to consult with FLMs before holding the public hearing on a proposed regional haze SIP, and to include a summary of the FLMs' conclusions and recommendations in the notice to the public. In addition, 40 CFR 51.308(i)(2)'s FLM consultation provision requires a state to provide FLMs with an opportunity for consultation that is early enough in the state's policy analyses of its emission reduction obligation so that information and recommendations provided by the FLMs' can meaningfully inform the state's decisions on its long-term strategy. If the consultation has taken place at least 120 days before a public hearing or public comment period, the opportunity for consultation will be deemed early enough. Regardless, the opportunity for consultation must be provided at least sixty days before a public hearing or public comment period at the state level. Section 51.308(i)(2) also provides two substantive topics on which FLMs must be provided an opportunity to discuss with states: assessment of visibility impairment in any Class I area and recommendations on the development and implementation of strategies to address visibility impairment. Section 51.308(i)(3) requires states, in developing their implementation plans, to include a description of how they addressed FLMs' comments.

The states in the MANE-VU RPO conducted FLM consultation early in the planning process concurrent with the state-to-state consultation that formed the basis of the RPO's decision making process. As part of the consultation, the FLMs were given the opportunity to review and comment on the technical documents developed by MANE-VU. The FLMs were invited to attend the intra- and inter-RPO

consultations calls among states and at least one FLM representative was documented to have attended seven intra-RPO meetings and all inter-RPO meetings. Maryland participated in these consultation meetings and calls.¹⁵⁶

As part of this early engagement with the FLMs, on April 12, 2018, the NPS sent letters to the MANE-VU states requesting that they consider specific individual sources in their long-term strategies.¹⁵⁷ NPS used an analysis of emissions divided by distance (Q/d) to estimate the impact of MANE-VU facilities. To select the facilities, NPS first summed 2014 NEI NO_x, PM₁₀, SO₂, and SO₄ emissions and divided by the distance to a specified NPS mandatory Class I Federal area. NPS summed the Q/d values across all MANE-VU states relative to Acadia, Mammoth Cave and Shenandoah National Parks, ranked the Q/d values relative to each Class I area, created a running total, and identified those facilities contributing to 80% of the total impact at each NPS Class I area. NPS applied a similar process to facilities in Maine relative to Acadia National Park. NPS merged the resulting lists of facilities and sorted them by their states. NPS suggested that a state consider those facilities comprising 80% of the Q/d total, not to exceed the 25 top ranked facilities. The NPS identified 12 facilities in Maryland in this letter.¹⁵⁸ Maryland included the NPS initial letter in their proposed SIP. In a subsequent letter dated October 22, 2018, NPS identified 13 facilities for which more control information was desired.¹⁵⁹ Maryland detailed the emission controls and updates to these facilities in its SIP submittal to address the NPS's request for more information.¹⁶⁰

On September 2, 2021, Maryland submitted a draft Regional Haze SIP to the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the National

Park Service for a 60-day review and comment period pursuant to 40 CFR 51.308(i)(2).¹⁶¹ Maryland received comments from the Forest Service on October 28, 2021, and from the National Park Service on October 29, 2021. Maryland responded to the FLM comments and included the responses in Appendix 20 of their submission to EPA, in accordance with 40 CFR 51.308(i)(3). Notices of the proposed SIP, availability and the public hearing were published on MDE's website and in the Maryland Register, and interested parties were emailed the notice, along with air quality contacts from other states, air quality regional organizations and the EPA. A public hearing on the proposed SIP revision was held on January 4, 2022. Written comments relevant to the proposal were accepted until the close of business January 4, 2022.

For the reasons stated above, the EPA proposes to find that Maryland has satisfied the requirements under 40 CFR 51.308(i) to consult with the FLMs on its regional haze SIP for the second implementation period.

Maryland's February 8, 2022 SIP submission includes a commitment to revise and submit a regional haze SIP by July 31, 2028, and every ten years thereafter. The state's commitment includes submitting periodic progress reports in accordance with 40 CFR 51.308(f) and a commitment to evaluate progress towards the reasonable progress goal for each mandatory Class I Federal area located within the state and in each mandatory Class I Federal area located outside the state that may be affected by emissions from within the state in accordance with 40 CFR 51.308(g).¹⁶²

V. Proposed Action

EPA is proposing to approve Maryland's February 8, 2022 SIP submission, as satisfying the regional haze requirements for the second implementation period contained in 40 CFR 51.308(f).

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission

¹⁵⁵ See Section 2.16 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵⁶ See Appendix 7, "MANE-VU Regional Haze Consultation Report (July 27, 2018)," of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵⁷ See Appendix 7, "MANE-VU Regional Haze Consultation Report (July 27, 2018)," and Appendix 9, "National Park Service Letter to MANE-VU (April 2018)" of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵⁸ See Appendix 7, "MANE-VU Regional Haze Consultation Report (July 27, 2018)," of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁵⁹ See Appendix 15, "National Park Service Correspondence with Maryland", of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁶⁰ See Section 2.6 and Appendix 20 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

¹⁶¹ See Appendix 14, Appendix 15, Appendix 16, and Appendix 20 of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022), and docket documents, "National Park Service Comments"; "State of Maryland Mail—Forest Service"; "USFS MD RH SIP Comment Letter"; "USFS MD RH SIP Comment Enclosure"

¹⁶² See Section 2.17, "Progress Report Requirements", of the MD Regional Haze SIP for the Second Implementation Period 2018–2028 (February 8, 2022).

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, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." EPA further defines the term fair treatment to mean

that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies." The Maryland Department of the Environment did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, this proposed rulemaking action, pertaining to Maryland regional haze SIP submission for the second planning period, is not approved to apply on any Indian reservation land or 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 and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by Reference, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Adam Ortiz,

Regional Administrator, Region III.

[FR Doc. 2023-18278 Filed 8-24-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R02-OAR-2022-0648, FRL-11358-01-R2]

Approval and Promulgation of Implementation Plans; New York; Elements of the 2008 and 2015 Ozone National Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of New York for purposes of certifying and meeting the requirements for Reasonably Available Control Technology (RACT) for the Serious classification of the 2008 and Moderate classification of the 2015 8-hour Ozone National Ambient Air Quality Standards (NAAQS). The EPA is also proposing to approve that this SIP revision fulfills SIP requirements pertaining to the Ozone Transport Region (OTR) for the 2015 Ozone NAAQS. The EPA is proposing to approve the demonstration portion of the comprehensive SIP revision submitted by New York that certify that the State has satisfied the requirements for an Ozone nonattainment new source review program, certify that the State has satisfied the requirements for a nonattainment emission inventory, and certify that the State has satisfied the requirements for clean fuels for fleets. The EPA is also proposing to approve New York's reasonable further progress plans and motor vehicle emissions budgets for both the Moderate and Serious classifications of the 2008 Ozone NAAQS.

DATES: Written comments must be received on or before September 25, 2023.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R02-OAR-2022-0648 at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Fausto Taveras, Environmental Protection Agency, 290 Broadway, New York, New York 10007–1866, at (212) 637–3378, or by email at Taveras.Fausto@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA.

Table of Contents

- I. What did New York submit?
- II. Background
- III. Summary and Evaluation of New York’s SIP Submittals
 - a. RACT Certifications
 - b. Additional Certifications
- IV. EPA’s Proposed Action
- V. Statutory and Executive Order Reviews

I. What did New York submit?

On January 29, 2021, New York submitted a State implementation plan (SIP) revision for purposes of meeting the requirement for Reasonably Available Control Technology (RACT)¹ for the 2008 8-hour Ozone National Ambient Air Quality Standard (NAAQS or standard) in New York’s portion of the New York-Northern New Jersey-Long Island (NY-NJ-CT) nonattainment area (also referred to as the New York Metro Area or NYMA) for the Serious classification.² The submittal was also meant to satisfy New York’s requirement for RACT for the 2015 NAAQS in the NYMA and the requirements for RACT for the 2015 NAAQS throughout the State for New York’s commitment to meet RACT within the Ozone Transport Region (OTR). New York also submitted a comprehensive SIP revision on November 29, 2021, which includes the reasonable further progress plan and motor vehicle emissions budgets (MVEB or Budgets) for the 2008 Ozone Serious classification of NYMA, certifying that the State has satisfied the requirements for an Ozone nonattainment new source review (NSR) program, certifying that the State has satisfied the requirements for a nonattainment emission inventory, and certifying that the State has satisfied the requirements for clean fuels for

fleets. In addition, New York also submitted a comprehensive SIP revision on November 13, 2017. Within that submittal, New York included the reasonable further progress plan and MVEB for the 2008 Ozone Moderate classification of the NYMA.

II. Background

In 2008, EPA revised the health-based NAAQS for Ozone, setting it at 0.075 parts per million (ppm) averaged over an 8-hour time frame. *See* 73 FR 16435 (March 27, 2008). The EPA determined that the revised 8-hour standard would be more protective of human health, especially with regard to children and adults who are active outdoors and individuals with a pre-existing respiratory disease such as asthma. *See id.*

On April 30, 2012, the EPA finalized its attainment/nonattainment designations for areas across the country with respect to the 2008 8-hour Ozone Standard. *See* 77 FR 30088 (May 21, 2012). This action became effective on July 20, 2012. The two 8-hour Ozone marginal nonattainment areas located in New York State are the New York portion of the NYMA and the Jamestown nonattainment area. The remainder of New York State was designated as unclassifiable/attainment. The New York portion of the NYMA, is composed of the five boroughs of New York City and the surrounding counties of Nassau, Suffolk, Westchester, Rockland, and the Shinnecock Indian Nation.³ 40 CFR 81.333. The Jamestown nonattainment area is composed of Chautauqua County. *See id.* In 2016, the EPA determined that Jamestown attained the 2008 Ozone Standard by the July 20, 2015, attainment date and that the NYMA nonattainment area did not attain the 2008 Ozone Standard by the applicable attainment date and was reclassified from a marginal to a moderate nonattainment area. *See* 81 FR 26697 (May 4, 2016).⁴ State attainment plans for Moderate nonattainment areas were due by January 1, 2017. *See id.* Since the NYMA was reclassified to a Moderate nonattainment area, New York, on November 13, 2017, submitted a comprehensive SIP revision, including an attainment demonstration and

reasonable further progress plan among other SIP required elements, related to the 2008 8-hour Ozone standard for the Moderate classification. Subsequently, the NYMA Moderate nonattainment area also failed to meet the Moderate area attainment date. Therefore, on August 23, 2019, EPA published a final rule that reclassified the NYMA, and other State’s nonattainment areas, from Moderate to Serious. *See* 84 FR 44238 (August 23, 2019). Because the NYMA nonattainment area also failed to meet the Serious area attainment date, on September 15, 2022, the EPA published a final rule that reclassified the NYMA, along with other State’s nonattainment area, from Serious to Severe. *See* 87 FR 60926 (October 7, 2022). This reclassification to Severe resulted in a revised attainment date for the NYMA of July 20, 2027. *See id.* RACT requirements tied to the Severe classification are due on May 7, 2024. *See id.*

The counties in the New York portion of the NYMA (and part of Orange County) were previously classified under the 1979 1-hour Ozone NAAQS as Severe, requiring RACT, while the remaining counties in the State were subject to RACT as part of the Moderate classification or as part of the Ozone Transport Region (OTR). *See* 77 FR 36165.⁵ Under the 2008 8-hour Ozone Standard, in areas classified as Moderate or located in the OTR (which includes all of New York State), a RACT determination is required for major stationary sources that emit or have the potential to emit 50 tons per year for VOC and 100 tons per year for NO_x. *See* 87 FR 21825 (April 13, 2022). As required by the anti-backsliding provisions of the CAA, for purposes of the RACT analysis for the 2008 Ozone standard, New York retained the 1-hour Ozone plan emission threshold of 25 tons per year or more for either NO_x or VOC for major sources in the New York portion of NYMA and portions of Orange County that were classified as Severe under the 1979 1-hour standard. *See* 40 CFR part 51.905.

Sections 182(b)(2) of the CAA require States to implement RACT in areas classified as Moderate (and higher) nonattainment for Ozone, while section 184(b)(1)(B) of the CAA requires VOC RACT in States located in the OTR, and section 182(f) requires NO_x RACT. RACT must be implemented for all major VOC and NO_x emission sources and for all sources covered by a control technique guideline (CTG). A CTG is a

¹ The EPA has defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53762, September 17, 1979).

² In New York’s January 29, 2021 submittal, the State certifies that an EPA-approved emission statement program satisfies the CAA Section 182(a)(3)(B) SIP Requirement for the 2015 8-hour Ozone NAAQS. New York’s certification for its emission statement program requirement for the 2015 8-hour Ozone NAAQS will be addressed under a separate future rulemaking and is not addressed within this proposal.

³ Information pertaining to areas of Indian country is intended for CAA planning purposes only and is not an EPA determination of Indian country status or any Indian country boundary. The EPA lacks the authority to establish Indian country land status and makes no determination of Indian country boundaries at 77 FR 30088 (May 21, 2012).

⁴ In 2019 the NY-NJ-CT nonattainment area was reclassified to serious nonattainment. 84 FR 44238 (August 23, 2019). The serious area attainment date and the deadline for RACT measures not tied to attainment is July 20, 2021. 84 FR 44238.

⁵ CAA Section 184(a) established a single ozone transport region (OTR) comprising all or part of 12 eastern States and the District of Columbia.

document issued by the EPA which provides recommendations to inform State, local, and Tribal air agencies as to what constitutes RACT for a specific VOC source category. States must submit rules, or negative declarations when the State has no such sources, for CTG source categories. A related set of documents, Alternative Control Techniques (ACT) documents, exists primarily for NO_x control requirements. RACT must be imposed on major sources of NO_x, and some of those major sources may be within a sector covered by an ACT document.

On March 6, 2015, the EPA published a final rule that outlines the obligations that areas found to be in nonattainment of the 2008 Ozone NAAQS need to address (2008 Ozone Implementation Rule). *See* 80 FR 12264. This rule contains, among other things, a description of the EPA's expectations for States with RACT obligations. The 2008 Ozone Implementation Rule provides that States could meet RACT through the establishment of new or more stringent requirements that meet RACT control levels, through a certification that previously adopted RACT controls in the SIP, that were approved by the EPA under a prior Ozone NAAQS, represent adequate RACT control levels for attainment of the 2008 Ozone NAAQS, or a combination of these two approaches. In addition, a State must submit a negative declaration in instances where there are no sources covered by a given CTG. The 2008 Ozone Implementation Rule requires that States with nonattainment areas were required to submit RACT SIPs to EPA within two years from the effective date of nonattainment designation, which for the areas at issue here was July 20, 2014.

Regarding the 2015 Ozone NAAQS, on June 4, 2018, EPA published a final rule establishing designations and classifications for this standard for most areas of the country, including New York. *See* 83 FR 25776 (June 4, 2018). This final rule created a Moderate nonattainment area within the NYMA which includes, within New York, the five boroughs of New York City and the surrounding counties of Nassau, Suffolk, Westchester, Rockland and the Shinnecock Indian Nation. Additionally, on December 6, 2018, EPA published a final rule outlining requirements for States to follow as they implement the 2015 Ozone NAAQS (2015 Ozone Implementation Rule). (*See* 83 FR 62998, December 6, 2018). The rule contains RACT and NNSR requirements similar to those outlined within the 2008 Ozone Implementation Rule, although the discretionary inter-

pollutant trading program provided for within the NNSR portion of the rule was subsequently voided.

Regarding NNSR, the minimum SIP requirements for NNSR permitting programs for the 2008 and the 2015 Ozone NAAQS are located in 40 CFR 51.165. These NNSR program requirements include those promulgated in the "Phase 2 Rule" implementing the 1997 8-hour Ozone NAAQS (*See* 70 FR 71612, November 29, 2005) and the 2008 Ozone Implementation Rule. Additionally, although the 2015 Ozone Implementation Rule included a provision to explicitly allow for inter-pollutant trading for meeting the emissions offset requirement for ozone, this provision was subsequently vacated.⁶ Under the Phase 2 Rule, the SIP for each ozone nonattainment area must contain NNSR provisions that:

- Set major source thresholds for NO_x and VOC pursuant to 40 CFR 51.165(a)(1)(iv)(A)(1)(i) through (iv) and (a)(1)(iv)(A)(2);
- Classify physical changes at a major source if the change would constitute a major source by itself pursuant to 40 CFR 51.165(a)(1)(iv)(A)(3);
- Consider any significant net emissions increase of NO_x as a significant net emissions increase for ozone pursuant to 40 CFR 51.165(a)(1)(v)(E);
- Consider increases of VOC emissions in extreme ozone nonattainment areas as significant net emissions increases and major modifications for ozone pursuant to 40 CFR 51.165(a)(1)(v)(F);
- Set significant emissions rates for VOC and NO_x as ozone precursors pursuant to 40 CFR 51.165(a)(1)(x)(A) through (C) and (E);
- Contain provisions for emissions reductions credits pursuant to 40 CFR 51.165(a)(3)(ii)(C)(1) and (2);
- Provide that the requirements applicable to VOC also apply to NO_x pursuant to 40 CFR 51.165(a)(8); and
- Set offset ratios for VOC and NO_x pursuant to 40 CFR 51.165(a)(9)(i) through (iii) (renumbered as (a)(9)(ii) through (iv) under the 2008 Ozone Implementation Rule).

Additionally, pursuant to the 2008 Ozone Implementation Rule, areas designated as nonattainment for that standard that also remain nonattainment for the 1997 Ozone Standard must satisfy the anti-backsliding requirements of 40 CFR 51.1105.

⁶ *Sierra Club v. EPA*, 985 F.3d 1055 (D.C. Cir. 2021).

III. Summary and Evaluation of New York's SIP Submittals

a. RACT Certifications

On January 29, 2021, New York submitted a determination that its regulatory framework for sources meets the criteria for RACT for purposes of the 2015 Ozone NAAQS. The submittal also contained a certification that the State's RACT requirements are sufficient to comprise RACT for the area's Serious classification for the 2008 Ozone NAAQS. EPA approved New York's statewide 2008 NAAQS RACT SIP submission for requirements associated with the Moderate area classification and the OTR on December 12, 2017, except the Agency conditionally approved New York's submission with respect to sources covered by the industrial cleaning solvents CTG. *See* 82 FR 58342. As of May 13, 2020, New York had a fully approved RACT SIP for purposes of the Moderate area classification and OTR requirements associated with the 2008 Ozone NAAQS. *See* 85 FR 28490. New York's RACT submittal notes that its prior designation as a nonattainment area for the New York portion of the NYMA for the previous ozone standards resulted in the adoption of stringent controls for major sources of VOC and NO_x, including RACT level controls. New York's major source applicability threshold for both VOC and NO_x have been maintained at 50 tons per year throughout the State and at 25 tons per year in the New York portion of the NYMA, due to anti-backsliding and the NYMA being designated as Severe for the one-hour Ozone Standard (*See* 56 FR 56694, November 6, 1991) where the threshold is 25 tons per year. In accordance with the 2008 and 2015 Ozone Implementation Rules, much of New York's submittal consists of a review of RACT controls adopted under previous ozone standards and an indication of whether those previously adopted controls still represent RACT for the 2008 and 2015 Ozone NAAQS. Additionally, New York notes that as a member state of the OTR, it works with the Ozone Transport Commission to identify and adopt, as deemed appropriate, regulations on additional VOC and NO_x categories beyond those for which EPA has issued CTGs or ACT documents.

Appendix A of New York's January 29, 2021, submission lists the CTGs and ACTs and corresponding New York RACT regulations that cover existing sources in New York. For major non-CTG sources, RACT compliance is enforced through the SIP approved provisions in 6 NYCRR Part 212,

“Process Operations.” On October 1, 2021, the EPA approved New York’s revisions to Part 212 into the SIP to strengthen enforcement of New York’s air pollution control regulations (*see* 86 FR 54375).

New York evaluated its existing RACT regulations and requirements and determined that these measures continue to constitute RACT for purposes of the 2008 Ozone NAAQS Serious classification, the 2015 Ozone NAAQS Moderate classification, and OTR requirements for the 2015 Ozone NAAQS. New York certified that its current regulations still comprise RACT for all major sources of NO_x/VOCs and all sources covered by CTGs where there is no negative declaration. In regard to NO_x RACT regulations, New York certified that their following SIP approved regulations met the current requirements for RACT: Subpart 212–3, “Reasonably Available Control Technology for Major Facilities” (86 FR 54375, October 1, 2021), Subpart 212–4, “Control of Nitrogen Oxides for Hot Mix Asphalt Production Plants” (86 FR 54375, October 1, 2021), Part 214, “Byproduct Coke Oven Batteries” (71 FR 41163, July 20, 2006), Part 216, “Iron and/or Steel Processes” (71 FR 41163, July 20, 2006), Subpart 219–10, “Reasonably Available Control Technology (RACT) for Oxides of Nitrogen (NO_x) at Municipal and Private Solid Waste Incineration Units” (87 FR 33438, June 2, 2022), Subpart 220–1, “Portland Cement Plants” (78 FR 41846, July 12, 2013), Subpart 220–2, “Glass Plants” (conditional approval 78 FR 41846, July 12, 2013) and Subpart 227–2, “Reasonably Available Control Technology (RACT) for Major Facilities of Oxides of Nitrogen (NO_x)” (78 FR 41846, July 12, 2013).

In regard to VOC RACT regulations, New York certified that their following SIP approved regulations met the current requirements for RACT: Part 203, “Oil and Natural Gas Sector” (87 FR 52337, August 25, 2022), Subpart 212–3, “Reasonably Available Control Technology for Major Facilities” (86 FR 54375, October 1, 2021), Part 226, “Solvent Cleaning Processes and Industrial Cleaning Solvents” (85 FR 28490, May 13, 2020), Part 228, “Surface Coating Processes, Commercial and Industrial Adhesives, Sealants and Primers” (79 FR 12082, March 4, 2014), Part 229, “Petroleum and Volatile Organic Liquid Storage and Transfer” (62 FR 67006, December 23, 1997), Part 230, “Gasoline Dispensing Sites and Transport Vehicles” (63 FR 23668, April 30, 1998), Part 233, “Pharmaceutical and Cosmetic Manufacturing Processes” (62 FR 67006, December 23, 1997), Part

234, “Graphic Arts” (77 FR 13974, March 8, 2012). Within New York’s January 29, 2021, SIP revision, the State noted that it was in the process of revising Part 230 to incorporate Federal standards for gasoline dispensing facilities pursuant to 40 CFR Subpart CCCCCC. This regulatory update was submitted to the EPA on March 3, 2021 and was approved into New York’s SIP on February 9, 2023. *See* 88 FR 8371.

In regard to negative declarations, New York reviewed the CTG and ACT categories and determined that their previously approved negative declarations remain valid. Based on the emission inventory and emission statements for New York, the State certified that there are no sources located within the State for the following six CTGs: Manufacture of Vegetable Oils; Manufacture of High-Density Polyethylene, Polypropylene and Polystyrene Resins; Natural Gas/Gasoline Processing Plants; Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry; Fiberglass Boat Manufacturing Materials; Agricultural Pesticides. In New York’s January 29, 2021, RACT submittal for the Serious classification of the 2008 Ozone standard, Moderate classification for the 2015 Ozone Standard, and OTR requirements related to the 2015 Ozone NAAQS New York recertifies that this previously approved negative declaration for the CTGs listed above remains valid. In this proposed action, the EPA is proposing that the State’s negative declaration for the six CTGs listed above remain valid and satisfies the requirements for the 2008 Ozone NAAQS Serious classification, the 2015 Ozone standard Moderate classification and requirements associated with the OTR for the 2015 Ozone NAAQS (82 FR 58342, December 12, 2017); 40 CFR 52.1683(a) and (b).

Regarding source specific RACT determinations, New York submits certain source specific RACT determinations to EPA as SIP revisions. In instances where a facility is unable to meet the relevant categorical RACT limit due to technical or economic infeasibility, an alternative RACT limit, also called a variance, is agreed to by DEC and the facility owner. Some regulations (*e.g.*, Part 220, “Portland Cement Plants and Glass Plants”) do not define categorical RACT limits due to the uniqueness of each facility; in these cases, each regulated facility performs a complete RACT analysis from which a facility-specific emission limit is established. A case-by-case RACT analysis may also be required for sources that are not in a source category

covered by an existing State RACT regulation or addressed by a CTG.

New York has periodically submitted source specific RACT determinations for multiple facilities under a bundled SIP submittal approach to EPA. Previous bundles were submitted to the EPA in 2008, 2010, and 2013. This included 34 RACT determinations bundled into one submittal on September 16, 2008, and 15 RACT determinations bundled into one submittal on August 30, 2010, for various regulated RACT rules (*e.g.*, Part 212–3, “RACT for Major Facilities,” and Part 220, “Portland Cement Plants and Glass Plants”). In addition, on December 18, 2013, New York submitted a bundle of six RACT determinations for Portland cement plants and glass plants regulated under Part 220. On May 7, 2020, New York withdrew 14 previously submitted RACT determinations because the facilities are no longer in operation or no longer need SIP approval due to changes in operations. EPA Region 2 continues to coordinate with NYSDEC to address the submittal status of the remaining source specific SIPs. Once submitted, these source specific SIPs will be addressed in future separate actions. Appendix B of New York’s January 29, 2021, submittal includes a list of source specific RACT determinations that have been submitted to EPA; Appendix C of the submittal contains correspondence from EPA dated May 21, 2020 regarding the latest developments in addressing the source specific SIP submittals.

We have reviewed New York’s RACT certification demonstration and propose to determine that the State’s regulatory requirements for VOC and NO_x emissions from major sources accomplish a RACT level of control for both pollutants. Regarding the CTG and ACT categories, New York has reviewed RACT controls adopted for previous Ozone standards and the EPA agrees with the State’s evaluation that those previously adopted controls still represent RACT for the Serious classification of the 2008 Ozone Standard, the Moderate classification of the 2015 Ozone Standard, and requirements associated with the OTR for the 2015 Ozone NAAQS. Also, the SIP-approved New York RACT rules have more stringent emission limits and/or lower thresholds of applicability than the recommendations contained in the CTG and ACT documents. Since we agree that the regulations which New York has cited as meeting RACT do conform with RACT for the 2015 and 2008 Ozone standards, we propose approval of New York’s RACT certification SIP revision requests dated

January 29, 2021, and November 29, 2021.

b. Additional Planning Elements and Certifications

New York's November 13, 2017, and November 29, 2021, SIP submissions also included additional certifications and planning elements as part of the comprehensive demonstrations. These include reasonable further progress and MVEB for the 2008 moderate and serious ozone classifications, a certification for an ozone NNSR program, a certification for a nonattainment emission inventory, and a certification that the State has satisfied the requirements for clean fuels for fleets.

Emission Inventory

CAA section 172(c)(3) requires that each SIP include a "comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in [the] area . . ." by requiring an accounting of actual emissions from all sources of the relevant pollutants in the area. This section provides for the base year inventory to include all emissions that contribute to the formation of a particular NAAQS pollutant. For the 2008 Ozone NAAQS, EPA's March 6, 2015, implementation rule recommended 2011 as a baseline year from which emission reductions used to meet RFP requirements are creditable. See 80 FR 12263.

On November 29, 2021, NYSDEC certified that the previously submitted 2011 base year emission inventory is up-to-date and satisfies the requirements for the 2008 Ozone NAAQS for the Serious classification. On November 13, 2017, New York submitted to the EPA as a SIP revision request an emission inventory of ozone precursors for 2011.⁷ The inventory was submitted to meet the CAA Section 182(a)(3)(A) obligation to develop a base year inventory and was also used as the baseline year in the State's 2008 Ozone Moderate and Serious RFP plans which are described elsewhere in this proposal. The inventories include emission estimates in the form of ozone

season day (OSD) emissions in tons per summer day. The OSD emissions are also adjusted for various types of stationary and mobile source categories based on their activity level during the summer ozone season. The ozone emission inventory catalogs NO_x and VOC emissions because these pollutants are precursors to ozone formation. New York's 2011 emissions inventory contains emission estimates for the nine counties in the NYMA and contains emission estimates summed statewide.

The specific details of New York's 2011 emission inventory and the rationale for the EPA's approval action are explained in the October 1, 2021, final rulemaking action. For this detailed information, the reader is referred to the EPA's rulemaking action approving New York's 2011 Emission Inventory. See 86 FR 54377. In that action, the EPA determined that New York's emission inventory is based on the most current and accurate information available to the State at the time it was being developed. Additionally, the inventories comprehensively address all source categories in New York's nonattainment areas and were developed consistent with the relevant EPA inventory guidance. For those reasons, the EPA approved the 2011 baseline emission inventories into New York's SIP as meeting the requirements of CAA Section 172(c)(3).

Since we agree that New York's 2011 base year inventory is consistent with the ozone base year inventory reporting requirements based on EPA guidance, we are proposing to approve New York's certification of its 2011 calendar year emission inventory to fully meets the requirements of the CAA for the 2008 8-hour Ozone NAAQS Serious classification.

Table 1 shows the NYMA summary of 2011 OSD emissions, in tons per day, by source category.

TABLE 1—EMISSIONS INVENTORY SUMMARY FOR NYMA NONATTAINMENT AREA

[Tons/ozone season day]

Source	New York portion of NY-NJ-CT area	
	NO _x	VOC
Point	344.88	11.26
Non-Point (Area)	52.49	301.11
Nonroad	155.07	96.88
Onroad	205.87	104.46
Biogenic	1.35	191.15
Total	759.65	704.86

Reasonable Further Progress

Section 182(b)(1) of the CAA and the EPA's 2008 Ozone Implementation Rule requires that State's submit a reasonable further progress (RFP) demonstration for each 8-hour ozone nonattainment area designated moderate and above, for review and approval into its SIP, that describes how the area will achieve actual emissions reductions of VOC and NO_x from a baseline emissions inventory. Section 182(b)(1) of the CAA requires a State's RFP to demonstrate a 15% reduction in VOC emissions before the more general RFP requirements of section 172(c)(2) of the CAA apply, which permits a combination of VOC and NO_x emission reductions to show RFP.

The EPA's 2008 Ozone Implementation Rule also finalized that 2008 nonattainment areas that have previously met the CAA requirement for a 15% ROP VOC reduction plan for the entire area are not required to fulfill that requirement again. Instead, for purposes of the 1997 Ozone NAAQS and for the 2008 Ozone NAAQS, the EPA interpreted the RFP requirement of CAA section 172(c)(2) to require an area classified as Moderate to achieve an average 3 percent annual reduction in VOC and/or NO_x emissions for the first 6 years following the baseline.⁸ For Serious and above areas, section 182(c)(2)(B) requires an additional 3% per year reduction in VOC emissions, averaged over consecutive 3-year periods until the attainment date.⁹ New York has previously met the 15% RFP for VOC, due to nonattainment obligations it had under the 1997 8-hour Ozone standard (see 86 FR 49249; September 2, 2021). Therefore, for purposes of the 2008 Ozone standard, New York submitted RFP demonstrations for its moderate and serious nonattainment areas showing VOC and NO_x emission reductions greater than the 18% requirement following six years after the 2011 base year inventory (between 2012–2017) and demonstrated a 27% reduction by the Serious classification attainment date, July 20, 2021. Note that we are only proposing action on both RFP plans for the New York portion of the NYMA.

In New York's November 13, 2017, submission, NYSDEC demonstrated that RFP was achieved for the moderate classification between the 2011 baseline

⁷ On October 1, 2021, The EPA approved revisions to the New York SIP which included the 2011 calendar year ozone season daily and annual ozone precursor emission inventories for CO, NO_x, and VOC for the NYMA portion of New York-New Jersey-Long Island, NY-NJ-CT, serious nonattainment area, and for the Jamestown marginal nonattainment area. In addition, the EPA approved the 2011 calendar year ozone emissions inventory that was developed statewide for New York. The pollutants included in the inventory are annual emissions for CO, NO_x, and VOC. See 86 FR 54377.

⁸ Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements." Final Rule. Published March 6, 2015; effective April 6, 2015. 80 FR 12271.

⁹ See Id.

year and the 2017 target year by showing that NO_x emissions declined by 28.01%, and VOC emissions by 6.70%, within the NYMA nonattainment area. New York updated its 2011 emission estimates for use within the RFP baseline inventory by using the most recently available at the time version of EPA's MOVES model, MOVES 2014a, for calculation of on-road and non-road mobile source emissions. New York also accounted for Emission Reduction Credits (ERCs) within its RFP analysis because there are emissions offsets available for facilities to use when constructing or modifying an emission source subject to New Source Review. New York relied on the emission projection work it had coordinated and submitted to the Mid-

Atlantic Regional Air Management Association for their effort to develop a 2017 modeling platform. The projections of emissions from electrical generating units (EGUs) were conducted using the Eastern Regional Technical Advisory Committee (ERTAC). The ERTAC projection tool uses 2011 emissions data from EPA's Clean Air Market Division and growth factors developed from the U.S. Department of Energy's Energy Information Administration (EIA) data and other sources to create a 2017 emission inventory for EGUs. EPA finds that the ERTAC EGU emissions forecasts produce reasonable results for facilities within the State.

Table 2 below contains a summary of the 2011 RFP baseline inventory, and

2017 projected, controlled emissions demonstrating the 6.70% VOC and 28.01% NO_x emission reductions for the New York portion of the NY-NJ-CT nonattainment area.¹⁰ Although NYSDEC's modeling demonstration illustrates that the NYMA did not meet the moderate area attainment deadline of July 20, 2018, New York's RFP analysis for the NYMA moderate nonattainment area showed that projected, controlled VOC and NO_x emission in 2017 were well below the emission target levels. Therefore, the EPA is proposing to approve New York's RFP for the moderate classification since it successfully meets the RFP requirement under CAA section 172(c)(2).

TABLE 2—SUMMARY OF RFP CALCULATIONS FOR NYMA FOR 2008 OZONE MODERATE CLASSIFICATION

Description	NO _x emissions (tons/ozone season day)	VOC emissions (tons/ozone season day)
<i>RFP Baseline Inventory (2011): NY portion of NY-NJ-CT area</i>	770.4	516.04
<i>2017 Projected, controlled emissions: NY portion of NY-NJ-CT area</i>	554.58	481.48

As mentioned previously, the RFP requirement in CAA section 182(c)(2)(B) require areas classified as Serious or higher to achieve an average 3% annual reduction for the first 6 years following the baseline year, and also requires Serious areas to demonstrate an additional 3% per year reduction in VOC emissions, averaged over consecutive 3-year periods until the attainment date.¹¹ Since the attainment date for the Serious classification was on July 20, 2021, this requires Serious areas located within New York to demonstrate 27% percent reductions by the end of the nine-year period (2011–2020) regardless of whether the area attains the NAAQS. In New York's November 29, 2021, submission,

NYSDEC demonstrated that RFP was achieved for the Serious classification between the 2011 baseline year and 2020 target year by showing that the 27% reduction requirement was achieved through a combination of NO_x and VOC emission reductions through 2020.

Table 3 below contains a summary of the 2011 RFP baseline inventory, and 2020 projected, controlled emissions demonstrating that VOC emissions were reduced by 17.76% and NO_x emission reduced by 30.41% within the New York portion of the NY-NJ-CT nonattainment area.¹² Because RFP requirements for the NYMA Serious nonattainment area can be satisfied with reductions in either NO_x or VOC

emissions, New York was able to demonstrate a reduction emission surplus from the 27% requirement. Although NYSDEC's modeling demonstration and 2020 Design Values (DVs) illustrated that the NYMA did not meet the serious area attainment deadline of July 20, 2021, New York's RFP calculations for the NYMA serious nonattainment area showed that the 27% reduction requirement was achieved through a combination of NO_x and VOC emission reductions through 2020. Therefore, the EPA is proposing to approve New York's RFP for the Serious classification since it successfully meets the RFP requirement under CAA section 182(c)(2)(B) and 40 CFR 51.1110.

TABLE 3—SUMMARY OF RFP CALCULATIONS FOR NYMA FOR 2008 OZONE SERIOUS CLASSIFICATION

Description	NO _x emissions (tons/summer day)	VOC emissions (tons/summer day)
<i>RFP Baseline Inventory (2011): NY portion of NY-NJ-CT area</i>	770.4	516.04
<i>2020 Projected, controlled emissions: NY portion of NY-NJ-CT area</i>	536.14	424.40

Motor Vehicle Emissions Budgets

Transportation conformity is required by section 176(c) of the CAA.

Conformity to a SIP means conformity to an implementation plan's purpose of eliminating or reducing the severity and

number of violations of the NAAQS and achieving expeditious attainment of the NAAQS, and that transportation

¹⁰ In New York's calculation for RFP of the 2008 Ozone Moderate classification, biogenic emissions were removed from the base year inventory and rule effectiveness of Point sources emissions for both EGUs and non-EGUs were factored in.

¹¹ Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements." Final Rule. Published March 6, 2015; effective April 6, 2015. 80 FR 12271.

¹² In New York's calculation for RFP of the 2008 Ozone Serious classification, biogenic emissions were removed from the base year inventory and rule effectiveness of Point sources emissions for both EGUs and non-EGUs were factored in.

activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS (CAA 176(c)(1)(A) and (B)). The EPA's conformity rule at 40 CFR part 93, subpart A requires that transportation plans, programs and projects conform to SIPs, and establishes the criteria and procedures for determining whether or not they conform. To accomplish its purpose, the conformity rule requires a demonstration that emissions from a metropolitan planning organization's

regional transportation plan and transportation improvement program are consistent and do not exceed the MVEB contained in the control strategy SIP revision or maintenance plan. *See* 40 CFR 93.101, 93.118, and 93.124. The MVEB are defined in 40 CFR 93.101 as the level of mobile source emissions of a pollutant, of the total allowable emissions, defined in the SIP for a certain date, for the purpose of demonstrating attainment or maintenance of the NAAQS or for

meeting reasonable further progress milestones.¹³

In New York's November 13, 2017 comprehensive SIP submittal, the State established the 2017 MVEB for VOCs and NO_x within the New York portion of the NY-NJ-CT nonattainment area for the 2008 8-hour Moderate classification. In New York's submittal, the State clarifies that the 2017 MVEB is a projection from the 2011 base year inventory, and that the 2017 VOC MVEB excludes emissions from refueling. Table 4 lists the New York 2017 MVEB.

TABLE 4—MVEB IN NEW YORK'S 2008 OZONE MODERATE RFP PLAN

Description	NO _x (tons/summer day)	VOC (tons/summer day)
2017 8-Hour Ozone Motor Vehicle Emission Budgets: NY portion of NY-NJ-CT area	117.21	65.69

On April 19, 2018, the EPA issued a letter to New York in which we stated that the Budgets for the New York portion of the NY-NJ-CT area were adequate for use in transportation conformity determinations. Additionally, the EPA published an announcement of this adequacy finding in the **Federal Register** on June 8, 2018. *See* 83 FR 26598. In this action the EPA is proposing to approve the 2008 Ozone

Moderate RFP on-road MVEB established for the New York portion of the NY-NJ-CT area. The EPA is also proposing to approve these Budgets because EPA has now completed its review of the overall 2008 Ozone Moderate RFP plan which demonstrates the required percent reductions needed for the plan approval.

Also, in New York's November 29, 2021 comprehensive SIP submittal, the

State established the 2020 MVEB for VOCs and NO_x within the New York portion of the NY-NJ-CT nonattainment area for the 2008 8-hour Serious classification. In New York's submittal, the State clarifies that the 2020 MVEB is a projection from the 2011 base year inventory, and that the 2020 VOC MVEB excludes emissions from refueling. Table 5 lists the New York 2020 MVEB.

TABLE 5—MVEB IN NEW YORK'S 2008 OZONE MODERATE RFP PLAN

Description	NO _x (tons/summer day)	VOC (tons/summer day)
2020 8-Hour Ozone Motor Vehicle Emission Budgets: NY portion of NY-NJ-CT area	89.07	54.51

On July 26, 2022, the EPA issued a letter to New York in which we stated that the Budgets for the New York portion of the NY-NJ-CT area were adequate for use in transportation conformity determinations. Additionally, the EPA published an announcement of this adequacy finding in the **Federal Register** on November 23, 2022. *See* 87 FR 71632. In this action the EPA is proposing to approve the 2008 Ozone Serious RFP on-road MVEB established for the New York portion of the NY-NJ-CT area. The EPA is proposing to approve the 2020 MVEB established for the New York portion of the NY-NJ-CT nonattainment area since these Budgets are based on the 2011 base year emission inventory that is consistent with EPA guidance, as discussed in Section III.B. The EPA is also proposing to approve these Budgets

because EPA has now completed its review of the overall 2008 Ozone Serious RFP plan which demonstrates the required percent reductions needed for the plan approval.

Ozone Nonattainment New Source Review (NNSR)

New York affirmed in its November 29, 2021, submittal that, because the State is located entirely in the OTR, regardless of the area's designation status, NNSR applies state-wide for emissions of ozone precursor pollutants, VOC and NO_x, for new major facilities or modifications to existing major or minor sources. New major facilities or modification to existing major or minor facilities in New York State are subject to the provisions of 6 NYCRR Part 231, "New Source Review for New and Modified Facilities." *See* 81 FR 95049

(December 27, 2016). Major-source pollutant thresholds are lower in the NYMA, however, due to the area's former Severe classification under the 1-hour Ozone NAAQS: 25 tons per year for VOC or NO_x, as opposed to 50 to 100 tons, respectively, throughout the rest of the State. The NYMA also has a lower significant source project threshold and significant net emission increase threshold, as well as a more stringent offset ratio for both precursors.

NNSR requires the application of Lowest Achievable Emission Rate which is more stringent than RACT. Furthermore, New York certified in its November 29, 2021 submittal that the State also relies upon Federal rules such as the National Emission Standards for Hazardous Air Pollutants (NESHAPs) regulated under CAA section 112. NESHAPs establish the need to use

¹³ Further information concerning EPA's interpretations regarding MVEBs can be found in

the preamble to EPA's November 24, 1993

transportation conformity rule. *See* 58 FR 62193–62196.

Maximum Achievable Control Technology (MACT), which may be more stringent than RACT, to control hazardous air pollutants.

The EPA is proposing to approve New York's certification that NNSR applies state-wide for NO_x and VOC emissions from stationary sources and fully meets the requirements of the CAA for the 2008 8-hour Ozone NAAQS.

Clean Fuels for Fleets

Clean Air Act Section 182(c)(4) requires States with Ozone nonattainment areas classified as Serious or above with 1980 populations greater than 250,000 to submit a SIP revision to either "include such measures as may be necessary to ensure the effectiveness of the applicable provisions of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter" or to provide "a substitute for all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter." The Clean Fuel Fleets requirement was adopted as part of the 1990 CAA Amendments and was designed to improve air quality and introduce clean burning fuels into the market. CAA Sections 243 and 245 included numerical emissions standards for the Clean Fuel Fleets light- and heavy-duty vehicles that were intended to encourage innovation, encourage the purchase of cleaner fleet vehicles and reduce emissions for fleets of motor vehicles in ozone nonattainment areas classified as Serious or above as compared to conventionally fueled vehicles available at the time.¹⁴ With the implementation of Tier 3 light-duty standards (40 CFR part 86, subpart S) and the continued implementation of current heavy-duty vehicle standards (40 CFR part 1036), the 1990 CAA Amendments' Clean Fuel Fleets standards became either less stringent than or equivalent to the standards that apply to vehicles and engines today. Because the statute continues to require Clean Fuel Fleets standards for State clean fuel vehicle programs in Serious and above ozone nonattainment areas, on June 29, 2021, the EPA revised the Clean Fuel Fleets requirements in 40 CFR part 88, to provide compliance options to the where vehicles and engines certified to current standards would be deemed to comply with the Clean Fuel Fleets standards as Ultra Low-Emission Vehicles. *See* 86 FR 34308 (June 29, 2021). This approach

enables States to address the Clean Fuel Fleets requirements by describing in a SIP that any new light- or heavy-duty vehicle purchased today are certified to current standards under 40 CFR part 86 and part 1036 or by the California Air Resources Board (CARB) under its Low Emission Vehicle Program (LEV III) would be deemed to comply with the Clean Fuel Fleets standards as Ultra Low-Emission Vehicles.

New York affirmed in its November 29, 2021, submittal that the State has satisfied the requirements for clean fuels for fleets. New on-road motor vehicles sold in New York are subject to the provisions of 6 NYCRR Part 218, "Emission Standards for Motor Vehicle Engines." Section 177 of the CAA permits States to adopt new motor vehicle emission standards that are identical to California's. Therefore, in this already implemented measure, NYSDEC has incorporated the latest California emission standards for light-duty vehicles through Part 218. This low-emission vehicle (LEV) regulations provide flexibility to auto manufacturers by allowing them to certify their vehicle models to one of several different emissions standards. These consist of several different tiers of increasingly stringent LEV emission standards to which a manufacturer may certify a vehicle, including LEV, ultra-low emission vehicle (ULEV), super-ultra-low-emission vehicle (SULEV), and ZEV. The different standards are intended to provide flexibility to manufacturers in meeting program requirements. However, manufacturers must demonstrate that the overall fleet for each model year meets the specified non-methane organic gas standard for that year. These requirements are progressively more stringent with each model year.

A 2016 update to Part 218 incorporated California's latest LEV standards (LEV III) and ZEV standards into New York's program. These LEV III amendments took effect for 2017 through 2025 model year passenger cars, light-duty trucks, and medium-duty passenger vehicles. The ZEV revisions apply to 2018 through 2025 model year passenger cars, light-duty trucks, and medium-duty vehicles.

The EPA is proposing to approve New York's certification that the State has satisfied the requirements for clean fuels for fleets under the CAA for the 2008 8-hour Ozone NAAQS. New York's program demonstrates that any new light- or heavy-duty vehicle purchased today are certified to current standards, including California's LEV III standards, thus is deemed to comply with the

Clean Fuel Fleets standards as Ultra Low-Emission Vehicles.

IV. EPA's Proposed Action

In this rule, EPA is proposing to approve the SIP revision submitted by the State of New York on January 29, 2021, for purposes of meeting the requirement for RACT for the 2008 8-hour Ozone NAAQS in New York's portion of the NYMA for the Serious classification. The EPA is also proposing to approve that same submittal for meeting New York's RACT requirements for the 2015 8-hour Ozone NAAQS in the NYMA and for meeting the State's requirements for statewide RACT for the 2015 8-hour Ozone NAAQS within the OTR. The EPA is also proposing to approve portions of a comprehensive SIP revision submitted by the State of New York on November 29, 2021, certifying that the State has satisfied the requirements for an ozone nonattainment new source review program, certifying that the State has satisfied the requirements for a nonattainment emission inventory, and certifying that the State has satisfied the requirements for clean fuels for fleets. EPA is also proposing to approve New York's reasonable further progress plans and MVEB for both the Moderate and Serious classifications of the 2008 Ozone NAAQS in the NYMA.

EPA is soliciting public comments on the issues discussed in this notice or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to this proposed rule by following the instructions listed in the **ADDRESSES** section of this **Federal Register**.

V. Statutory and Executive Order Reviews

Under the 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, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);

¹⁴ CAA sections 241(5) "Definition of a Covered Fleet" and 246(b) "Phase-in Requirements" require that CFFPs apply to fleets of 10 or more vehicles that are capable of being centrally fueled.

- 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 subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a State program;
- 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 Clean Air Act.

In addition, this proposed rulemaking action, pertaining to New York's submissions, is not approved to apply on any Indian reservation land or 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 and will not impose substantial direct costs on Tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and

commercial operations or programs and policies.”

The NYSDEC did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

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

Lisa Garcia,

Regional Administrator, Region 2.

[FR Doc. 2023–18283 Filed 8–24–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 23–281; RM–11958; DA 23–706; FR ID 165158]

Television Broadcasting Services; Alamogordo, New Mexico

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Vision Broadcasting Networks, Inc. (Petitioner), requesting the allotment of reserved noncommercial educational (NCE) channel *4 to Alamogordo, New Mexico as the community's first local television service.

DATES: Comments must be filed on or before September 25, 2023 and reply comments on or before October 10, 2023.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve

counsel for the Petitioner as follows: James L. Oyster, Esq., 108 Oyster Lane, Castleton, Virginia 22716.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, Media Bureau, at (202) 418–1647; or Joyce Bernstein, Media Bureau, at Joyce.Bernstein@fcc.gov.

SUPPLEMENTARY INFORMATION: The Petitioner contends that Alamogordo is a community deserving of a new television broadcast service. In support, the Petitioner states that Alamogordo, with a 2020 population of 30,898 is the county seat of Otero County. Alamogordo has a mayor, six Commissioners, and a city manager; police, fire, public works, and utility departments, planning, engineering, and community and economic development departments; a library, school district, numerous businesses and places of worship; and its own ZIP Code. The Petitioner states its intention to file an application for channel *4, if allotted, and take all necessary steps to obtain a construction permit. The proposed amendment to the Table of TV Allotments warrants consideration. The Petitioner's proposal would result in a first local service to Alamogordo under Allotment Priority (2) of the Commission's television allotment priority standard. The Petitioner demonstrates, and a staff engineering analysis confirms, that channel *4 can be allotted to Alamogordo, New Mexico, consistent with the minimum geographic spacing requirements for new allotments in section 73.623(d) of the Commission's rules. In addition, the allotment point complies with section 73.625(a)(1) of the rules as the entire community of Alamogordo is encompassed by the 35 dBμ contour.

This is a synopsis of the Commission's *Notice of Proposed Rulemaking*, MB Docket No. 23–281; RM–11958; DA 23–706, adopted August 16, 2023, and released August 16, 2023. The full text of this document is available for download at <https://www.fcc.gov/edocs>. To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to FCC504@fcc.gov or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden “for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of

2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

Members of the public should note that all *ex parte* contacts are prohibited from the time a Notice of Proposed Rulemaking is issued to the time the matter is no longer subject to Commission consideration or court review, *see* 47 CFR 1.1208. There are, however, exceptions to this prohibition, which can be found in section 1.1204(a) of the Commission's rules, 47 CFR 1.1204(a).

See sections 1.415 and 1.420 of the Commission's rules for information regarding the proper filing procedures for comments, 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

Proposed Rule

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. Amend § 73.622 by adding, in the table in paragraph (j), under New Mexico, in alphabetical order the entry for “Alamogordo” to read as follows:

§ 73.622 Digital television table of allotments.

* * * * *

(j) * * *

Community	Channel No.
* * *	* * *
New Mexico	
* * *	* * *
Alamogordo	* 4
* * *	* * *

[FR Doc. 2023–18343 Filed 8–24–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[PSHSB: PS Docket No. 23–239; FCC 23–65 FR ID 166265]

Cybersecurity Labeling for Internet of Things

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) proposes measures to improve consumer confidence and understanding of the security of their connected devices—commonly known as Internet of Things (IoT) devices—that are woven into the fabric of their everyday lives. To provide consumers with the peace of mind that the technology being brought into their homes is reasonably secure, and to help guard against risks to communications, the Commission proposes a voluntary cybersecurity labeling program that would provide easily understood, accessible information to consumers on the relative security of an IoT device or product, and assure consumers that manufacturers of devices bearing the Commission's IoT cybersecurity label adhere to widely accepted cybersecurity standards. In this regard, the Commission's cybersecurity labeling program would help consumers compare IoT devices and make informed purchasing decisions, drive consumers toward purchasing devices with greater security, incentivize manufacturers to meet higher cybersecurity standards to meet market demand, and encourage retailers to market secure devices. The proposed IoT label would offer a trusted, government-backed symbol for devices that comply with IoT cybersecurity standards.

DATES: Comments are due on or before September 25, 2023 and reply comments are due on or before October 10, 2023. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public and other interested parties on or before October 24, 2023.

ADDRESSES: You may submit comments, identified by PS Docket No. 23–239, by any of the following methods:

- *Federal Communications Commission's website:* <https://www.apps.fcc.gov/ecfs/>. Follow the instructions for submitting comments.
- *Mail:* Parties who choose to file by paper must file an original and one copy

of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, DA 20–304 (March 19, 2020). <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT: Erika Olsen, Acting Chief, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–2868, or by email to erika.olsen@fcc.gov; or James Zigouris, Attorney-Advisor, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–0697, or by email to james.zigouris@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to PRA@fcc.gov or contact Nicole Ongele, Office of Managing Director, Performance Evaluation and Records Management, 202–418–2991, or by email to PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking (NPRM)*, FCC 23–65, adopted August 6, 2023, and released August 10, 2023. The full text of this document is available by

downloading the text from the Commission's website at: <https://docs.fcc.gov/public/attachments/FCC-23-7A1.pdf>. When the FCC Headquarters reopens to the public, the full text of this document will also be available for public inspection and copying during regular business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

Regulatory Flexibility Act: The Regulatory Flexibility Act of 1980, as amended (RFA), requires an agency to prepare a regulatory flexibility analysis for notice-and-comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The Commission seeks comment on potential rule and policy changes contained in the document, and accordingly, has prepared an IRFA. The IRFA for this document in PS Docket No. 23-239 is set forth below in this document and written public comments are requested. Comments must be filed by the deadlines for comments on the document indicated under the **DATES** section of this document and must have a separate and distinct heading designating them as responses to the IRFA. The Commission reminds commenters to file in the appropriate docket: PS Docket No. 23-239.

Paperwork Reduction Act: This document may contain proposed modified information collection requirements. Therefore, the Commission seeks comment on potential new or revised information collections subject to the Paperwork Reduction Act of 1995. If the Commission adopts any new or revised information collection requirements, the Commission will publish a notice in the **Federal Register** inviting the general public and the Office of Management and Budget to comment on the information collection requirements, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comments on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Ex Parte Rules—Permit-But-Disclose. This proceeding this document initiates

shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

Synopsis

I. Notice of Proposed Rulemaking in PS Docket No. 23-239

A. The Internet of Things (IoT) Landscape

1. As the world continues to become even more interconnected, malicious cyber campaigns become bolder and continue to threaten network security and privacy. Today, there are a wide range of consumer IoT products on the market that communicate over wired and wireless networks. These products are made up of various devices, and are based on many technologies, each of which presents a set of security

challenges. Consumer IoT products and their component devices are susceptible to a wide range of relatively common security vulnerabilities including the continued use of default passwords, lack of regular security updates, and weak encryption and insecure authentication. Some IoT products and devices even lack any type of physical security. These vulnerabilities can be exploited by attackers to gain unauthorized access to the device or its data, launch denial of service (DoS) attacks, use the device as part of a larger botnet, or use the device as an interference generator. Compromised devices could also be forced to transmit at times and intervals selected by the attacker to interfere with other devices, either causing them to function improperly or causing a denial of service.

2. The proliferation of consumer IoT devices has opened the door to cyberattacks on consumer products that can have serious privacy and national security consequences, ranging from theft of personal information to disruption of critical infrastructure. In just the first six months of 2021, for example, it was estimated "that more than 1.5 billion attacks have occurred against IoT devices." Cybersecurity vulnerabilities in IoT products and their devices also open a gateway to larger and more significant intrusions that may threaten national security.

B. Public and Private IoT Security Efforts

3. Significant work has already been conducted in the realm of IoT cybersecurity. There are also ongoing efforts to address IoT security labeling across both private and public sectors. In the private sector, for example, the Consumer Technology Association (CTA) convened an IoT working group tasked with supporting the advancement of the consumer IoT industry, and produced a white paper addressing the current regulatory approach to IoT. CTA has also convened with various organizations to discuss IoT baseline security capabilities. In addition, researchers at Carnegie Mellon University (CMU) conducted significant research into consumer IoT purchasing and concluded there is a need to "provide consumers with readily accessible information to help them make informed decisions about what they bring into their homes." International efforts have also advanced in the IoT labeling space.

4. In May 2021, Executive Order No. 14028 also emphasized the importance of IoT cybersecurity, noting the "persistent and increasingly

sophisticated malicious cyber campaigns that threaten the public sector, the private sector, and ultimately the American people's security and privacy." Indeed, securing the Internet of Things forms a significant pillar in the recently-released National Cybersecurity Strategy, which noted in particular the need to advance the goals of the E.O.'s IoT labeling efforts so that "consumers will be able to compare the cybersecurity protections offered by different IoT products, thus creating a market incentive for greater security across the entire IoT ecosystem."

5. In this respect and pursuant to that E.O., in 2022 the National Institute of Standards and Technology (NIST) issued a White Paper that identified labeling criteria for cybersecurity capabilities of IoT consumer devices, informed by existing consumer product labeling programs and input provided by diverse stakeholders, and issued a summary report about creating a cybersecurity labeling program for consumer IoT products. Additionally, NIST produced a final report, *Profile of the IoT Core Baseline for Consumer IoT Products* (NISTIR 8425), which identifies cybersecurity capabilities commonly needed for the consumer IoT sector, thereby providing a starting point for what consumers should consider when purchasing IoT products. From these efforts, NIST identified key elements of a labeling program, including encouraging innovation, and being practical and not burdensome, among other elements. In addition, NIST initiated a pilot IoT cybersecurity labeling program, in which it solicited contributions from stakeholders regarding how current and future-planned labeling efforts could align with the NIST recommendations. NIST describes a potential program that would educate the public on IoT cybersecurity capabilities, thereby allowing and enabling consumers in the marketplace to make informed choices about their IoT purchases.

6. The foregoing priorities and efforts, Commission experience guiding compliance assessment programs, and prior Commission action in this space (including the recent *Spectrum Requirements for Internet of Things Notice of Inquiry*, ET Docket No. 21–353, Notice of Inquiry, 36 FCC Rcd 14165 (2021), and efforts to address the potential for reprogrammed communications equipment to operate outside of authorized device parameters with the attendant risk of harmful interference) provide important building blocks for the Commission's analysis and inform its proposals today.

Discussion

C. Establishing a Voluntary Cybersecurity Labeling Program

7. The Commission proposes to establish a voluntary cybersecurity labeling program. Given the nature of the IoT market, the Commission believes that the success of a cybersecurity labeling program will be dependent upon a willing, close partnership and collaboration between the federal government, industry, and other stakeholders. While this proposed program would be voluntary, entities that choose to participate in the Commission's program would be required to ensure their IoT devices and products comply with the Commission's program requirements the Commission proposes to codify in its rules. As described below, the Commission proposes the use of certain baseline cybersecurity criteria and the development of product standards informed by those criteria, as well as the parameters for labeling of IoT products that conform with those standards and associated informational requirements. IoT products qualifying for the program would be authorized to use the Commission's proposed new distinctive label signifying their participation in the program and adherence to the standards set. The Commission anticipates that devices or products bearing the Commission's cybersecurity label will be valued by consumers, particularly by those who may otherwise have difficulty determining whether a product they are thinking of buying meets basic security standards. The Commission seeks comment on this proposed approach.

8. In adopting this document, the Commission concludes its consideration of IoT cybersecurity labeling issues related to the Notice of Inquiry in ET Docket No. 21–232 and EA Docket No. 21–233, and close that proceeding as to those issues. See *Authorization Program; Protecting Against National Security Threats to the Communications Supply Chain* through the Competitive Bidding Program, ET Docket No. 21–232, EA Docket No. 21–233, Notice of Proposed Rulemaking and Notice of Inquiry, 36 FCC Rcd 10578, para. 104 (2021) (Supply Chain NOI). That NOI raised IoT cybersecurity labeling in the specific context of the Commission's existing equipment authorization program, and although the Commission does not formally rule out building on its equipment authorization program at this stage, the Commission believes that its proposals for a voluntary labeling program building on the efforts of NIST and others as reflected in this document

represent the most appropriate, and targeted, approach to IoT cybersecurity labeling that the Commission wants to explore at this time. The Commission believes that closing the Supply Chain NOI with respect to IoT cybersecurity labeling issues will focus commenters on this proceeding and spur comments that better reflect that distinct focus. Thus, although the Commission hereby incorporates relevant comments in those dockets into this proceeding, PS Docket 23–239, the Commission also requests that, going forward, interested parties use PS Docket 23–239 for any filings. The Commission directs the Office of Engineering and Technology to provide public notice of the closed issues in ET Docket Nos. 21–232, 21–233.

D. Eligible Devices or Products

9. The Commission seeks comment on the scope of IoT devices or products for sale in the United States that should be eligible for inclusion in the Commission's labeling program. To help inform the program's scope, the Commission observes that the practical goal is to provide consumers with a clear, easily understood indicator that the IoT devices displaying the Commission's label satisfy certain baseline cybersecurity requirements and have specific cybersecurity capabilities. In assessing scope, the Commission seeks to ensure that its program would be sufficiently inclusive to be of value to consumers in this regard.

10. The Commission seek comment on whether to focus the program initially on IoT "devices" (as defined in this document) and specifically those wireless devices that intentionally emit radio frequency (RF) energy. The Commission begins by considering NIST's definition of IoT devices. NIST defines IoT devices as those devices that have at least one transducer (sensor or actuator) for interacting directly with the physical world and at least one network interface (e.g., Ethernet, Wi-Fi, Bluetooth) for interfacing with the digital world. The Commission proposes two modifications to the NIST definition for purposes of its labeling program. First, the Commission proposes to add "internet-connected" to its definition because, as NIST observes, a key component of IoT is the usage of standard internet protocols for functionality, which expose IoT to related security threats and challenges caused by being internet-connected. Second, because the Commission's relevant statutory authorities recognize the more extensive risks of harmful interference associated with devices that intentionally emit RF energy, the Commission proposes to include the

premise that an IoT device must be capable of intentionally emitting RF energy. In this respect, the Commission is referring to an IoT device, with a wireless interface, that intentionally uses RF energy to communicate or interact with the physical world. Accordingly, incorporating the Commission's modifications, the Commission proposes, for purposes of the IoT labeling program, to define an IoT device as: (1) an internet-connected device capable of intentionally emitting RF energy that has at least one transducer (sensor or actuator) for interacting directly with the physical world, coupled with (2) at least one network interface (e.g., Wi-Fi, Bluetooth) for interfacing with the digital world. The Commission seeks comment on this proposed definition.

11. The Commission proposes to focus the scope of its program on intentional radiators that generate and emit RF energy by radiation or induction. Such devices—if exploited by a vulnerability—could be manipulated to generate and emit RF energy to cause harmful interference. While the Commission observes that any IoT device may emit RF energy (whether intentionally, incidentally, or unintentionally), in the case of incidental and unintentional radiators, the RF energy emitted because of exploitation may not be enough to be likely to cause harmful interference to radio transmissions. The Commission seeks comment on this view. Does this proposed definition unduly limit the devices that should be eligible for participation in the cybersecurity labeling program? Are there specific unintentional radiators or incidental radiators that should be included in the program, or should they be included generally? Alternatively, should the Commission consider adding these devices to the program at a later date? The Commission also seeks comment on any other ways in which the Commission's proposal might be limiting or should otherwise be expanded. For example, would the exclusion of wired-only IoT devices impact the success, usefulness and effectiveness of this labeling program and confuse consumers, rather than adequately informing them on IoT devices with appropriate network security standards?

12. To ensure that its program is able to be of greatest value to the consumer, the Commission also seeks comment on whether it should focus the cybersecurity labeling program on to IoT “products,” rather than IoT devices as defined above. For such purposes the Commission could define an IoT

product consistent with the NIST definition as follows: An IoT device and any additional product components (e.g., backend, gateway, mobile app, etc.) that are necessary to use the IoT device beyond basic operational features. The Commission seeks comment on this proposed definition of an IoT product eligible for an IoT label.

13. Further, the Commission seeks comment on whether a program that addresses products (as opposed to just devices) would be more consumer friendly, as the public may find it easier to understand that the product (as a whole) they are looking to purchase meets the IoT security standards, rather than trying to parse which devices (*i.e.*, parts of the product) meet applicable standards. Likewise, would limiting the label to devices create confusion with consumers who may not fully understand the label does not apply to the entire product? If the program only encompasses devices, should the Commission differentiate the labeling in situations where a product contains multiple devices, and some devices are labeled and some are not? If so, how could the Commission make this differentiation without causing consumer confusion? How does the Commission mitigate consumer confusion if a device label is used in a common packaging environment? The Commission seeks comment on these issues.

14. The Commission also seeks comment on whether either definition fully accounts not only for the IoT device or product itself, but also the other components that make the IoT device functional and may be vulnerable to attack. For example, there is a category of IoT devices that do not connect directly to the customer's home Wi-Fi network; instead, they connect to an intermediate communication device (*i.e.*, Wi-Fi Gateway) which connects to the home Wi-Fi network. What are the risks and vulnerabilities inherent in the communication between these types of IoT devices or products and their environment? Are there other IoT devices or products that similarly have vulnerabilities that would be outside the scope of the Commission's proposed definition? Should such concerns be considered when adopting a definition for devices and/or products that would be eligible for the labeling program? If so, how?

15. Finally, the Commission recognizes that IoT devices and products have proliferated not only in the non-enterprise space, but also in the workplace from office settings to field settings, from medical settings to industrial settings. As such, the

Commission seeks comment on whether to focus the IoT labeling program on consumer IoT devices or products intended for consumer use or include “enterprise” devices or products intended for industrial or business use, or to otherwise tailor the scope of devices and products covered by the labeling program based on their usage. If commenters propose that the program include a broader array of devices or products beyond the non-enterprise setting, what additional considerations should the Commission take into account for these products or devices, including the relative sophistication and specific needs of the purchasers of these devices?

16. *IoT Products Excluded from the Commission's Labeling Program.* Pursuant to the Secure and Trusted Communications Networks Act of 2019, and the Commission's rules, the Commission's Public Safety and Homeland Security Bureau (PSHSB) publishes and regularly updates a list of communications equipment and services produced or provided by specified entities (“Covered List”), which have been determined to pose an unacceptable risk to the national security of the United States or the security and safety of United States persons (“Covered List”). Beginning on February 6, 2023, the Commission no longer permits authorization of any applications for equipment certification of any equipment that has been identified as “covered” equipment on the Commission's Covered List. This decision did not, however, revoke any previously authorized equipment that now constitutes “covered” equipment, although it may do so in the future. In this proceeding, the Commission proposes to exclude from the labeling program any such previously authorized “covered” equipment. The Commission seeks comment on this proposal.

17. In light of this prohibition, the Commission similarly proposes to exclude from the program any communications equipment that now, or in the future, has been placed on the Covered List. The Commission proposes to exclude any IoT device that is produced by an entity identified on the Covered List as producing “covered” equipment. Furthermore, the Commission proposes to exclude from the Commission's labeling program any device or product from a company named on the Department of Commerce's Entity List, the Department of Defense's List of Chinese Military Companies or similar lists. *See, e.g.*, Bureau of Industry and Security, U.S. Department of Commerce, Supplement No. 4 to Part 744—Entity List, <https://>

www.bis.doc.gov/index.php/documents/regulations-docs/2326-supplement-no-4-to-part-744-entity-list-4/file (May 19, 2023); Entities Identified as Chinese Military Companies Operating in the United States in Accordance with Section 1260H of the William M. (“Mac”) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), Tranche 2, U.S. Department of Defense, <https://media.defense.gov/2022/Oct/05/2003091659/-1/-1/0/1260H%20COMPANIES.PDF> (Oct. 5, 2022).

18. The cybersecurity label has the potential to convey important information about a device or product’s security. The Commission finds it could be harmful to consumers to portray such a message on devices or products made by companies that its sister agencies have identified publicly as part of their national security review. The Commission seeks comment on this proposal and on other government lists the Commission should consider. How can the Commission ensure any such proposed exclusion is implemented? Should applicants be required to include a written and signed attestation that the particular equipment for which they seek approval is not “covered” equipment (*i.e.*, is not communications equipment that has been identified and placed on the Commission’s Covered List)? Are there other products or categories of products that the Commission should explicitly exclude from the program?

E. Oversight and Management of the Proposed IoT Cybersecurity Labeling Program

19. As discussed above, the Commission believes that close partnership and collaboration between the federal government, industry, and other stakeholders is vital to ensuring the success of the proposed voluntary IoT cybersecurity labeling program. Moreover, a collaborative environment that can leverage the expertise, incentives, and authority of various constituencies in this context would allow for the swift establishment and maturity of the program with broad industry and consumer acceptance that could adapt to a rapidly evolving threat landscape. As such, the Commission proposes a public-private partnership in the oversight and administration of this labeling program, subject to ultimate Commission supervision.

20. In seeking comment on the proposed IoT labeling program, the Commission notes that NIST identified several key elements of a potential labeling program. These include the use

of certain recommended baseline product criteria (including both technical product criteria that promotes cybersecurity-related capabilities and non-technical criteria providing important product information), the use or development of requirements and/or standards that are informed by the recommended product criteria, the establishment of a conformity assessment program to assess whether particular products satisfy the developed requirements and/or standards, and the creation of labeling requirements for IoT products (a single label indicating that a product has met the baseline standard, as well as a means to access additional label information for the specific IoT product) that will aid in IoT purchasing decisions by enabling comparisons among products and providing important information about cybersecurity considerations. NIST also noted that “one size does not fit all,” and that multiple solutions might be offered.

21. The Commission proposes to establish a program where the Commission would create and own a new distinctive trademark to be used in a voluntary program for IoT cybersecurity labeling and would take appropriate steps to authorize its overall use in a way that ensures the integrity of the mark and the label. The Commission also proposes to have third parties play integral roles in the management and administration of the labeling program. These entities would, for example, be authorized to conduct activities such as development of requirements or standards for consideration by the Commission, and assessment of IoT devices and products for conformity with those requirements or standards subject to supervision of the Commission. Subject to Commission oversight, third parties could evaluate and authorize the use of the Commission’s trademark on an IoT device or product. In this regard, the Commission proposes to incorporate and leverage the specialized expertise of third parties, where appropriate, into its standards, application and review procedures.

22. *Oversight and Management of the Labeling Program.* In NIST’s White Paper on a cybersecurity labeling program for consumer IoT products, it discussed the need for management and oversight of the overall labeling program. Specifically, it contemplated that there would be one entity (the “labeling scheme owner”) that would manage the labeling program, determine its structure and management, and perform oversight to ensure that the program is functioning consistently in

keeping with overall objectives; further, this entity would be responsible for defining the conformity assessment requirements, developing the label and associated information, and conducting consumer outreach and education.” The Commission seeks comment on the appropriate entity or entities to serve in the oversight and management of the labeling program. Should the Commission be the scheme owner to oversee as well as manage the labeling program? If the Commission takes on the role of overseeing the labeling program, should one or more third-party administrators, as detailed below, manage the tasks identified above or some portion of them? Or, should one or more third-party administrators be designated as the scheme owner(s), and if so, how should the Commission retain and exercise its oversight responsibilities?

23. *Use of Third-Party Administrator(s).* The Commission seeks comment on how one or more third-party administrator(s) might be utilized to manage some or all of the functions outlined above as NIST ascribed to the labeling program scheme owner, or how such an entity, or entities, might otherwise manage all or some elements of the envisioned labeling program to ensure effectiveness, efficiency, consistency, and timely implementation, subject to ultimate Commission supervision. The Commission seeks comment on the best approach for utilizing the respective levels of expertise that reside in the Commission, other federal government entities, industry, and other stakeholders. In particular, the Commission seeks comment on whether there are existing stakeholders, public or private, who are well situated to convene and develop the IoT security standards among stakeholders as to a particular IoT device or product, or classes of IoT devices or products, to ensure the consistency and fair administration of the proposed labeling program. Further, could a third-party administrator approve, or submit to the Commission for approval, more specific standards for conformance assessment of the proposed criteria, or for otherwise evaluating program applicants? Could a third-party administrator set the requirements for testing laboratories? Should the Commission consider designating a third-party administrator or other outside entity(ies) to authorize the use of the envisioned cybersecurity label, and if so, what oversight should it exercise, for example, to ensure the integrity of the mark and label?

24. If the Commission were to utilize one or more third-party administrator(s),

the Commission seeks comment on how it should select such administrator(s). What qualifications should a third-party administrator possess, and how should the Commission intake and evaluate applications? What national security considerations are relevant to such qualifications? Should a third-party administrator(s) be required to have previous experience administering an IoT product or similar conformity assessment program? Given the diversity in IoT devices and products, would it be preferable for third party administrators to have varying areas of expertise? What level of control or oversight should the Commission retain, and what level of guidance should be provided? Are there entities in this space that should be considered for this role and, if so, why? Are there benefits to utilizing multiple third-party administrators versus a single administrator? If there are multiple administrators, how could the Commission ensure standards are consistently applied across similar devices and avoid conflict among administrators? How could the Commission reconcile the functionalities of each administrator to avoid conflict? Are there other attributes or qualities that the Commission should require of an administrator? For example, should the administrator be required to be a non-profit entity? Should the administrator establish that it would be neutral and independent, with no conflicts of interest (financial or organizational) on the part of the organization or its officers, directors, employees, contractors, or significant subcontractors? Should the Commission direct PSHSB, coordinating with the Office of the Managing Director and the Office of Engineering and Technology, to develop and implement a selection or qualifications review process?

25. Cybersecurity Labeling Authorization Bodies. The Commission seeks comment on how IoT devices or products can demonstrate compliance with the IoT security standards, once they are developed. In the context of the Commission's existing equipment authorization process, Telecommunications Certification Bodies (TCBs), which are accredited third parties recognized by the Commission, certify RF equipment based in part on testing for compliance with applicable technical RF requirements on behalf of the Commission and in accordance with the Commission's rules and standards. TCBs may then be subject to international Mutual Recognition Agreements which determine

acceptance of their conformity assessment results by other countries. The Commission anticipates that it could draw from this type of program's organizational structure to assess IoT devices and products for compliance with the IoT cybersecurity standards, once they are developed. In the context of IoT labeling, instead of RF-based testing and certification, we envision that third parties with expertise in security and compliance testing, as described below, could fill this role. The Commission refers to these entities as Cybersecurity Labeling Authorization Bodies (CyberLABs) for purposes of this discussion. The Commission seeks comment on this proposal.

26. CyberLABs Accreditation or Recognition. The Commission proposes that the Commission or one of its authorized third-party administrators would evaluate, accredit, or recognize the CyberLABs based on their qualifications, resources, and procedures. If the Commission were to authorize third party administrators to evaluate, accredit or recognize these entities, what oversight would the Commission exercise over these entities or over the process? The Commission seeks to ensure that CyberLABs have the necessary expertise and resources to properly test and assess IoT devices and products compliance with the IoT security standards. To become accredited or recognized for the proposed IoT labeling program, the Commission proposes that a CyberLAB submit an application demonstrating that it meets the following requirements:

- **Qualifications:** The CyberLAB has technical expertise in cybersecurity testing and conformity assessment of IoT devices and products.
- **Resources:** The CyberLAB has the necessary equipment, facilities, and personnel to conduct cybersecurity testing and conformity assessment of IoT devices and products.
- **Procedures:** The CyberLAB has documented procedures for conformity assessment.

- **Continued competence:** Once accredited or recognized, CyberLABs would be periodically audited and reviewed to ensure they continue to comply with the IoT security standards and testing procedures. In addition to periodic audits, the FCC or its third-party administrator would also conduct random inspections of CyberLABs to ensure that they are complying with the IoT security standards and testing and label authorization procedures. Additionally, existing standards, e.g., ISO/IEC 17025 could be leveraged for developing qualifications for a CyberLAB. See General requirements for

the competence of testing and calibration laboratories, ISO/IEC 17025:2017 (Nov. 2017) (available at <https://www.iso.org/standard/66912.html>).

27. The Commission seeks comment on this proposed process and accompanying qualifications. Are they an appropriate fit for the Commission's objectives? Are there other options the Commission should consider? For example, could device manufacturers be allowed to perform testing and self-assessment subject to review by a third-party administrator or other entity? What additional qualifications, if any, should the Commission seek in a CyberLAB seeking to perform such as testing and conformity assessments? What additional controls might be necessary, if any, to ensure a CyberLAB remains impartial when testing and assessing IoT devices and products with relevant standards? Should the Commission take into account any national security considerations, or adopt Character Qualifications for CyberLABs? If so, what should these include? Would this accreditation or recognition process impact the Commission's existing, or future, Mutual Recognition Agreements and, if so, how might it be remedied to avoid such impact? Should CyberLABs be located only in the United States? If the Commission should consider CyberLABs located outside the United States, what additional scrutiny, if any, should these entities be given during the Commission's accreditation process? Given the sensitive information that will be shared with CyberLABs, should accreditation or recognition include reviewing CyberLABs internal security practices? If requested by participating firms, should CyberLABs be required to provide information on their own security or internal practices to firms?

F. Development of IoT Cybersecurity Criteria and Standards

28. Applying the Baseline NIST Criteria. The Commission seeks comment on the adoption of the NIST's recommended IoT criteria as the basis for the proposed labeling program. The NIST IoT criteria are based on product-focused cybersecurity outcomes, rather than specific requirements. NIST contemplates that "the outcome-based approach allows for the flexibility required by a diverse marketplace of IoT products" and the "role of the scheme owner is critical to ensure that supporting evidence demonstrates that the product meets the expected outcomes." The NIST criteria include: (1) asset identification; (2) product configuration; (3) data protection; (4)

interface access control; (5) software update; (6) cybersecurity state awareness; (7) documentation; (8) information and query reception; (9) information dissemination; and (10) product education and awareness. NIST has noted that while the first six of these criteria generally concern certain technical product criteria, the last four concern non-technical product criteria. How could NIST's IoT criteria, such as product configuration, interface access control, product education and awareness, data production, asset identification, software updates, cybersecurity state awareness, documentation, information and query reception, etc., be leveraged to inform minimum IoT security requirements and standards in a manner that is suitable for conformity assessments (e.g., for technical-related testing and non-technical verification) in appropriate circumstances, or for self-attestation in others? Are there other criteria the Commission should consider? Are there separate criteria that should be considered for higher risk IoT devices or classes of devices?

29. *Standards Development Based on NIST Criteria.* The Commission recognizes that this conformity assessment program must be based on IoT security standards and testing requirements that the IoT devices and product must satisfy to be eligible to receive and use the label. The Commission proposes that the IoT security standards be developed jointly with the industry and other stakeholders. In this regard, there may be a number of expert Standards Development Organizations (SDOs), industry groups and government agencies that have both the technical expertise and other requisite experience to contribute to this task. The Commission seeks comment on whether the Commission or an outside entity is in the best position to convene these stakeholders, and to timely develop the more specific detail that would allow the consistent and replicable testing necessary to ensure the outcome based NIST IoT labeling criteria are fulfilled. Would the Federal Advisory Committee Act (FACA) limit the Commission's ability to convene these stakeholders? The Commission seeks comment on this proposal.

30. The Commission proposes that the IoT security requirements and standards would be developed and implemented through the following process:

- *Collecting information:* Conduct research, consult with experts, and review existing standards such as those developed and in use by international organizations.

- *Establishing requirements:* Informed by the new data, develop requirements that will help meet NIST core baseline criteria.

- *Develop the standard:* With the requirements established, the standard can be developed. This will involve creating a document that outlines the requirements in a clear and concise manner and a clear mapping between the standards and the device or product criteria.

- *Reviewing and improving:* Ensure that the standard is comprehensive, clear, and suitable for lab testing.

- *Implementation:* Conduct training, testing, and monitoring to ensure that the requirements are satisfied.

31. The Commission seeks comment on the scope of this work and on this proposed process. What additional factors should be included or otherwise factored into this process? How can the Commission ensure that the views of small, women- and minority-owned businesses, including small IoT manufacturers, are considered in this process? Considering the amount of work that the industry, NIST, and international community have already completed in this area, how could this work be leveraged to promote the swift development of standards for IoT cybersecurity labeling? How long might this work take to complete? The Commission seeks comment on the shortest but most thorough path to accomplishing this work and the minimum amount of time it should take to develop the standards. The Commission recognizes there are other IoT security standards already available and seek comments on whether and why the Commission should consider their adoption. Are there standards for particular IoT devices or classes of IoT devices that are already sufficiently mature such that they could be readily—or more quickly—adopted? Should the program start with those devices or products?

32. The Commission recognizes that while the IoT cybersecurity label would not constitute a guarantee that the participating IoT product can withstand every single cyberattack, it should provide meaningful assurance to consumers that the IoT devices and products that display the label satisfy certain minimum cybersecurity standards and have specific cyber capabilities that demonstrably reduce relevant vulnerabilities appropriate to the class of device. As such, while participation in the IoT labeling program would be voluntary, the Commission proposes to require those who choose to participate to adhere to

the specific standards described above, and as recognized by the Commission.

33. The Commission observes that in other contexts, it periodically incorporates by reference various standards established by standards-setting bodies including, but not limited to, the American National Standards Institute (ANSI), Accredited Standards Committee C63 (ANSI C63), and the International Organization for Standardization; and the International Electrotechnical Commission. As the Commission has noted, use of industry-based standards in this context is intended to ensure the integrity of the measurement data associated with an equipment authorization. The Commission recognizes that, in addressing cybersecurity standards, timely adoption and speed are a prime benefit of a multi-stakeholder, industry-led approach, which militate in favor of a more streamlined process than the full Commission-level review described above. Accordingly, the Commission proposes if standards are developed by outside bod(ies), that they submit the IoT security standards for acceptance by the Commission prior to utilization for testing and other conformity evaluation. In this regard, the Commission proposes to direct PSHSB to place the standards on Public Notice for comment in accordance with the rulemaking requirements of the Administrative Procedure Act and, subsequent to reviewing any comments received, accept the standards as proposed or with amendments as warranted by the record. Is this sufficient, or do commenters believe a Commission-level rulemaking is needed? Alternatively, could an outside body adopt the standards and attest their conformity with the broader NIST criteria in a manner acceptable to the Commission, without the need for further action by the Commission? What other streamlined processes might be appropriate for prompt review and validation of IoT security standards?

34. *Conformity Assessments.* The Commission seeks comment on the process for assessing conformity of consumer IoT products and devices under the Commission's IoT labeling program. While the Commission expects that third-party assessment (testing and other required assessment via CyberLAB, as discussed above) would provide an avenue for conformity assessment, the Commission proposes that other approaches also be considered. For example, NIST describes how different IoT conformity assessment activities could be leveraged to demonstrate that consumer IoT devices conform to technical

requirements, either exclusively or in combination. In addition to third-party testing, assessment activities could also include the supplier's declaration of conformity/self-attestation of the consumer IoT device where a statement is issued based on a comprehensive review that an IoT device or product comply with the IoT security standards. While the Commission's equipment authorization program has evolved over the years, as currently administered the program includes two procedures for equipment authorizations—certification and Supplier's Declaration of Conformity (SDoC). Relevant technical RF-based standards listed in section 2.910 of the Commission's rules are incorporated by reference in Part 2. The rules specify the obligations of the "responsible party" (e.g., the manufacturer or importer), including warranting that each unit of equipment marketed under the grant of certification or SDoC is materially identical to the unit that was tested or measured. The Commission seeks comment on the extent to which any of these same procedures may be appropriate for the IoT labeling program. Are there other alternative procedures that are more suitable for the IoT labeling program context?

35. *Third-Party Compliance Testing and Assessment.* The Commission proposes that conformity assessments for IoT devices and products be based on compliance assessment (any testing and other requisite assessment) that includes supporting documentation and data submitted by the manufacturer or importer of the IoT device or product in question to a third-party such as a CyberLAB, and that the third party administrator could authorize the use of the IoT security label only for devices that meet the established IoT security standards. Should all IoT devices or products be required to pursue third party compliance assessment, or are there classes of IoT devices or products that should allow for self-attestation?

G. Administering the IoT Labeling Program

36. *Commission to Obtain Trademark.* The Commission proposes that the Commission utilize a certification mark to identify those products that meet the Commission's IoT labeling requirements. A certification mark is a type of trademark that is used to show consumers that particular goods and/or services, or their providers, have met certain requirements. Specifically, the mark indicates that: (1) the owner of the mark controls who may use the mark; (2) the owner of the mark has determined that the user complies with

a specific standard described by the owner of the mark; and (3) the owner of the mark does not itself produce the goods or services covered by the mark. The Commission has applied for a mark with the United States Patent and Trademark Office (USPTO), and as the owner of the mark, should this proposal be adopted, will ensure that the IoT products and devices bearing the mark meet FCC-approved cybersecurity labeling program requirements. The Commission also seeks comment on whether the Commission should permit outside entities to authorize use of the mark where the terms of the program are met and what measures are necessary to ensure that the Commission is effectively controlling the use of the mark for purposes of trademark law.

37. *Commission IoT Label.* The Commission proposes to implement a single binary label with layering. Under a binary label construct, products or devices will either qualify to carry the label or not qualify (i.e., not be able to carry the label) and "layers" of the label would include the Commission's IoT mark representing that the product or device has met the Commission's baseline consumer IoT cybersecurity standards and a scannable code (e.g., QR code) directing the consumer to more detailed information of the particular IoT product.

38. The Commission seeks comment on where authorized program participants should affix the security IoT label. If the Commission's program addresses devices (rather than products), should it be affixed on each IoT device or on the product packaging? Should equipment that includes a user display screen be permitted to display the label on the user display screen rather than on the device itself? Should there be limitations or prescriptions on how companies and third-party resellers can use the mark in advertising or sales displays, products or websites? The Commission also seeks comment on other approaches with regard to what the label should display and where the label should be placed.

39. *Layered Information.* The Commission seeks comment on the use of a QR code or URL to enable consumers to access more detailed information about the device or product, including specific security information, such as the device manufacturers' level of support, software update history, privacy policy, and similar information. To provide consumers with uniform information and minimize the potential for consumer confusion, the Commission proposes that there be a single IoT device or product registry associated with the Commission's IoT

cybersecurity labeling program, and that any QR code or URL included with the FCC IoT mark provide a link to the IoT product's specific web page within this IoT registry. The Commission proposes to prohibit any additional QR codes or URLs be placed in connection with the Commission's IoT mark. The Commission believes that this would help ensure the integrity of the Commission's IoT label. If third parties are authorized by the Commission to grant use of the cybersecurity IoT label, should the Commission also permit them to generate and specify the QR code and the URL that can be placed next to the FCC IoT mark and require them to prevent the program participants from affixing other QR codes or URLs next to the FCC mark? Should the use of the IoT mark be prohibited without the associated QR code or URL? What information must a company include if they reference the IoT mark in product listings or descriptions? What alternative approaches should the Commission consider?

40. *QR Code.* The Commission proposes that the FCC IoT label include a QR code that contains consumer-friendly information that is available without internet connection in addition to a URL to the device's or product's registry page, which is discussed below. (While the Commission thinks the use of a QR code is appropriate in conjunction with the layered labeling approach it is proposing here, the Commission acknowledges that it previously rejected its use in other contexts, such as the required labeling under its equipment authorization rules. The Commission is not proposing to revisit those decisions in the context of this proceeding. Similarly, the Commission intends its proposals to operate distinct and separate from the provisions for the electronic labeling of radiofrequency devices contained in its equipment authorization rules (47 CFR 2.935), and seeks comment on whether it needs to adopt or modify its rules accordingly.) In order to prevent consumer confusion and allow for easy comparison among devices or products, the Commission also proposes that the information contained within the QR code for each certified device or product be uniform and include information that is helpful to non-expert, home users of IoT devices and products. In this way, the label would be able to impact consumer purchasing decisions, which are oftentimes made under time pressure while the consumer is at the store choosing between products. The Commission proposes the QR code

include a description of the device's security (e.g., easy to understand explanation of what security standards the device meets, and how these standards protect the consumer). The Commission also proposes the QR code include a statement that while the label indicates the device or product meets certain cyber security criteria that reduce risk, it does not eliminate risk entirely and the label does not imply product endorsement by the label program and that the consumer is encouraged to visit the product registry linked by the URL provided therein to get the most up-to-date security and other information related to the IoT device or product. The Commission seeks comment on this proposal and what additional or other information should be embedded in the QR code to be of benefit to consumers.

41. Given the static nature of the information stored in the QR code, the Commission urges commenters to consider the types of information that would be appropriate for consumer decision-making without needing to have the information stored in the QR code updated. Alternatively, the QR code could merely provide a link to the IoT registry page for the device or product in question, discussed below.

42. The Commission proposes to require that the manufacturer disclose the guaranteed minimum support period for an IoT device or product, during which the manufacturer commits to identify and patch security vulnerabilities in the product. See NIST, *Recommended Criteria for Cybersecurity Labeling for Consumer IoT Products*, at 10 (Feb. 4, 2022), <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.02042022-2.pdf>. While the Commission recognizes the length of such a support period is at the discretion of the manufacturer, and may even be zero, the Commission seeks comment on the benefits and drawbacks of requiring a manufacturer to disclose, via the label or associated registry entry, the length of time that an IoT device or product would be supported, and the level of support provided. Should they also be required to disclose whether all or only critical patches will be supported, the regularity with which such patches are made available, whether they are automatically deployed, or what additional steps a consumer may need to take to remain secure when support ends? Should the Commission require the manufacturer to provide notice when that support ends? How can the Commission ensure this information is meaningful to consumers? The Commission seeks comment on these options and any

alternatives to help provide consumers with necessary, accurate, and timely information.

43. *IoT Registry*. The Commission proposes the use of an IoT registry where the public may access a catalog of devices or products that are approved pursuant to the Commission's IoT labeling program. This IoT registry would be accessible via the internet and serve as a one-stop reference for the public to understand which products in the market bear the IoT label (e.g., consumers could check the registry before they shop). The IoT registry could contain IoT security-related information that is sortable and searchable by manufacturer or brand, device or product vendor, device or product name, model number, firmware/software build version, and other identifying variables, such as a unique asset identification number. The Commission seeks comment on this approach. Are there any similar product registries that have already been established or that are being initiated, and that might be leveraged for these purposes? Should the Commission consider selecting and overseeing a third-party IoT registry administrator, and if so, how could such an administrator be funded? Should there be more than one administrator or more than one registry, and if so, how should the Commission ensure that accurate, up to date, and complete information is contained in each of them? Should it be the same third-party administrator contemplated to manage the other aspects of the labeling program as described herein?

44. The QR code and/or the URL associated with the IoT label would include a link to the IoT registry, which would provide detailed information on the IoT product through the product's web page within the IoT registry. The Commission seeks comment on what information should be included within the IoT registry and associated with the QR codes. If the URL is the sole piece of information associated with the QR code, how should registry information be presented or organized to ensure consumer-friendliness?

45. The Commission proposes that, among other information, the IoT registry might provide the following information for each approved device (or product): (1) how to operate the device securely (e.g., basic cyber hygiene to include changing default passwords) and, if applicable, what level of security the device or product has achieved; (2) whether the product's security settings are protected against unauthorized changes, including disabling its security; (3) where the

device was manufactured; and (4) when the registry information for the device was last updated. What other information should be included? Would the information included in the CMU IoT Security and Privacy Label (CMU Label) be an appropriate model for each IoT product's listing provided within the IoT registry? CMU Labels are divided into three major sections: (1) security mechanisms, (2) data practices, and (3) more information, with various data fields under these sections (e.g., security updates, access control, sensor type, privacy policy, manufacturer contact information, and platform compatibility). CMU Labels often link to external sites, such as manufacturers' websites, to provide more detailed information. Would linking to external websites, over which the Commission would have no oversight or control, be appropriate for the Commission's IoT labeling program and the IoT registry? How could the Commission ensure the content of the information provided in the external links is accurate and up-to-date? Are there additional exemplary labels that the Commission should consider? What other additional details should be disclosed to inform consumers of cybersecurity risks underlying the IoT product? What details can potentially be omitted? How can the Commission otherwise ensure the information provided in the IoT registry is meaningful and understandable by consumers?

46. The Commission further asks whether such IoT registry might also be used by retailers to assist them with choosing products that carry the IoT label for sale in their stores and whether retailers may use the registry to confirm that the products that they market legitimately bear the FCC's IoT label. If so, should the registry maintain different sets of information for general consumers and retailers? What additional information would retailers want to see but is not relevant to general consumers?

47. *Updating Information*. The Commission seeks comment on how to ensure consumers are not misled by the meaning of the IoT label and can obtain up-to-date information about their device or product. Unlike other labeling programs, such as the Commission's Broadband Consumer Label, or the ENERGY STAR label, the Commission's labeling program addresses cybersecurity risk, which is constantly changing and requires constant updating. For example, if a new vulnerability is discovered, the product would remain insecure until that newly discovered vulnerability is patched. The Commission proposes that consumers

be made aware of any vulnerabilities or updated product information through the IoT registry. That way, once the product's web page within the IoT product registry is updated to indicate that the authorization to use the mark is outdated, and/or the device is no longer maintained/updated, the consumer can understand this information by accessing the web page using the QR code and/or the URL provided next to the FCC IoT label. Should the Commission impose a duty on manufacturers or importers of the IoT devices and products to notify the IoT registry operator when they become aware of an unpatched vulnerability that poses security risks to their IoT devices and products? Are there other events that should trigger IoT product manufacturers or importers to notify the registry operator that their IoT registry device or product page should be updated?

48. The Commission seeks comment on these proposals, and on any other ways to ensure consumers have up-to-date information regarding IoT devices or products labeled under the program, as well as have an understanding that the FCC cybersecurity label is not a guarantee against all cybersecurity threats. What additional information might be warranted to help minimize the potential for customer confusion?

49. *Application/Renewal.* The Commission proposes that IoT label applicants file for renewal each year, together with supporting evidence that the products still meet the FCC's IoT requirements, as tested and administered by the CyberLABs or as self-attested. In this regard, the Commission seeks to ensure consumers have up-to-date information regarding the participating device or product, and to address end-of-life issues for devices previously approved, but that no longer warrant continued authorization to use the label. Should the label include the specific date, or the year, the label was awarded to help notify consumers how fresh the authorization is? Should the FCC IoT labels on the device or product have an expiration date? How does the Commission ensure consumers are aware of when a device with an FCC IoT label is no longer maintained and/or updated by manufacturers, and may no longer meet up-to-date cybersecurity requirements?

50. The Commission seeks comment on this proposal to employ a renewal process. Should the Commission consider other timeframes on a shorter or longer basis? Should there be an event in the product's life-cycle or a security event that should trigger the applicant to file for an early renewal?

When would such an event trigger early renewal, versus filing updated information with the program administrator and updating the IoT registry? Similarly, are there incidents or developments that might warrant the removal of the IoT cybersecurity label, and what might those circumstances be? After the IoT device or product is authorized for the first time, what supporting documents should the program participants provide to validate and renew their authorization to use the label? Must it be retested annually? How should the IoT registry reflect that an authorization to use the label is out of date?

51. The Commission also seeks comment on the interplay between the proposed IoT cybersecurity labeling program and its current equipment authorization rules. Given that the review process for the proposed program will likely not be administered in the same manner, and by the same entities, as are involved in its equipment authorization program, the Commission proposes that they generally operate in a distinct manner. However, given that equipment subject to the requirements of the Commission's equipment authorization rules must satisfy those rules before they can be manufactured and sold in the United States, the Commission proposes that approval be granted under the cybersecurity labeling program only after any applicable requirements of the equipment authorization rules have been satisfied for the relevant device or product. The Commission seeks comment on these proposals and on any other ways in which it should address the potential interplay between the proposed IoT cybersecurity labeling program and its current equipment authorization rules.

52. *Costs.* The Commission permits TCBs to establish and assess fees for processing equipment authorization applications and conducting other Commission-required tasks. The Commission anticipates that similarly situated third parties in this program may wish to charge for their services and seek comment on whether there is any oversight the Commission needs to exercise over such charges. Further, the Commission proposes, that when a proposed grant of labeling authority is submitted to the Commission for action it should be accompanied by an application fee pursuant to its authority under section 8 of the Communications Act. The Commission proposes to follow the fee calculation methodology adopted by the Commission in the 2020 Application Fee Report and Order. The Commission seeks comment on this

proposal and any changes or modifications the Commission should consider here.

53. *Investigation, Disqualification, and Enforcement.* Ensuring that the label remains a trusted and valuable resource to purchasers requires that the integrity of the devices and products bearing the label is maintained. As such, the Commission seeks comment on how to enforce the labeling program requirements. To the extent that non-Commission entities are better situated to perform, and receive approval to perform, certain functions, should they also be required to conduct a certain number of random audits of the certified IoT devices and products to confirm that they are in compliance? Are there types of market surveillance that should be conducted, and by whom? Should the Commission allow consumer or third-party complaints? Should the Commission or other entities accept and process such complaints? What should the Commission's role be in audit and oversight? For any non-compliance, the Commission could rely on a combination of enforcement procedures such as administrative remedies under the Communications Act (*e.g.*, show cause orders, revocation proceedings, forfeitures, consent decrees, cease and desist orders, and penalties) or civil litigation for breach of contract or trademark infringement, in which the Department of Justice (DOJ) would participate. As noted above, the Commission also seeks comment on what, if any, additional measures are necessary to ensure that the Commission is effectively controlling use of the certification mark for purposes of trademark law. What enforcement measures would be appropriate for firms that falsely put the IoT certification mark or label on their products? How would it be enforced if firms are outside of the United States? In the more contractual context of the ENERGY STAR program, EPA has set out certain Disqualification Procedures that it would apply if a product fails third-party verification testing, or if it fails subsequent Department of Energy (DOE) appliance testing or in the event of product nonconformity. In particular, this process gives the ENERGY STAR Partner notice and an opportunity to dispute the assessment with EPA before a formal disqualification decision is made. The Disqualification Procedures specify certain steps that ENERGY STAR Partners must take in the event of a disqualification (*e.g.*, removing references to ENERGY STAR in the product labeling, marketing, etc.). Should the Commission adopt a similar

disqualification procedure under its rules? What enforcement measures would be appropriate in addition to revoking authorization to use the IoT label? What procedures or consequences should apply where a device or product was certified under one set of standards but is not capable of meeting a new or updated standard adopted later? How should the participants address the products that have the IoT security labels affixed to their products when their products become non-compliant? If an applicant is denied authority to use the Commission's IoT label, should they be able to appeal that decision? The Commission also seeks comment on any recordkeeping and audit requirements for compliance review purposes.

54. Conversely, where a program participant has received authorization to utilize the Commission's IoT Label and has appropriately maintained the device's security measures, does this represent an indicium of reasonableness that might serve as a defense or safe harbor against liability for damages resulting from a cyber incident, *e.g.*, data breach, denial of service, malware? While the Commission clarifies that it does not intend at this time for the labeling program in and of itself to preempt otherwise existing law, are there other affirmative measures that the Commission should consider adopting that should be afforded to devices that have achieved and maintained a Commission IoT security label?

55. *Consumer Education.* The Commission expects that the success of this program will rely upon a robust education campaign with shared responsibilities among the scheme owner, manufacturers, retailers, industry, and non-profit security groups to promote label recognition, brand trust, and transparency of what the Commission's IoT cybersecurity label means. The Commission seeks comment on whether the education campaign used should be comprised of the consumer education materials recommended by NIST, which include providing consumers online access to information addressing:

- *Intent and Scope:* What the label does and does not mean, including addressing potential misinterpretations (*e.g.*, stating that meeting the label security criteria reduces risk but does not eliminate it entirely, and that labeled products are not necessarily more secure than unlabeled products); and a statement that the label does not imply product endorsement by the Commission;

- *Product Criteria:* The cybersecurity properties that must be met for a device to have the Commission label and how

and why these properties were selected; including information on how the criteria address security risks both to the consumer and to others for common intended uses of the products;

- A glossary of applicable technical terms written in plain English;
- General information about conformity assessment and how cybersecurity properties are evaluated;
- *Declaration of Conformity:* The device's specific declaration of conformity to the IoT security standards, including the date the label was last awarded;
- *Scope:* The kinds of devices eligible for the label and an easy way for consumers to identify labeled devices;
- *Changing Applicability:* The current state of device labeling as new cybersecurity threats and vulnerabilities emerge;
- Security considerations for end-of-life IoT devices and implications for functionality if the device is no longer connected;
- *Expectations for Consumers:* The responsibility consumers share in securing the device software and how their actions (or inactions) can impact the device's software cybersecurity; and
- Contact information for the labeling program and information on how consumers can lodge a complaint regarding a product label.

56. The Commission seeks comment on anticipated costs of such a consumer education campaign particularly with regard to upfront costs that will be incurred to start the program. The Commission also seeks comment on mechanisms for conducting the outreach consistent with the constraints on federal outreach and the possibility of public or private partnerships that may facilitate a consumer education campaign.

57. *Integrity of the National Government-based IoT Cybersecurity Label.* The Commission seeks comment on ways to avoid consumer confusion between the government-based IoT cybersecurity label and existing and future IoT cybersecurity labeling schemes such as UL and IoT Security Trust Mark. What features and assurances can the Commission's label provide to improve customer awareness of the security of a given IoT device? Alternatively, should the FCC label act as an aggregator for other labeling programs ensuring that these programs meet the IoT security standards in addition to any wider or sector specific security needs the scheme owners feel necessary. What about other labeling programs in other countries? How should the Commission coordinate and engage with other international bodies

maintaining labeling programs to develop recognition of the Commission's IoT Label, and where appropriate, mutual recognition of those international labels? The Commission's proposal seeks to implement this program for devices or products for sale in the United States. What steps, if any, should the Commission take to ensure the FCC label is not mistaken for compliance with IoT security or RF-emission standards in other countries?

58. *Accessibility.* The Commission emphasizes its continued commitment to ensuring that the labeling program is accessible and usable by individuals with disabilities. With respect to the Commission's Broadband Consumer Label, in 2022, the Commission noted that the Consumer Advisory Committee (CAC) determined that participating providers can best ensure accessibility to printed and online information by relying on well-established legal requirements included in the Americans with Disabilities Act and by following the guidance developed by the Web Accessibility Initiative. The Commission seeks comment on whether relying on these guidelines provides the best likelihood of ensuring that consumers with disabilities will be able to access necessary information about their IoT devices or products. The Commission seeks comment on how best to ensure that any adopted IoT cybersecurity label is accessible to persons with disabilities.

Legal Authority

59. The Commission tentatively concludes that it has authority to adopt the proposed IoT labeling program. In particular, section 302(a) of the Communications Act authorizes the FCC "consistent with the public interest, convenience, and necessity, [to] make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; . . ." While this program would be voluntary, entities that elect to participate would need to do so in accordance with the regulations the Commission adopts in this proceeding, including but not limited to the IoT security standards, compliance requirements, and the labeling program's operating framework. The Commission tentatively concludes that the standards the Commission proposes to apply when administering the proposed labeling program fall within the scope of "reasonable regulations . . . governing the interference potential

of devices. . . .” The Commission seeks comment on this reasoning.

60. The Commission has exercised authority in other contexts to secure both software and firmware to prevent unauthorized modification that would compromise a device or the data it transmits. For example, in adopting technical rules for the Citizens Broadband Radio Service (CBRS), the Commission required end user devices to “contain security features sufficient to protect against modification of software and firmware by any unauthorized parties” and required that such devices “be able to protect the communication data that are exchanged between these elements.” The Commission adopted a further obligation for identified security vulnerabilities to be resolved on a going-forward basis, and encouraged industry to develop best practices for end-to-end security that can be validated through the certification process. By way of further example, in the 5 GHz band, the Commission, noting the potential for reprogramming of unlicensed national information infrastructure (U-NII) devices to operate outside of authorized device parameters, similarly adopted security measures requiring manufacturers to prevent software changes that would result in this outcome. Declining to mandate specific software security measures, the Commission required manufacturers instead to document their methods. In addition, the Commission’s rules require security protocols and procedures to ensure the integrity of transmission related between and among white space devices and databases.

61. The Commission’s proposed labeling program rules are intended to ensure that IoT devices have implemented certain minimum cybersecurity protocols to prevent their being hacked by bad actors who could cause the devices to cause harmful interference to radio communications. As noted above, in the 5 GHz context, the Commission identified concerns about security vulnerabilities that could, if exploited, lead equipment to operate outside established parameters, with the associated risk that doing so could cause harmful interference. As also noted above, interference issues also could arise if security vulnerabilities were exploited to use a device as an interference generator, or to transmit at times and intervals selected by the attacker to interfere with other devices. The Commission anticipates that this could be a more pervasive risk, and the Commission seeks comment on that predictive judgment. Furthermore,

under the Act, the Commission’s other obligations in this regard can encompass not only the prevention of interference to other devices, but the need to mitigate against the risk of interference to covered equipment. In this regard, and in considering the potential need to encompass not only devices but, ultimately, products in order to adequately secure the IoT ecosystem and empower consumer choices, the Commission believes such an approach is reasonable under sections 333 and 302(a) of the Act.

62. In particular, the Commission also seeks comment on the authorities that would support including additional IoT products and devices within the proposed IoT labeling Program. For example, section 302(a)(2) of the Act provides the Commission with the authority to adopt reasonable regulations “establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy.” Does this authority support reasonable regulations that may include the regulations proposed herein? Section 333 states: “No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government.” Does this authority, possibly coupled with other provisions, provide a basis for the Commission’s proposed action? Is the Commission’s proposal necessary or reasonably ancillary to the execution of its implementation of any or all of these statutory responsibilities?

63. Is it reasonable for the Commission’s labeling program to not only guard against the risk that covered devices and products cause harmful interference, but also to guard against other risks, including the risk of interference to those covered devices and products consistent with policy goals underlying sections 302(a)(2) and 333 of the Act? For example, the Commission tentatively concludes that its authority to adopt “reasonable regulations” to guard against harmful interference under section 302 of the Act authorizes a labeling program that applies a set of criteria or standards that address not only risks of harmful interference *from* the products or devices subject to labeling but also other harms, such as the risk of harmful interference *to* such products or devices—particularly where the relevant criteria or standards were designed or intended to be applied as a package or collectively.

64. The Commission also tentatively concludes that its authority under section 302(a)(1) of the Act to adopt reasonable regulations consistent with the public interest to guard against interference provides the Commission flexibility to tailor the proposed labeling program in other ways. For example, the Commission believes that, in adopting reasonable regulations consistent with the public interest under section 302, the Commission has authority to exclude equipment from the Covered List from participating in the voluntary labeling program, consistent with the objectives of sections 2(a) and (d) of the Secure and Trusted Communications Networks Act of 2019. The Commission further tentatively concludes that its section 302 authority likewise enables it to rely on third parties in carrying out the implementation details of the proposed labeling program. In particular, section 302(e) of the Act authorizes the Commission to delegate equipment testing and certification to private laboratories, and the Commission notes in that regard that it already has relied in part on third parties in carrying out its equipment authorization rules. The Commission also seeks comment on whether its authority to adopt reasonable regulations in the public interest to carry out the objectives of section 302 authorizes the Commission to rely on a third party IoT registry administrator as well as rely on third parties to perform some of the functions described above.

65. The Commission also seeks comment on whether section 301 of the Act also provides the Commission with authority to include in its labeling program IoT products and devices that might receive harmful interference from an unauthorized cyber event. The Commission also recognizes, for example, that cyberattacks utilizing IoT vulnerabilities may not only give rise to harmful interference concerns, but can also effectuate physical threats to the world around us—degrading wireless networks, for example, changing service settings on smart appliances, or—more catastrophically—shutting down an industrial control system. Are there additional authorities that support the inclusion of additional IoT products and devices that do not emit RF externally for purposes of communications, such as unintentional or incidental radiators, or wired-only IoT?

66. The Commission seeks comment broadly its legal authority under the Communications Act, or any other source, to implement the proposed voluntary IoT labeling program, including its authority pursuant to Titles II and III as well as its authority

under section 4(i) of the Communications Act, as amended, to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions” which includes “the purpose of promoting safety of life and property.”

67. The Commission further seeks comment on how it may utilize enforcement authorities under the Act, including the potential imposition of penalties under section 503 and cease and desist orders under section 312 for those entities that voluntarily participate in the labeling program, but fail to continue to comply with the Commission’s regulations. Would participants in the labeling program already be holders of authorizations within the meaning of section 503(b)(5) of the Act, or are there steps the Commission should take to structure the labeling program so that participation would itself satisfy that provision? Are there any additional avenues for enforcement or oversight of the program’s participants or of a third-party security certifying body? What trademark remedies are available to the Commission? Are there other agencies that might contribute to program enforcement?

Promoting Digital Equity

68. The Commission, as part of its continuing effort to advance digital equity for all,⁸⁴ including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations⁸⁵ and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Commission seeks comment on how its proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well as the scope of the Commission’s relevant legal authority.

Appendix A

69. Within the scope of a consumer IoT product, the following baseline product criteria are recommended by NIST to define the cybersecurity outcomes expected of IoT products and IoT product developers as part of a consumer IoT product labeling program. Most criteria concern the IoT product directly and are expected to be satisfied by software and/or hardware means implemented in the IoT product. Some criteria apply to the IoT product developer rather than to the IoT product

directly. These criteria are expected to be satisfied through actions and supported by assertions and evidence from the developer rather than from the IoT product itself.

70. *Product criteria are recommended to apply to the IoT product overall, as well as to each individual IoT product component (e.g., IoT device, backend, companion app), as appropriate.* (Given the nature of consumer IoT product, it is expected that all IoT products should satisfy all technical product criteria since they will, in most cases, be finished products intended for direct plug-and-play use. Individual IoT product components, though, may be more likely to not require certain criteria (e.g., based on lack of applicability). A scheme owner has the flexibility to adapt the product criteria and determine appropriate supporting evidence. Though NIST recommends that all criteria apply to every IoT product, some components may not be able or need to support all criteria. That might be the case due to product risk considerations, product development (e.g., cybersecurity tasks delegated via contracts and supply chain), nature of the components to form the product (e.g., backends may be highly distributed), or limitations of IoT components (e.g., devices may be constrained, companion software apps may have limited access and functionality).

Asset Identification: The IoT product is uniquely identifiable and inventories all of the IoT product’s components.

- The IoT product can be uniquely identified by the customer and other authorized entities (e.g., the IoT product developer).
- The IoT product uniquely identifies each IoT product component and maintains an up-to-date inventory of connected product components.

Cybersecurity utility: The ability to identify IoT products and their components is necessary to support asset management for updates, data protection, and digital forensics capabilities for incident response.

Product Configuration: The configuration of the IoT product is changeable, there is the ability to restore a secure default setting, and any and all changes can only be performed by authorized individuals, services, and other IoT product components.

- The customer can change the configuration settings of the IoT product via one or more IoT product components.
- The IoT product applies configuration settings to applicable IoT components.

Cybersecurity utility: The ability to change aspects of how the IoT product functions can help customers tailor the IoT product’s functionality to their needs and goals. Customers can configure their IoT products to avoid specific threats and risk they know about based on their risk appetite.

Data Protection: The IoT product and its components protect data stored (across all IoT product components) and transmitted (both between IoT product components and outside the IoT product) from unauthorized access, disclosure, and modification.

- Each IoT product component protects data it stores via secure means, including the ability to delete or render inaccessible data stored that is either collected from or about the customer, home, family, etc.

- When data is sent between IoT product components or outside the product, protections are used for the data transmission.

Cybersecurity utility: Maintaining confidentiality, integrity, and availability of data is foundational to cybersecurity for IoT products. Customers will expect that data is protected and that protection of data helps to ensure safe and intended functionality of the IoT product.

Interface Access Control: The IoT product and its components restrict logical access to local and network interfaces—and to protocols and services used by those interfaces—to only authorized individuals, services, and IoT product components.

- Each IoT product component controls access (to and from) all interfaces (e.g., local interfaces, network interfaces, protocols, and services) in order to limit access to only authorized entities. At a minimum, the IoT product and its components shall:

a. Use and have access only to interfaces necessary for the IoT product’s operation. All other channels and access to channels are removed or secured.

b. For all interfaces necessary for the IoT product’s use, access control measures are in place (e.g., unique password-based multifactor authentication).

c. For all interfaces, access and modification privileges are limited.

- The IoT product executes means via some, but not necessarily all, components to protect and maintain interface access control. At a minimum, the IoT product shall:

a. Validate that data sent to other product components matches specified definitions of format and content.

b. Prevent unauthorized transmissions or access to other product components.

c. Maintain appropriate access control during initial connection (*i.e.*, on-boarding) and when reestablishing connectivity after disconnection or outage.

Cybersecurity utility: Inventorying and controlling access to all internal and external interfaces to the IoT product will help preserve the confidentiality, integrity, and availability of the IoT product, its components, and data by helping prevent unauthorized access and modification.

Software Update: The software of all IoT product components can be updated by authorized individuals, services, and other IoT product components only by using a secure and configurable mechanism, as appropriate for each IoT product component.

- Each IoT product component can receive, verify, and apply verified software updates.

- The IoT product implements measures to keep software on IoT product components up to date (*i.e.*, automatic application of updates or consistent customer notification of available updates via the IoT product).

Cybersecurity utility: Software may have vulnerabilities discovered after the IoT product has been deployed; software update capabilities can ensure secure delivery of security patches.

Cybersecurity State Awareness: The IoT product supports detection of cybersecurity incidents affecting or affected by IoT product components and the data they store and transmit.

- The IoT product captures and records information about the state of IoT components that can be used to detect cybersecurity incidents affecting or affected by IoT product components and the data they store and transmit.

Cybersecurity utility: Protection of data and ensuring proper functionality can be supported by the ability to alert the customer when the device starts operating in unexpected ways, which could mean that unauthorized access is being attempted, malware has been loaded, botnets have been created, device software errors have happened, or other types of actions have occurred that was not initiated by the IoT product user or intended by the developer.

Documentation: The IoT product developer creates, gathers, and stores information relevant to cybersecurity of the IoT product and its product components prior to customer purchase, and throughout the development of a product and its subsequent lifecycle.

- Throughout the development lifecycle, the IoT product developer creates or gathers and stores information relevant to the cybersecurity of the IoT

product and its product components, including:

- a. Assumptions made during the development process and other expectations related to the IoT product, including:

- i. Expected customers and use cases.
- ii. Physical use, including security of the location of the IoT product and its product components (*e.g.*, a camera for use inside the home that has an off switch on the device vs. a security camera for use outside the home that does not have an off switch on the device), and characteristics.

- iii. Network access and requirements (*e.g.*, bandwidth requirements).

- iv. Data created and handled by the IoT product.

- v. Any expected data inputs and outputs (including error codes, frequency, type/form, range of acceptable values, etc.).

- vi. The IoT product developer's assumed cybersecurity requirements for the IoT product.

- vii. Any laws and regulations with which the IoT product and related support activities comply.

- viii. Expected lifespan and anticipated cybersecurity costs related to the IoT product (*e.g.*, price of maintenance), and length and terms of support.

- b. All IoT components, including but not limited to the IoT device, that are part of the IoT product.

- c. How the baseline product criteria are met by the IoT product across its product components, including which baseline product criteria are not met by IoT product components and why (*e.g.*, the capability is not needed based on risk assessment).

- d. Product design and support considerations related to the IoT product, *for example:*

- i. All hardware and software components, from all sources (*e.g.*, open source, proprietary third-party, internally developed) used to create the IoT product (*i.e.*, used to create each product component).

- ii. IoT platform used in the development and operation of the IoT product, its product components, including related documentation.

- iii. Protection of software and hardware elements implemented to create the IoT product and its product components (*e.g.*, secure boot, hardware root of trust, and secure enclave).

- iv. Consideration of the known risks related to the IoT product and known potential misuses.

- v. Secure software development and supply chain practices used.

- vi. Accreditation, certification, and/or evaluation results for cybersecurity-related practices.

- vii. The ease of installation and maintenance of the IoT product by a customer (*i.e.*, the usability of the product).

- e. Maintenance requirements for the IoT product, *for example:*

- i. Cybersecurity maintenance expectations and associated instructions or procedures (*e.g.*, vulnerability/patch management plan).

- ii. How the IoT product developer identifies authorized supporting parties who can perform maintenance activities (*e.g.*, authorized repair centers).

- iii. Cybersecurity considerations of the maintenance process (*e.g.*, how customer data unrelated to the maintenance process remains confidential even from maintainers).

- f. The secure system lifecycle policies and processes associated with the IoT product, *including:*

- i. Steps taken during development to ensure the IoT product and its product components are free of any known, exploitable vulnerabilities.

- ii. The process of working with component suppliers and third-party vendors to ensure the security of the IoT product and its product components is maintained for the duration of its supported lifecycle.

- iii. Any post end-of-support considerations, such as the discovery of a vulnerability which would significantly impact the security, privacy, or safety of customers who continue to use the IoT product and its product components.

- g. The vulnerability management policies and processes associated with the IoT product, *including:*

- i. Methods of receiving reports of vulnerabilities (see Information and Query Reception below).

- ii. Processes for recording reported vulnerabilities.

- iii. Policy for responding to reported vulnerabilities, including the process of coordinating vulnerability response activities among component suppliers and third-party vendors.

- iv. Policy for disclosing reported vulnerabilities.

- v. Processes for receiving notification from component suppliers and third-party vendors about any change in the status of their supplied components, such as end of production, end of support, deprecated status (*e.g.*, the product is no longer recommended for use), or known insecurities.

Cybersecurity utility: Generating, capturing, and storing important information about the IoT product and its development (*e.g.*, assessment of the IoT product and development practices used to create and maintain it) can help inform the IoT product developer

regarding the product's actual cybersecurity posture.

Information and Query Reception:

The ability of the IoT product developer to receive information relevant to cybersecurity and respond to queries from the customer and others about information relevant to cybersecurity.

- The IoT product developer can receive information related to the cybersecurity of the IoT product and its product components and can respond to queries related to cybersecurity of the IoT product and its product components from customers and others, including:

- a. The ability of the IoT product developer to identify a point of contact to receive maintenance and vulnerability information (e.g., bug reporting capabilities and bug bounty programs) from customers and others in the IoT product ecosystem (e.g., repair technician acting on behalf of the customer).

- b. The ability of the IoT product developer to receive queries from and respond to customers and others in the IoT product ecosystem about the cybersecurity of the IoT product and its components.

Cybersecurity utility: As IoT products are used by customers, those customers may have questions or reports of issues that can help improve the cybersecurity of the IoT product over time.

Information Dissemination: The IoT product developer broadcasts (e.g., to the public) and distributes (e.g., to the customer or others in the IoT product ecosystem) information relevant to cybersecurity.

- The IoT product developer can broadcast to many/all entities via a channel (e.g., a post on a public channel) to alert the public and customers of the IoT product about cybersecurity relevant information and events throughout the support lifecycle. At a minimum, this information shall include:

- a. Updated terms of support (e.g., frequency of updates and mechanism(s) of application) and notice of availability and/or application of software updates.

- b. End of term of support or functionality for the IoT product.

- c. Needed maintenance operations.

- d. New IoT device vulnerabilities, associated details, and mitigation actions needed from the customer.

- e. Breach discovery related to an IoT product and its product components used by the customers, associated details, and mitigation actions needed from the customer (if any).

- The IoT product developer can distribute information relevant to cybersecurity of the IoT product and its product components to alert appropriate

ecosystem entities (e.g., common vulnerability tracking authorities, accreditors and certifiers, third-party support and maintenance organizations) about cybersecurity relevant information, *for example:*

- a. Applicable documentation captured during the design and development of the IoT product and its product components.

- b. Cybersecurity and vulnerability alerts and information about resolution of any vulnerability.

- c. An overview of the information security practices and safeguards used by the IoT product developer.

- d. Accreditation, certification, and/or evaluation results for the IoT product developer's cybersecurity-related practices.

- e. A risk assessment report or summary for the IoT product developer's business environment risk posture.

Cybersecurity utility: As the IoT product, its components, threats, and mitigations change, customers will need to be informed about how to securely use the IoT product.

Product Education and Awareness: The IoT product developer creates awareness of and educates customers and others in the IoT product ecosystem about cybersecurity-related information (e.g., considerations, features) related to the IoT product and its product components.

- The IoT product developer creates awareness and provides education targeted at customers about information relevant to cybersecurity of the IoT product and its product components, including:

- a. The presence and use of IoT product cybersecurity capabilities, including at a minimum:

- i. How to change configuration settings and the cybersecurity implications of changing settings, if any.

- ii. How to configure and use access control functionality (e.g., set and change passwords).

- iii. How software updates are applied and any instructions necessary for the customer on how to use software update functionality.

- iv. How to manage device data including creation, update, and deletion of data on the IoT product.

- b. How to maintain the IoT product and its product components during its lifetime, including after the period of security support (e.g., delivery of software updates and patches) from the IoT product developer.

- c. How an IoT product and its product components can be securely re-provisioned or disposed of.

- d. Vulnerability management options (e.g., configuration and patch

management and anti-malware) available for the IoT product or its product components that could be used by customers.

- e. Additional information customers can use to make informed purchasing decisions about the security of the IoT product (e.g., the duration and scope of product support via software upgrades and patches).

Cybersecurity utility: Customers will need to be informed about how to securely use the device to lead to the best cybersecurity outcomes for the customers and the consumer IoT product marketplace.

Procedural Matters

Initial Paperwork Reduction Act of 1995 Analysis

This document seeks comment on potential new or revised proposed information collection requirements. Therefore, the Commission seeks comment on potential new or revised collections subject to the Paperwork Reduction Act of 1995. If the Commission adopts any new or revised final information collection requirements when the final rules are adopted, the Commission will publish a notice in the **Federal Register** inviting further comments from the public on the final information collection requirements, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501–3520). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this document, as required by the PRA. Public and agency comments on the PRA proposed information collection requirements are due October 24, 2023. Comments should address: (a) 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; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) 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 (e) way to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might

“further reduce the information collection burden for small business concerns with fewer than 25 employees.”

Initial Regulatory Flexibility Analysis

71. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the document. The IRFA is set forth in Appendix B of the document. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the document, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the document and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

72. The document proposes a voluntary cybersecurity labeling program for the Internet of Things (IoT) to improve consumer confidence and understanding of security for IoT devices and/or products. Such IoT devices and products are susceptible to a wide range of security vulnerabilities, which can be exploited by attackers to gain unauthorized access to an IoT device or IoT product and its data. Accordingly, providing consumers with a label certifying that an IoT device and/or product satisfies certain baseline cybersecurity standards and has specific cybersecurity capabilities allows a consumer to understand the relative security risk that an IoT device and/or product may pose when making a purchase. The document seeks comments on the scope of the proposed cybersecurity labeling program, including comments on proposed definitions of an IoT device and an IoT product. It also seeks comments on specific technical criteria for the cybersecurity labeling program, including whether other criteria in addition to the IoT Criteria developed by the National Institute of Standards and Technology (NIST), should be considered, and whether and how to develop administrable standards. Finally, the document invites comments on how to administer the cybersecurity labeling program, the appropriate means to fund the costs of running the program, and what program auditing, enforcement, disqualification and certification revocation processes and

procedures should be put in place to ensure that the labeling program is a trusted and valuable resource that consumers can rely upon to assess the security of the IoT devices and/or products that exhibit the label.

B. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

73. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

74. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* The Commission’s actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration’s (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.

75. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

76. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships,

villages, school districts, or special districts, with a population of less than fifty thousand.” U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments— independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of “small governmental jurisdictions.”

77. *Radio Frequency Equipment Manufacturers (RF Manufacturers).* There are several analogous industries with an SBA small business size standard that are applicable to RF Manufacturers. These industries are Fixed Microwave Services, Other Communications Equipment Manufacturing, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. A description of these industries and the SBA small business size standards are detailed below.

78. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service (UMFUS), Millimeter Wave Service (70/80/90 GHz), Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), 24 GHz Service, Multiple Address Systems (MAS), and Multichannel Video Distribution and Data Service (MVDDS), where in some bands licensees can choose between common carrier and non-common carrier status. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

79. The Commission’s small business size standards with respect to fixed

microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in Part 101 of the Commission's rules for the specific fixed microwave services frequency bands.

80. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time the Commission is not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

81. *Other Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment). Examples of such manufacturing include fire detection and alarm systems manufacturing, Intercom systems and equipment manufacturing, and signals (e.g., highway, pedestrian, railway, traffic) manufacturing. The SBA small business size standard for this industry classifies firms having 750 or fewer employees as small. For this industry, U.S. Census Bureau data for 2017 shows that 321 firms operated for the entire year. Of that number, 310 firms operated with fewer than 250 employees. Based on this data, the Commission concludes that the majority of Other Communications Equipment Manufacturers are small.

82. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television

broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment). Examples of such manufacturing include fire detection and alarm systems manufacturing, Intercom systems and equipment manufacturing, and signals (e.g., highway, pedestrian, railway, traffic) manufacturing. The SBA small business size standard for this industry classifies firms having 750 or fewer employees as small. For this industry, U.S. Census Bureau data for 2017 shows that 321 firms operated for the entire year. Of that number, 310 firms operated with fewer than 250 employees. Based on this data, the Commission concludes that the majority of Other Communications Equipment Manufacturers are small.

C. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

83. The voluntary cybersecurity labeling program for IoT devices and/or products to provide consumers with accessible information on the relative security of these IoT devices and/or products that the Commission proposes in the document may impose new reporting, recordkeeping, notice or other compliance requirements on small entities that choose to participate in the program. The requirements may include application or other conformance reporting, licensing, certification and/or other reporting obligations.

84. The proposals in the document build upon other actions the Commission has taken to protect and secure public safety. Accordingly, the proposals being made in this document may require additional analysis and mitigation activities by small and other IoT manufacturers in order to satisfy certain technical criteria or standards for the ability to display an IoT cybersecurity label. At this time, the Commission is not in a position to determine whether the requirements that may be adopted for participants in the proposed cybersecurity labeling program will require small entities to hire professionals in order to comply and cannot quantify the cost of compliance with the potential

requirements and obligations that may result in this proceeding. Among other things considered, the Commission inquires about the options for it to address the costs of running and administering the labeling program including whether there may be application fees charged by third-parties administering the program and whether there is oversight the Commission should exercise over such charges. The Commission seeks comment on these issues and anticipate that the information it receives in comments will address these matters and any broader cost issues for small entities that may choose to participate in the proposed labeling program.

85. In light of the importance of mark integrity and the need to build consumer confidence and trust in the security of IoT devices and products that will display the Commission's IoT label, regardless of the size of the entity seeking to participate in the proposed cybersecurity labeling program, adherence by all participants to the same Commission rules is necessary. However, the Commission expects that the comments it receives will help it identify and evaluate relevant matters for small entities before adopting final rules for the labeling program, including any compliance costs and burdens that may result from the proposals and other matters discussed in the document.

D. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

86. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

87. The Commission's development of a voluntarily cybersecurity labeling program for the IoT products and devices builds on the work of the National Institute of Standards and Technology (NIST) which produced labeling criteria for cybersecurity capabilities of IoT consumer devices. Using the work of NIST as a foundation has the potential to minimize the

economic impact on small entities for several reasons. First, NIST took into account existing consumer product labeling programs and information provided by diverse stakeholders. Next, two of the key elements NIST identified for labeling were encouraging innovation, and being practical and not burdensome. Further, the Commission believes building on the approach NIST developed for IoT cybersecurity labeling will provide a level of consistency with the requirements it establishes for the entities subject to Commission regulation that choose to participate in the Commission's cybersecurity IoT labeling program.

88. In the document, the Commission considers and seeks comment on various compliance requirements that it could consider in advancing a voluntary cybersecurity labeling program. More specifically, the Commission considered the NIST definition for IoT devices which defines IoT devices as devices that have at least one transducer (sensor or actuator) for interacting directly with the physical world and at least one network interface (e.g., Ethernet, Wi-Fi, Bluetooth) for interfacing with the digital world, and determined that it should propose an alternative definition. The Commission's proposed definition modifies the NIST definition to add "internet-connected" because a key element of the IoT is the usage of standard internet protocols for functionality, which exposes IoT devices to the security threats and challenges related to being connected to the internet. The Commission's proposed definition also includes the requirement that devices must be capable of intentionally emitting radio frequency energy because the relevant scope of Commission's statutory authorities focus on devices that intentionally emit radio frequency energy.

89. Although the Commission includes in its definition devices that intentionally emit radio frequency energy, it considered whether there are unintentional radiators or incidental radiators that should be included in the program, and if so whether the Commission should revise the definition to omit the word "intentional." Alternatively, the Commission inquires if it should consider adding unintentional or incidental radiating devices to the program at a later date. In addition, while the Commission refers to devices and products in the document, it inquires whether it should expand the proposed scope of the cybersecurity labeling program and definition of devices beyond IoT devices to apply to

IoT products. Under this expanded alternative the Commission could define an IoT product as an IoT device and any additional product components (e.g., backend, gateway, mobile App) that are necessary to use the IoT device. A further alternative the Commission considered, is whether to limit the IoT labeling program to consumer IoT devices or products intended for personal use, or to include "enterprise" devices or products intended for industrial or business uses and any additional considerations that would need to be accounted for with such devices or products. The Commission seeks comment on these inquiries and alternatives in the document, in addition to comments on the proposed definition.

90. Regarding the content and updating of the IoT label on the physical device, product, or packaging, the Commission believes the simple approach proposed in the document will result in cost savings which could minimize the impact of these requirements for small entities. The Commission's proposal is to have the physical device, product, or packaging simply indicate that the manufacturer participates in the FCC's labeling program by having the FCC mark along with the related QR Code and/or the URL to the IoT registry. The detailed information on the IoT device or product will be made available on the device or product's web page within the IoT registry using an QR Code and/or a URL. When the device or product's web page within the IoT registry is updated to indicate for example, that the device or product's authorization is outdated, and/or the device or product is no longer maintained or updated, using the QR Code and/or the URL provided next to the FCC mark the information can be accessed on the device or product's web page within the IoT registry. Updating requirements for the device or product's web page within the IoT registry could alleviate the need for the Commission to adopt additional notification requirements which would increase costs for small entities.

91. The Commission also considered and seeks comment on alternatives on how to address the end-of-life issues for devices previously receiving authorization under the program. For example, the Commission considered whether the label should include the specific date, or the year the authorization was awarded, or an expiration date. Further, the Commission considered whether it would be sufficient to provide consumers with additional information via the QR Code regarding the current

security status of a device, and whether the QR Code-linked website should indicate when the label was issued by the Commission, and when the information on the web page last updated.

92. In the area of accessibility, to ensure that any IoT cybersecurity label information the Commission adopts is accessible to persons with disabilities, the Commission considered an alternative that would alleviate the need for the Commission to establish and impose new accessibility requirements on small entities and other participants in the labeling program. Consistent with its approach with broadband consumer labels in 2022, in the document the Commission considered and seeks comment on relying on the existing legal requirements in the Americans with Disabilities Act (ADA) and following the guidance developed by the Web Accessibility Initiative, which the Consumer Advisory Committee (CAC) determined is the best method to ensure accessibility to printed and online information is made available by providers.

93. Further, rather than proposing rules at this juncture, in the document the Commission seeks comment on costs associated with the proposed cybersecurity IoT labeling program, and on investigation, disqualification and enforcement processes to maintain the integrity of the devices or products that will be labeled under the program. The Commission's actions on all of these matters have the potential to minimize the impact of the cybersecurity IoT labeling program the Commission adopts on small entities.

94. Regarding investigation, disqualification and enforcement, as discussed in the document, the Commission considered and seeks comment on whether to have random audits of IoT devices or products to confirm continued compliance; whether the Commission should adopt disqualifications procedures similar to those adopted for the ENERGY STAR program by the Environmental Protection Agency (EPA); what additional non-compliance or disqualification measures would be appropriate in addition to authorization revocation, and whether there should be an appeal process available to applicants that are denied authority to use the IoT label. Additionally, the Commission seeks comment on what recordkeeping and audit requirements could be adopted for purposes of compliance review.

95. The Commission expects to more fully consider the economic impact and alternatives for small entities following

the review of comments filed in response to the document. Having input from interested parties will allow the Commission to better evaluate options and alternatives to minimize any significant economic impact on small entities that may result from the proposed cybersecurity IoT labeling program and the inquiries and alternatives discussed in the document. The Commission's evaluation of this information will shape the final alternatives it considers to minimize any significant economic impact that may occur on small entities, the final conclusions it reaches and any final rules it promulgates in this proceeding.

E. Legal Basis

96. The proposed action is taken under authority found in sections 1, 2, 4(i), 4(n), 301, 302, 303(b), 312, 333, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(n), 301, 302a, 303(b), 312, 333, 503; and the IoT Cybersecurity Improvement Act of 2020, 15 U.S.C. 278g–3a to 278g–3e.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

97. None.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–18357 Filed 8–24–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531, 533, 535, and 537

[NHTSA–2023–0022]

RIN 2127–AM55

Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA).

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: This document corrects technical errors in the proposed rule that appeared in the **Federal Register** on August 17, 2023, entitled “Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035.” That document proposed new Corporate Average Fuel Economy (CAFE) standards for passenger cars and light trucks to be manufactured in model years (MYs) 2027–2032, and new fuel efficiency standards for heavy-duty pickup trucks and vans (HDPUVs) to be manufactured in MYs 2030–2035.

DATES: Comments for the proposed rule published on August 17, 2023, at 88 FR 56128, must be received on or before October 16, 2023.

FOR FURTHER INFORMATION CONTACT: Joseph Bayer, CAFE Program Division Chief, Office of Rulemaking, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE,

Washington, DC 20590; email: joseph.bayer@dot.gov; phone: (202) 366–9540.

SUPPLEMENTARY INFORMATION: Prior to publication of the proposal for new CAFE standards for passenger cars and light trucks and new fuel efficiency standards for HDPUVs, NHTSA noticed several minor typographical errors that could not be corrected prior to printing. The needed corrections to the preamble replace the target function coefficient numbers in Table II–3, Table III–4, Table III–12, Table III–13, Table III–15, Table III–16, Table III–18, Table III–19, Table III–21, and Table III–22. NHTSA notes that these modifications do not change the values but simply provide additional significant figures for the coefficients. For the reader's reference, NHTSA has also made the corresponding changes to the target coefficient tables in the accompanying Technical Support Document (TSD) and Preliminary Regulatory Impact Assessment (PRIA), which are found in the docket for this rulemaking and on the agency's website. The needed correction to the proposed regulatory text clarifies that NHTSA is proposing to eliminate 5-cycle and alternative approvals for off-cycle fuel consumption incentive values (FCIVs) starting in MY 2027. This document also corrects the proposed regulatory text to clarify that multipliers for advanced, innovative, and off-cycle technologies for heavy-duty pickup trucks and vans are available through model year 2027.

I. Preamble Corrections

In proposed rule FR Doc. 2023–16515, beginning on page 56128 in the issue of August 17, 2023, make the following corrections, in the **SUPPLEMENTARY INFORMATION** section.

1. On page 56260, Table III–3 is corrected to read as follows:

TABLE III–3—PASSENGER CAR CAFE TARGET FUNCTION COEFFICIENTS FOR NO-ACTION ALTERNATIVE ⁴⁵⁰

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	66.95	66.95	66.95	66.95	66.95	66.95
<i>b</i> (mpg)	50.09	50.09	50.09	50.09	50.09	50.09
<i>c</i> (gpm per s.f)	0.000335	0.000335	0.000335	0.000335	0.000335	0.000335
<i>d</i> (gpm)	0.001196	0.001196	0.001196	0.001196	0.001196	0.001196

2. On page 56261, Table III–4 is corrected to read as follows:

⁴⁵⁰ The Passenger Car Function Coefficients ‘a’, ‘b’, ‘c’, and ‘d’ are defined in Draft TSD Chapter 1.2.1, Equation 1–1.

TABLE III-4—LIGHT TRUCK CAFE TARGET FUNCTION COEFFICIENTS FOR NO-ACTION ALTERNATIVE ⁴⁵¹

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	53.73	53.73	53.73	53.73	53.73	53.73
<i>b</i> (mpg)	32.30	32.30	32.30	32.30	32.30	32.30
<i>c</i> (gpm per s.f)	0.000374	0.000374	0.000374	0.000374	0.000374	0.000374
<i>d</i> (gpm)	0.003272	0.003272	0.003272	0.003272	0.003272	0.003272

3. On page 56266, Table III-12 is corrected to read as follows:

TABLE III-12—PASSENGER CAR CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC1LT3 ⁴⁶⁷

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	67.63	68.31	69.00	69.70	70.40	71.11
<i>b</i> (mpg)	50.60	51.11	51.63	52.15	52.68	53.21
<i>c</i> (gpm per s.f)	0.000332	0.000328	0.000325	0.000322	0.000319	0.000316
<i>d</i> (gpm)	0.001184	0.001172	0.001161	0.001149	0.001138	0.001126

4. On page 56266, Table III-13 is corrected to read as follows:

TABLE III-13—LIGHT TRUCK CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC1LT3 ⁴⁶⁸

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	55.39	57.10	58.87	60.69	62.56	64.50
<i>b</i> (mpg)	33.30	34.33	35.39	36.48	37.61	38.78
<i>c</i> (gpm per s.f)	0.000363	0.000352	0.000342	0.000331	0.000321	0.000312
<i>d</i> (gpm)	0.003173	0.003078	0.002986	0.002896	0.002809	0.002725

5. On page 56267, Table III-15 is corrected to read as follows:

TABLE III-15—PASSENGER CAR CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC2LT4 ⁴⁶⁹

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	68.32	69.71	71.14	72.59	74.07	75.58
<i>b</i> (mpg)	51.12	52.16	53.22	54.31	55.42	56.55
<i>c</i> (gpm per s.f)	0.000328	0.000322	0.000315	0.000309	0.000303	0.000297
<i>d</i> (gpm)	0.001172	0.001149	0.001126	0.001103	0.001081	0.001060

6. On page 56267, Table III-16 is corrected to read as follows:

TABLE III-16—LIGHT TRUCK CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC2LT4 ⁴⁷⁰

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	55.96	58.30	60.73	63.26	65.89	68.64
<i>b</i> (mpg)	33.64	35.05	36.51	38.03	39.61	41.26
<i>c</i> (gpm per s.f)	0.000359	0.000345	0.000331	0.000318	0.000305	0.000293
<i>d</i> (gpm)	0.003141	0.003015	0.002894	0.002779	0.002668	0.002561

⁴⁵¹ The Light Truck Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1, Equation 1-1.

⁴⁶⁷ The Passenger Car Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

⁴⁶⁸ The Light Truck Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

⁴⁶⁹ The Passenger Car Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

⁴⁷⁰ The Light Truck Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

7. On page 56269, Table III–18 is corrected to read as follows:

TABLE III–18—PASSENGER CAR CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC3LT5⁴⁷¹

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	69.02	71.16	73.36	75.63	77.97	80.38
<i>b</i> (mpg)	51.64	53.24	54.89	56.58	58.33	60.14
<i>c</i> (gpm per s.f)	0.000325	0.000315	0.000306	0.000297	0.000288	0.000279
<i>d</i> (gpm)	0.001160	0.001125	0.001092	0.001059	0.001027	0.000996

8. On page 56269, Table III–19 is corrected to read as follows:

TABLE III–19—LIGHT TRUCK CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC3LT5⁴⁷²

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	56.55	59.53	62.66	65.96	69.43	73.09
<i>b</i> (mpg)	34.00	35.79	37.67	39.65	41.74	43.94
<i>c</i> (gpm per s.f)	0.000355	0.000338	0.000321	0.000305	0.000290	0.000275
<i>d</i> (gpm)	0.003108	0.002953	0.002805	0.002665	0.002531	0.002405

9. On page 56270, Table III–21 is corrected to read as follows:

TABLE III–21—PASSENGER CAR CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC6LT8⁴⁷³

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	71.23	75.77	80.61	85.75	91.23	97.05
<i>b</i> (mpg)	53.29	56.69	60.31	64.16	68.26	72.61
<i>c</i> (gpm per s.f)	0.000315	0.000296	0.000278	0.000262	0.000246	0.000231
<i>d</i> (gpm)	0.001124	0.001057	0.000993	0.000934	0.000878	0.000825

10. On page 56270, Table III–22 is corrected to read as follows:

TABLE III–22—LIGHT TRUCK CAFE TARGET FUNCTION COEFFICIENTS FOR ALTERNATIVE PC6LT8⁴⁷⁴

	2027	2028	2029	2030	2031	2032
<i>a</i> (mpg)	58.40	63.48	69.00	74.99	81.52	88.60
<i>b</i> (mpg)	35.11	38.16	41.48	45.09	49.01	53.27
<i>c</i> (gpm per s.f)	0.000344	0.000317	0.000291	0.000268	0.000247	0.000227
<i>d</i> (gpm)	0.003010	0.002769	0.002548	0.002344	0.002156	0.001984

II. Proposed Regulatory Language Corrections

In proposed rule FR Doc. 2023–16515, beginning on page 56128 in the issue of August 17, 2023, make the following corrections, in the Regulatory Text section.

■ 1. On page 56385, column 1, in § 531.6, correct paragraph (b)(3) and paragraph (b)(4) introductory text to read as follows:

§ 531.6 [Corrected]

* * * * *

(b) * * *

(3) *Off-cycle technologies using 5-cycle testing.* Through MY 2026, a manufacturer may increase its fleet average fuel economy performance through the use of off-cycle technologies tested using the EPA's 5-cycle methodology in accordance with 40 CFR 86.1869–12(c). The fuel consumption improvement is determined in

accordance with 40 CFR 600.510–12(c)(3)(ii).

(4) *Off-cycle technologies using the alternative EPA-approved methodology.* Through MY 2026, a manufacturer may seek to increase its fuel economy performance through use of an off-cycle technology requiring an application request made to the EPA in accordance with 40 CFR 86.1869–12(d).

* * * * *

⁴⁷¹ The Passenger Car Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

⁴⁷² The Light Truck Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

⁴⁷³ The Passenger Car Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

⁴⁷⁴ The Light Truck Function Coefficients 'a', 'b', 'c', and 'd' are defined in Draft TSD Chapter 1.2.1.

■ 2. On page 56387, column 1, in § 533.6, correct paragraph (c)(4) and paragraph (c)(5) introductory text to read as follows:

§ 533.6 [Corrected]

* * * * *

(c) * * *

(4) *Off-cycle technologies using 5-cycle testing.* Through MY 2026, a manufacturer may increase its fleet average fuel economy performance through the use of off-cycle technologies tested using the EPA's 5-cycle methodology in accordance with 40 CFR 86.1869–12(c). The fuel consumption improvement is determined in accordance with 40 CFR 600.510–12(c)(3)(ii).

(5) *Off-cycle technologies using the alternative EPA-approved methodology.* Through MY 2026, a manufacturer may seek to increase its fuel economy performance through use of an off-cycle technology requiring an application request made to the EPA in accordance with 40 CFR 86.1869–12(d).

* * * * *

■ 3. On page 56388, column 3, in § 535.5, correct paragraph (a)(9) to read as follows:

§ 535.5 [Corrected]

(a) * * *

(9) *Advanced, innovative and off-cycle technologies.* For vehicles subject to Phase 1 standards, manufacturers may generate separate credit allowances for advanced and innovative technologies as specified in § 535.7(f)(1) and (2). For vehicles subject to Phase 2 standards, manufacturers may generate separate credits allowance for off-cycle technologies in accordance with § 535.7(f)(2). Separate credit allowances for advanced technology vehicles cannot be generated; instead, manufacturers may use the credit multipliers specified in § 535.7(f)(1)(ii) through model year 2027.

* * * * *

Issued on August 21, 2023, in Washington, DC, under authority delegated in 49 CFR 1.95.

Ann Carlson,
Acting Administrator.

[FR Doc. 2023–18310 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531, 533, 535, and 537

[NHTSA–2023–0022]

RIN 2127–AM55

Public Hearing for Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of public hearing.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) is announcing a virtual public hearing to be held September 28, 2023, on its proposal for the “Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035,” which was signed on July 28, 2023. This hearing also allows the public to provide oral comments regarding the Draft Environmental Impact Statement that accompanies the proposal. An additional session will be held on September 29, if necessary, to accommodate the number of people that sign up to testify.

DATES: NHTSA will hold a virtual public hearing on September 28, 2023. An additional session will be held on September 29, if necessary, to accommodate the number of people that sign up to testify. The hearing will convene at 9 a.m. Eastern time and will conclude when the last pre-registered speaker has testified but no later than 6 p.m. Eastern time. All hearing attendees, including those who do not intend to provide testimony, should preregister by September 22, 2023. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: The link to register will be available at <https://www.nhtsa.gov/cafe>. Additional information regarding the hearing appears below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: For questions regarding how to register to attend the hearing, please contact NHTSA's Office of Communications at NHTSA.Communication@dot.gov. For

any other questions about this notice, please contact Mark Totten, Office of Rulemaking, NHTSA, at (202)-209–3170.

SUPPLEMENTARY INFORMATION: NHTSA, on behalf of the DOT, is proposing new corporate average fuel economy (CAFE) standards for passenger cars and light trucks for MYs 2027–2032, and new fuel efficiency standards for heavy-duty pickup trucks and vans (HDPUVs) for MYs 2030–2035. This proposal responds to NHTSA's statutory obligation to set CAFE and HDPUV standards at the maximum feasible level that the agency determines vehicle manufacturers can achieve in each MY, in order to improve energy conservation. Specifically, NHTSA is proposing new fuel economy standards for passenger cars and light trucks and fuel efficiency standards for model years (MYs) 2027–31 that increase at a rate of 2 percent per year for passenger cars and 4 percent per year for light trucks, and new fuel efficiency standards for heavy-duty pickup trucks and vans (HDPUVs) for MYs 2030–2035 that increase at a rate of 10 percent per year. NHTSA is also setting forth proposed augural standards for MY 2032 passenger cars and light trucks, which would increase at 2 percent and 4 percent year over year, respectively, as compared to the prior year's standards. In addition, NHTSA is also proposing certain technical amendments to clarify and streamline our compliance regulations. The proposal was signed on July 28, 2023, and was published in the **Federal Register** on August 17, 2023. A notice of availability for the accompanying Draft Environmental Impact Statement (Draft EIS) was published in the **Federal Register** on August 04, 2023 (88 FR 51812). The Draft EIS is available on NHTSA's CAFE website, <https://www.nhtsa.gov/cafe>, and is also available in Docket ID No. NHTSA–2022–0075.

Participation in Virtual Public Hearing

NHTSA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please follow the instructions below. The last day to pre-register to speak at the hearing will be September 22, 2023.

- *To watch the hearing (without providing oral comments):* Click the link at <https://www.nhtsa.gov/cafe> and register. Indicate NO on the registration page that you do not wish to provide testimony. Within 24 hours of registering, you will be emailed your link to join.

- *To comment at the hearing:* Click the link at <https://www.nhtsa.gov/cafe> and register by September 22. Indicate YES on the registration page that you would like to provide comments. Within 24 hours of registering, you will be emailed your link to join. Additionally, you will receive an email on September 26 with your approximate time to testify, and additional information about how to turn on your audio and camera to comment. We recommend you join via a computer, but if you are unable to do so, an option to join via phone will also be provided in that email.

If you do not receive your confirmation email(s), or have further questions about this hearing, please email NHTSA.Communication@dot.gov. NHTSA is committed to providing equal access to this event for all participants. Closed captioning will be available. People with disabilities who need additional accommodations should send a request to NHTSA.Communication@dot.gov no later than September 22.

Each commenter will have 3 minutes to provide oral testimony. NHTSA may ask clarifying questions during the oral presentations but will not otherwise respond to the presentations at that

time. NHTSA recommends submitting the text of your oral comments as written comments to the rulemaking docket or to the Draft EIS docket, as appropriate. 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. If identical comments are submitted by the same commenter more than once to the docket, NHTSA does not consider those comments to carry more weight than if they had been submitted only once. If the oral testimony is specifically intended to reference the Draft EIS, please mention that in your opening remarks.

Please note that any updates made to any aspects of the hearing logistics, including any change to the date of the hearing or a potential additional session on September 29, 2023, will be posted online at the CAFE website, <https://www.nhtsa.gov/cafe>. While NHTSA expects the hearing to go forward as set forth above, please monitor our website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates. NHTSA does not intend to publish a

document in the **Federal Register** announcing updates. Finally, NHTSA will post a video of the hearing at <https://www.nhtsa.gov/cafe> and will make a transcript of the hearing available in the rule making docket as soon as practicable.

How can I get copies of the proposed action, the Draft Environmental Impact Statement, and other related information?

NHTSA has established a docket for the proposal under Docket ID No. NHTSA–2023–0022 and a separate docket for the Draft EIS at Docket ID No. NHTSA–2022–0075. Relevant documents and information can also be accessed at NHTSA’s CAFE website, at <https://www.nhtsa.gov/cafe>. Please refer to the notice of proposed rulemaking for detailed information on accessing information related to the proposal and the Draft EIS.

Issued on August 21, 2023, in Washington, DC, under authority delegated in 49 CFR 1.95.

Ann Carlson,

Acting Administrator.

[FR Doc. 2023–18309 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–59–P

Notices

Federal Register

Vol. 88, No. 164

Friday, August 25, 2023

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

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and 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 regarding this information collection received by September 25, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Food and Nutrition Service

Title: Operating Guidelines, Forms, Waivers, and Annual State Report on Verification of SNAP Participation.

OMB Control Number: 0584–0083.

Summary of Collection: Under section 16 of the Food and Nutrition Act of 2008 (the Act), 7 U.S.C. 2025, the Secretary is authorized to pay each State agency an amount equal to 50 percent of all administrative costs involved in each State agency's operation of the Supplemental Nutrition Assistance Program (SNAP). Under corresponding SNAP regulations at 7 CFR 272.2(c), the State agency is required to submit and maintain annually for FNS approval a (1) Budget Projection Statement (FNS–366A), which projects total costs for major areas of SNAP operations, and (2) a Program Activity Statement (FNS–366B), which provides a summary of SNAP operations during the preceding fiscal year both approved by OMB under the Food Processing Reporting Systems (FPRS). Additionally, under section 11(o) of the Act each State agency is required to develop and submit plans for the use of (3) automated data processing (ADP) and information retrieval systems to administer SNAP. As for (4) State Plan of Operation Updates, State agencies will submit the operations planning documents to the appropriate regional office for approval through the SNAP The Waiver Information Management System (WIMS) (5) the Federal Financial Reporting Form SF 425 (known as SF 425/FNS 778); (6) Other ADP Plan or Updates. Additionally, to improve operational efficiency and streamline the agency's information collection portfolio, FNS is merging the recordkeeping hours for the State Issuance and Participation Estimates (FNS–388) and Supplemental Nutrition Assistance Program Project Area Data Format (FNS–388A) into this information collection and will submit a discontinuation request for 0584–0081. We are not seeking reporting burden hours for FNS 388 or 388A.

Need and Use of the Information: FNS will collect information to estimate funding needs and also provide data on the number of applications processed, number of fair hearings, and fraud control activity. FNS uses the data to estimate funding needs and to monitor

State agency activity levels and performance. If the information were not collected it would disrupt budget planning and delay appropriation distributions and FNS would not be able to verify and ensure State compliance with statutory criteria. The FNS–388 and FNS–388A records State agencies are required to maintained by the same recordkeeping activities are essentially the same; three years. We are merging this information collection for operational efficiency.

Description of Respondents: State, local or Tribal government.

Number of Respondents: 164.

Frequency of Responses:

Recordkeeping; reporting: annually.

Total Burden Hours: 1,138.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–18340 Filed 8–24–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and 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 regarding this information collection received by September 25, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/

public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Brucellosis and Bovine tuberculosis: Importation of Cattle and Bison

OMB Control Number: 0579–0442.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease. The AHPA is contained in title X, subtitle E, sections 10401–18 of Public Law 107–171, May 13, 2002, the Farm Security and Rural Investment Act of 2002 [7 U.S.C. 8301 et. seq.]

Disease prevention is the most effective method for maintaining a healthy animal population and for enhancing the United States’ ability to compete in the world market of animal and animal product trade. Tuberculosis (TB) is a contagious disease of both animals and humans. Bovine TB, caused by *M. bovis*, can be transmitted from livestock to humans and other animals. Brucellosis is an infectious disease of animals and humans caused by the bacteria of the genus *Brucella*. The disease is characterized by abortions and impaired fertility in its principal animal hosts. Brucellosis is mainly a disease of cattle, bison, and swine; *Brucella abortus* is associated with the disease in cattle and bison. There is no economically feasible treatment for brucellosis in livestock.

Need and Use of the Information: APHIS uses the following information activities to prevent importation of cattle and bison infected with or exposed to TB and brucellosis: Request for Regional Classification; Application for Recognition of Regional Classification;

Request for Additional Information about a Region; Maintaining Classification and Reclassification; and Official Identification and Certification

Failure to collect this information would make it much more difficult for APHIS to prevent, detect, control, and eradicate TB and brucellosis from the United States. Outbreaks of the diseases would have severe economic consequences on the U.S. cattle industry.

Description of respondents: Business or other for-profit; Federal Government. *Number of Respondents:* 21.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 907.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–18338 Filed 8–24–23; 8:45 am]

BILLING CODE 3410–34–P

U.S. COMMITTEE ON THE MARINE TRANSPORTATION SYSTEM

[Docket No. DOT–OST–2023–0117]

Proposed National Guidance for Industry on Responding to Munitions and Explosives of Concern in U.S. Federal Waters

AGENCY: U.S. Committee on the Marine Transportation System.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces the availability of a draft guidance document, the National Guidance for Industry on Responding to Munitions and Explosives of Concern in U.S. Federal Waters. The U.S. Committee on the Marine Transportation System invites public comment on the draft guidance.

DATES: Submit comments on or before September 25, 2023.

ADDRESSES: The draft guidance can be viewed through the U.S. Committee on the Marine Transportation System’s website at <https://www.cmts.gov/topic-offshore-energy/>. You may submit comments, identified by docket number DOT–OST–2023–0117, using the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments received will be posted without change to <https://www.regulations.gov>, including any personal information you provide. Do not submit any information you consider to be private information,

privileged or confidential commercial or financial information, or if the disclosure of which is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Michael Heard Snow, Senior Policy Advisor, U.S. Committee on the Marine Transportation System, 1200 New Jersey Ave. SE, Washington, DC 20590–0001; telephone (202) 805–0570; email m.heardsnow@cmts.gov.

SUPPLEMENTARY INFORMATION:

Background

Until 1972, one of the primary mechanisms for the disposal of munitions and explosives of concern (MEC), including unexploded ordnance, discarded military munitions, and munitions constituents—all of which may pose explosive hazards—was to dispose of them at sea. This disposal, in addition to other mechanisms, has led to a significant buildup of MEC in Federal waters on the outer continental shelf (OCS) with a concentration along the eastern seaboard of the United States. As the demand for renewable energy continues to grow, offshore energy, with a focus on offshore wind, is rapidly increasing. The Biden-Harris Administration has set a goal of significantly increasing the nation’s offshore wind energy capacity to 30 gigawatts by 2030. However, many of the sites leased and targeted for development of these projects overlap with areas where MEC have settled over the decades. To answer questions on how to address the discovery of MEC through a whole-of-government process, the Bureau of Safety and Environmental Enforcement (BSEE) approached the U.S. Committee on the Marine Transportation System (CMTS), a Congressionally mandated, Cabinet-level interagency body, to convene Federal agencies to develop this guidance. This document is intended to help Federal agencies coordinate their statutory and regulatory authorities to approve, regulate, or permit the detonation, removal, or mitigation of MEC on the OCS.

The draft national guidance describes the process recommended to industry when responding to MEC discovered in Federal waters and on the OCS during the development of offshore energy installations. This includes procedures for industry to inform the government of MEC discoveries on the OCS, a process to safely develop a risk assessment, and MEC operational response plan. The draft guidance also outlines the interagency process for the government to respond to such discoveries and work with industry.

Comments Invited

The CMTS invites public comments on the draft guidance concerning the proposed process for addressing the discovery of munitions and explosives of concern on the U.S. outer continental shelf during offshore energy development. The CMTS will consider the public comments submitted during this comment period in issuing any final National Guidance.

Issued in Washington, DC.

Brian J. Tetreault,

Acting Director, U.S. Committee on the Marine Transportation System.

[FR Doc. 2023-18381 Filed 8-24-23; 8:45 am]

BILLING CODE 4910-9X-P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New York Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Notice of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the New York Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom. The purpose of the meeting is to discuss major themes and issues that have emerged from panel briefings I through VII on the New York child welfare system and its impact on Black children and families.

DATES: Friday, September 15, 2023, from 1:00 p.m.–3:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual):
<https://bit.ly/45CbWxh>.

Join by Phone (Audio Only): 1-833-435-1820 USA Toll Free; Webinar ID: 161 634 8673#.

FOR FURTHER INFORMATION CONTACT:

Mallory Trachtenberg, DFO, at mtrachtenberg@usccr.gov or 1-202-809-9618.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the

meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning is available by selecting “CC” in the meeting platform. To request additional accommodations, please email svillanueva@usccr.gov at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Mallory Trachtenberg at mtrachtenberg@usccr.gov. Persons who desire additional information may contact the Regional Programs Coordination Unit at 1-202-809-9618.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via www.facadatabase.gov under the Commission on Civil Rights, New York Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission’s website, <http://www.usccr.gov>, or may contact the Regional Programs Coordination Unit at svillanueva@usccr.gov.

Agenda

- I. Welcome and Roll Call
- II. Approval of Minutes
- III. Discussion
- IV. Public Comment
- V. Next Steps
- VI. Adjournment

Dated: August 21, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-18290 Filed 8-24-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of the Census

2030 Census Advisory Committee

AGENCY: Census Bureau, Department of Commerce.

ACTION: Notice of request for nominations.

SUMMARY: The Census Bureau is requesting nominations of members representing stakeholder organizations, groups, interests, and viewpoints to the

2030 Census Advisory Committee (Committee). The Census Bureau will consider nominations received in response to this notice, as well as from other sources. The **SUPPLEMENTARY INFORMATION** section of this notice provides committee and membership criteria.

DATES: Please submit nominations by September 30, 2023.

ADDRESSES: Please submit nominations to the 2030 Census Advisory Committee email address, Census.2030Advisory.Committee@census.gov (subject line “2030 Census Advisory Committee Nomination”).

FOR FURTHER INFORMATION CONTACT:

Shana J. Banks, Chief, Advisory Committee Branch, Office of Program, Performance and Stakeholder Integration (PPSI), Census Bureau, by telephone at 301-763-3815 or by email at Shana.J.Banks@census.gov. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Committee is established under agency authority pursuant to 15 U.S.C. 1512, and in accordance with the provisions of the Federal Advisory Committee Act, as amended, (FACA), 5 U.S.C. 1001 *et seq.* The following provides information about the committee, membership, and the nomination process.

Objectives and Duties

1. The Committee will review and provide feedback related to 2030 Census plans and execution to assist the Census Bureau to devise strategies to increase census awareness and participation, reduce barriers to response, and enhance the public’s trust and willingness to respond.

2. As part of this work, the Committee may consider, among other things, implications of enumeration strategies, including use of administrative and third-party data, how best to leverage partner and stakeholder support efforts throughout the decade, new technologies, social media and marketing, the role of tribal, state, and local governments, and the outreach and mobilization needs of historically undercounted populations.

3. The Committee may advise and provide recommendations on external factors and policies that may affect 2030 Census plans.

4. The Committee may advise the Census Bureau on communicating with the public to ensure maximum self-

response and participation by the public in the 2030 Census.

5. The Committee may devise and recommend strategies to increase census awareness and participation, and to motivate response to the 2030 Census.

6. The Committee may provide feedback and recommendations regarding proposed 2030 Census data products' content, timing, geographic specificity, and fitness for use.

7. The Committee may provide recommendations regarding 2030 Census employee recruitment strategies.

8. The Committee may consider the Census Bureau's outreach, communications, and partnership efforts, providing perspectives on community trends, challenges, and opportunities for the 2030 Census. This may include recommendations on how to capture broader community perspectives.

9. The Committee will provide insight, perspectives, and expertise through recommendations on planning and implementation of the 2030 Census to advise the Census Bureau in conducting an accurate decennial census. The Committee will provide the Director of the Census Bureau periodic updates on insights regarding various topics relating to preparation for the 2030 Census.

10. The committee will function solely as an advisory body and shall fully comply with the provisions of FACA.

Membership

1. The Committee will consist of up to approximately 30 members representing stakeholder organizations, groups, interests, and viewpoints. Members will be appointed by and serve at the discretion of the Director of the Census Bureau.

2. Members will be selected on a standardized basis, in accordance with applicable Department of Commerce guidance. Members will be selected from the public and private sectors and will have experience as well as expertise in census and survey matters, including but not limited to: historically undercounted populations; national, state, local, and tribal areas; redistricting including interactions with state officials and redistricting experts; international and national statistics; geospatial information; census involvement and needs of community-based organizations and academia; the business and technology sectors; and marketing and media sectors. Members serve as representatives of their respective group or viewpoint and are not Special Government Employees

(SGEs) as defined in title 18 of United States Code, section 202(a).

3. Persons seated on other Census Bureau stakeholder entities (*i.e.*, State Data Centers, Census Information Centers, Federal State Cooperative on Populations Estimates program, or other Census Bureau advisory committees, etc.) may not serve on the Committee.

4. The Director of the Census Bureau will appoint the Committee Chair and Vice Chair from among the membership to one-year terms. The Chair and Vice Chair may be appointed for additional one-year terms. Appointment as the Committee Chair and Vice Chair will not exceed membership term limitations. Upon completion of appointment as Committee Chair or Vice Chair, the member may fulfill any remaining membership term(s) at the discretion of the Director of the Census Bureau.

5. Members generally will serve an initial three-year term. All members will be reevaluated at the conclusion of their initial term with the prospect of renewal, pending advisory committee and 2030 Census needs. Active attendance and participation in meetings and activities (*i.e.*, conference calls, administrative matters, and assignments) will be factors considered when determining term renewal or membership continuance. Members may be appointed for a second, three-year term at the discretion of the Director of the Census Bureau.

6. The Committee aims to have a balanced representation among its members, considering such factors as geography, technical expertise, community involvement, and knowledge of census programs and/or activities. The diverse membership of the Committee assures perspectives and expertise reflecting the breadth of the Committee's responsibilities, and, where possible, the Census Bureau will also consider the ethnic, racial, and gender diversity and various abilities of the United States population.

7. Members shall not reference or otherwise utilize their membership on the Committee in connection with public statements made in their personal capacities without a disclaimer that the views expressed are their own and do not represent the views of the Committee, the Census Bureau, the Department of Commerce, or the U.S. Government.

Miscellaneous

1. Members of the Committee shall not be compensated for their participation, but will, upon request, be allowed travel and per diem expenses as authorized by 5 U.S.C. 5703.

2. The Census Bureau will convene at least two Committee meetings per year, budget and environmental conditions permitting.

Nomination Process

1. Nominations should satisfy the requirements described in the Membership section above.

2. Individuals, groups, and/or organizations may submit nominations on behalf of candidates. A summary of the candidate's qualifications (resume or curriculum vitae) *must* be included along with the nomination letter. Nominees must be able to actively participate in the tasks of the Advisory Committee, including, but not limited to regular meeting attendance, committee meeting discussant responsibilities, review of materials, as well as participation in conference calls, webinars, working groups, and/or special committee activities.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks diverse Advisory Committee membership.

Robert L. Santos, Director, Census Bureau, approved the publication of this Notice in the **Federal Register**.

Dated: August 21, 2023.

Shannon Wink,

*Program Analyst, Policy Coordination Office,
U.S. Census Bureau.*

[FR Doc. 2023-18341 Filed 8-24-23; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Census Bureau

2030 Census Advisory Committee

AGENCY: Census Bureau, Department of Commerce.

ACTION: Notice of committee establishment.

SUMMARY: The Census Bureau is publishing this notice to announce the establishment of the 2030 Census Advisory Committee (Committee). The Secretary of Commerce has determined that the Committee's establishment is necessary and in the public interest. The Committee will function solely as an advisory body and in compliance with provisions of the Federal Advisory Committee Act. Copies of the charter will be filed with the appropriate standing committees of the U.S. Congress and with the Library of Congress.

FOR FURTHER INFORMATION CONTACT: Shana Banks, Advisory Committee Branch Chief, Office of Program, Performance and Stakeholder

Integration, shana.j.banks@census.gov, Department of Commerce, Census Bureau telephone 301-763-3815. For TTY callers, please use the Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Committee will review and provide feedback related to 2030 Census plans and execution to assist the Census Bureau to devise strategies to increase census awareness and participation, reduce barriers to response, and enhance the public's trust and willingness to respond.

The Census Bureau will benefit from the insight, perspectives, and expertise of the Committee through recommendations on planning and implementation of the 2030 Census to advise the Census Bureau in conducting an accurate decennial census. The Committee will provide the Director of the Census Bureau periodic updates on insights regarding various topics relating to preparation for the 2030 Census.

Robert L. Santos, Director, Census Bureau, approved the publication of this Notice in the **Federal Register**.

Dated: August 21, 2023.

Shannon Wink,

*Program Analyst, Policy Coordination Office,
U.S. Census Bureau.*

[FR Doc. 2023-18339 Filed 8-24-23; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S-104-2023]

Approval of Subzone Status; LL Flooring Services, LLC, Sandston, Virginia

On June 23, 2023, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Virginia Port Authority, grantee of FTZ 20, requesting subzone status subject to the existing activation limit of FTZ 20, on behalf of LL Flooring Services, LLC, in Sandston, Virginia.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (88 FR 41884, June 28, 2023). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish Subzone 20G was approved on August 22, 2023, subject to the FTZ Act and the

Board's regulations, including section 400.13, and further subject to FTZ 20's 2,000-acre activation limit.

Dated: August 22, 2023.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2023-18388 Filed 8-24-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Ilya Balakaev,

Sharikopodshipnikovskaya 20-68,
Moscow, Russian Federation;
Radiotester OOO,
a/k/a Radiotester LLC,
Sharikopodshipnikovskaya 11,
Building 1,
Moscow, 115088, Russian Federation
and
Volgograd Prospect, House 2,
Moscow, 109316, Russian Federation;
Order Renewing Temporary Denial of
Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations (the "Regulations" or "EAR"),¹ I hereby grant the request of the Bureau of Industry and Security ("BIS"), U.S. Department of Commerce, through its Office of Export Enforcement ("OEE"), to renew the temporary denial order ("TDO") issued in this matter on February 24, 2023. I find that renewal of this order is necessary in the public interest to prevent an imminent violation of the Regulations.

I. Procedural History

On February 24, 2023, I signed an order denying the export privileges of

¹ The Regulations, currently codified at 15 CFR parts 730-774 (2020), originally issued pursuant to the Export Administration Act (50 U.S.C. 4601-4623 (Supp. III 2015) ("EAA"), which lapsed on August 21, 2001. The President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended by successive Presidential Notices, continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) ("IEEPA"). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801-4852 ("ECRA"). While section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders.

Ilya Balakaev and Radiotester OOO a/k/a Radiotester LLC (collectively, "the Respondents") for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations and was effective upon issuance.²

On July 31, 2023, BIS, through OEE, submitted a written request for renewal of the TDO that was issued on February 24, 2023. The written request was made more than 20 days before the TDO's scheduled expiration. A copy of the renewal request was sent to Respondents in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received.

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an "imminent violation" of the Regulations. 15 CFR 766.24(b)(1) and 766.24(d). "A violation may be 'imminent' either in time or degree of likelihood." 15 CFR 766.24(b)(3). BIS may show "either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations." *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge "is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent[.]" *Id.* A "[l]ack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation." *Id.*

Pursuant to Sections 766.23 and 766.24, TDO may also be made applicable to other persons if BIS has reason to believe that they are related to a respondent and that applying the order to them is necessary to prevent its evasion. 15 CFR 766.23(a)-(b) and 766.24(c). A "related person" is a person, either at the time of the TDO's issuance or thereafter, who is related to a respondent "by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business." 15 CFR 766.23(a). Related persons may be added to a TDO on an

² The TDO was published in the **Federal Register** on March 1, 2023 (88 FR 12912).

ex-parte basis in accordance with Section 766.23(b) of the Regulations. 15 CFR 766.23(b).

B. The TDO and BIS's Request for Renewal

The U.S. Commerce Department, through BIS, responded to the Russian Federation's ("Russia's") further invasion of Ukraine by implementing a sweeping series of stringent export controls that severely restrict Russia's access to technologies and other items that it needs to sustain its aggressive military capabilities. These controls primarily target Russia's defense, aerospace, and maritime sectors and are intended to cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage.

As of February 24, 2022, any item classified under any Export Classification Control Number ("ECCN") in Categories 3 through 9 of the Commerce Control List ("CCL") required a license to be exported or reexported to Russia. *See* 87 FR 12226 (Mar. 3, 2022). As of April 8, 2022, the license requirements for Russia were expanded to cover all items on the CCL. *See* 87 FR 22130 (Apr. 14, 2022). These rules were codified in Title 15 CFR 746.8, which state, "a license is required, excluding deemed exports and deemed reexports, to export, reexport, or transfer (in-country) to or within Russia or Belarus any item subject to the EAR and specified in any Export Control Classification Number ("ECCN") on the CCL."

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO and the evidence developed over the course of this investigation, which demonstrate the existence of an illicit procurement network conspiring to violate U.S. export control laws by unlawfully procuring and shipping controlled counterintelligence items to Russia and North Korea. As detailed in its July 31, 2023 request for renewal of the TDO, OEE's investigation, which remains ongoing, has revealed evidence that this illicit network and its reach remain ongoing. As a result, the renewal of this order is necessary.

1. The Basis for the Initial TDO

As detailed in the initial TDO issued on February 24, 2023, Balakaev engaged in conduct prohibited by the Regulations by unlawfully procuring and exporting from the United States electronic devices subject to the EAR to the Federal Security Service of the Russian Federation ("FSB"), a BIS-listed

entity located in the Russian Federation ("Russia"), and to the Democratic People's Republic of Korea ("North Korea" or "DPRK") without the required U.S. government authorization.

"Export" is defined in the EAR as an "actual shipment or transmission out of the United States, including the sending or taking of an item out of the United States, in any manner." 15 CFR 734.13(a)(1).³

The FSB is listed on the Commerce Department's Entity List⁴ with a policy of denial for all items subject to the EAR with certain exceptions for transactions authorized by the Department of the Treasury's Office of Foreign Assets Control ("OFAC") pursuant to General License No. 1B of March 2, 2021.⁵ As a result of this listing, no item subject to the Regulations may be exported, reexported, or transferred (in-country) to the FSB without prior authorization from BIS, and BIS will review any license applications for the FSB pursuant to a policy of denial.⁶ The FSB was originally listed on the Entity List on January 4, 2017,⁷ with a license review policy of presumption of denial for all items subject to the EAR.⁸ As such, as of January 4, 2017, a license was required to export, reexport, or transfer (in-country) all items subject to the EAR to the FSB.

As of January 26, 2007, a license is required for the export or reexport to North Korea of all items subject to the EAR other than food or medicine designated as EAR99.⁹ This rule was codified in Title 15 CFR 746.4, which states "consistent with United Nations Security Council Resolution 1718, a

³ "Item" means "commodities, software, and technology." 15 CFR 772.1. Further, "technology" may be in any tangible or intangible form, such as written or oral communications, blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering designs and specifications, computer-aided design files, manuals or documentation, electronic media or information revealed through visual inspection. *Id.*

⁴ The Entity List (supplement no. 4 to part 744 of the EAR) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States.

⁵ *See* 87 FR 34131 (Jun. 6, 2022). *See also* §§ 734.9(g), 746.8(a)(3), and 744.21(b) of the EAR.

⁶ *Id.*

⁷ *See* 82 FR 722 (Jan. 4, 2017). *See also* 82 FR 18219 (Apr. 18, 2017), 86 FR 37903 (Jul. 19, 2021), 87 FR 12240 (Mar. 3, 2022), and 87 FR 34136 (Jun. 6, 2022) for additional listings of FSB-related entities on the Entity List.

⁸ On March 2, 2021, the Department of State designated the FSB pursuant to Executive Order 13382 for its contributions to the proliferation of weapons of mass destruction. Thus, exports to the FSB were also prohibited under 15 CFR 744.8.

⁹ *See* 52 FR 3722 (Jan. 26, 2007).

license is required to export or reexport any item subject to the EAR (see part 734 of the EAR) to the Democratic People's Republic of Korea (North Korea), except food and medicines classified as EAR99 (definitions in part 772 of the EAR)."¹⁰

As referenced in the initial TDO, on February 21, 2023, Balakaev was indicted on multiple counts in the United States District Court for the Eastern District of New York. The charges included, but were not limited to, conspiring to violate U.S. export control laws in connection with the unlicensed export of electronic spectrum analyzers, signal generators, and gas detection equipment, among other items, to Balakaev's company Radiotester, located in Moscow, Russia, for ultimate end use by officials of the FSB and the DPRK. As described in the indictment and initial TDO, Radiotester is owned or controlled by Balakaev. The company is described on its website as "helping to quickly resolve issues of supply and repair of foreign-made measuring equipment" and as having "experience of working with large federal, city-forming, manufacturing enterprises".

As further detailed in the initial TDO, Balakaev heads an illicit procurement network consisting of an individual in the United States, referred to herein as "Individual 3", who would assist Balakaev in purchasing the electronic equipment, as well as two members of the FSB in Russia, referred to as FSB Co-Conspirator 1 and FSB Co-Conspirator 2, who worked in FSB Center 8's Military Unit 43753 and who would publish a request for proposal ("RFP") to repair a device on publicly available Russian websites (collectively, the "Balakaev Network"). In particular, Balakaev would purchase the electronic devices on the internet or directly through the United States-based

¹⁰ Additionally, BIS implemented broad based controls for items and activities subject to the EAR in support of U.S. national security and foreign policy. 50 U.S.C. 4811(l)-(2). These controls included restrictions on exports and reexports to the DPRK for United Nations ("UN") and anti-terrorism reasons. 15 CFR 746.4, 742.19. Consistent with ECRA and UN Security Council Resolutions, with limited exceptions, a license was required to export or reexport any item subject to the EAR to North Korea. 15 CFR 746.4. The DPRK was also subject to a UN Security Council arms embargo, and thus, militarily sensitive items were also restricted. 15 CFR 746.1(b)(2). Furthermore, the Secretary of State designated the DPRK a state sponsor of terrorism and implemented additional restrictions on it. 15 CFR 742.19(a)(2)-(3). For example, additional prohibitions applied to certain items destined for military, police, intelligence or other sensitive end users or if an item would make a significant contribution to the military potential of the DPRK. 15 CFR 742.19(a)(3); Supplement No. 2 to part 742.

manufacturers and ship them to Individual 3's home in Richmond, Virginia. Then, often traveling through the Eastern District of New York, Balakaev flew to the United States to pick up the devices and bring them back to Russia or had Individual 3 and others ship the electronic devices from the United States to Russia. On occasion, Balakaev directed others to travel with the electronic devices from the United States to Russia. Balakaev subsequently used parts from the electronic devices to repair FSB equipment or provided the equipment directly to a DPRK official. The electronic devices Balakaev purchased, repaired, and sold to the FSB and DPRK are subject to the EAR and are items commonly used as part of sensitive foreign counterintelligence and military operations, including the transmission of encrypted communications, the ability to scan a room to determine if it was bugged, and the detection of hazardous gases.

As stated in the initial TDO, OEE has presented evidence indicating that Balakaev and the other above-captioned parties were engaged in unlawfully purchasing and shipping dual-use items from U.S. manufacturers to the FSB and DPRK. These items included advanced electronics and sophisticated testing equipment, some of which can be used in sensitive foreign counterintelligence and military operations.

The February 2023 indictment charged Balakaev, owner of Radiotester, with conspiring to defraud, conspiring to violate IEEPA, conspiring to violate ECRA, and smuggling goods from the United States. The violations charged in the indictment cover conduct occurring between at least January 2017 through February 2022, and it alleges that Balakaev was not only aware of U.S. export control laws but also took active steps to evade U.S. export controls by illicitly procuring items subject to the EAR without the required BIS export licenses.

i. Unlicensed Exports of U.S.-Origin Electronic Devices to the FSB in Russia

As stated in the indictment and in the initial TDO issued on February 24, 2023, Balakaev and his co-conspirators in the Balakaev Network unlawfully sourced, purchased, shipped and transported spectrum analyzers and signal generators from vendors and manufacturers in the United States for the benefit of the FSB in Russia. Spectrum analyzers are generally used to detect the frequency of radio signals to identify surveillance devices. The spectrum analyzers that were exported by Balakaev are classified under ECCN 3A992.a and are controlled for Anti-

Terrorism (AT) reasons. Signal generators are generally used to securely transmit information, often as part of counterintelligence or other covert operations. The signal generators that were exported by Balakaev are classified under ECCN 3A992.a and are controlled for AT reasons. A license was required to export these items to the FSB in Russia.

As described in the indictment and in the initial TDO, because many of the spectrum analyzers and signal generators used by the FSB were manufactured in the United States, it is difficult for the FSB to obtain parts to repair these items. Pursuant to the scheme involving the Balakaev Network, Balakaev conspired with FSB Co-Conspirator 1 and FSB Co-Conspirator 2, who worked in FSB Center 8's Military Unit 43753. In particular, FSB Co-Conspirator 1 and FSB Co-Conspirator 2 would publish a RFP to repair certain devices on publicly available Russian websites. Balakaev, FSB Co-Conspirator 1, and FSB Co-Conspirator 2 then negotiated a contract price to repair the devices before Balakaev submitted a bid in response to the RFP. To ensure that Balakaev won the bid, FSB Co-Conspirator 1 and FSB Co-Conspirator 2 instructed Balakaev to submit two higher bids under fictitious company names, in addition to the agreed-upon bid through Balakaev's company, Radiotester.

Once the FSB accepted Radiotester's bid and the contract was signed, Balakaev traveled to FSB Center 8 in Russia to pick up the broken device(s). Either FSB Co-Conspirator 1 or FSB Co-Conspirator 2 would meet Balakaev outside the secure gate of FSB Center 8 to provide Balakaev with the broken device(s).

As described in the indictment and the initial TDO, Balakaev then sourced the necessary repair parts from the United States. Balakaev either purchased the devices over the internet or directly from the U.S. manufacturers, and had the devices shipped to Individual 3's home in Richmond, Virginia. Once purchased, Balakaev brought or shipped the devices to Russia where he then mined the devices for component parts to use to repair the FSB devices. After Balakaev repaired the devices, he returned to FSB Center 8, where he met with either FSB Co-Conspirator 1 or FSB Co-Conspirator 2 outside the FSB Center 8 gate to provide the repaired devices. The FSB Military Unit 43753 then wired payment to Balakaev's Sberbank account.

As also referenced in the indictment and initial TDO, in total, between

approximately 2017 and February 2022, Balakaev entered into approximately ten (10) contracts with FSB Military Unit 43753 to repair approximately forty (40) spectrum analyzers and signal generators. In furtherance of those contracts, Balakaev purchased approximately forty-three (43) devices in the United States. Balakaev frequently traveled between Russia and the United States during this time to obtain the devices, often through John F. Kennedy International Airport ("JFK Airport") in the Eastern District of New York. In furtherance of the scheme to unlawfully export controlled items from the United States to the FSB, on or about and between February 2017 and March 2021, Balakaev traveled from Russia to the United States approximately fourteen (14) times, typically staying in the United States anywhere from two (2) to fourteen (14) days on each trip. Included below is one example of the multiple unlawful exports to the FSB which are described in further detail in the indictment.

By way of example, on or about December 19, 2019, Balakaev, acting through Radiotester, entered into a contract with the FSB Military Unit 43753. As described in the indictment, the contract was to repair an Agilent HP 8562EC and two Agilent HP 8560EC spectrum analyzers. According to purchase records and shipment notifications, Balakaev purchased two Agilent HP 8560E spectrum analyzers that were delivered to Individual 3's home in Richmond, Virginia on or about January 14, 2020 and January 15, 2020. Approximately one month later, on or about February 10, 2020, Balakaev flew from Russia to the United States, where he stayed for approximately one week, in order to obtain the two Agilent HP 8560E spectrum analyzers that he purchased. While in the United States, on or about February 17, 2020, Balakaev emailed FSB Co-Conspirator 1 with the subject of the email "Repair Contracts 43753" and attached a PDF about spectrum analyzers. The following month, in or about March 2020, Balakaev purchased an Agilent HP 8562EC spectrum analyzer to fulfill the FSB contract. On or about March 21, 2020, the device was delivered to Individual 3's home in Richmond, Virginia.

In addition to the example described above, between approximately April 16, 2020 and March 6, 2021, Balakaev purchased approximately thirty (30) additional spectrum analyzers, spectrum analyzer parts, and other radio parts which were shipped to Individual 3's home in Richmond, Virginia. Balakaev also traveled to the United

States twice in 2021 to obtain the devices and fulfill his FSB contracts. Further, in approximately January 2022, Balakaev, through Radiotester, entered into a new contract with FSB Military Unit 43753 to repair six spectrum analyzers and signal generators, including the following make and models: HP8648D; Agilent HP 8562E; Agilent HP 8562EC; Rohde & Schwarz FS300; and Rohde & Schwarz SM300. In approximately February 2022, Balakaev picked up the devices from FSB Co-Conspirator 1 at FSB Center 8 to begin the process of procuring spectrum analyzers for use in repairing the devices.

ii. Unlicensed Exports of U.S.-Origin Gas Detection Equipment to the DPRK

Between approximately 2019 and 2020, Balakaev conspired with DPRK Government Official 1, the First Secretary of the Embassy of the DPRK to the Russian Federation, to provide the DPRK with U.S.-origin technology that can detect hazardous gases, in violation of United States laws.

As described in the indictment and in the initial TDO, in approximately 2019, DPRK Government Official 1 contacted Balakaev to discuss business they could engage in together. DPRK Government Official 1 contacted Balakaev specifically due to connections that Balakaev had made while working at the Russian Ministry of Culture and in his travel to North Korea. Balakaev subsequently met DPRK Government Official 1 multiple times at the North Korean embassy in Moscow, Russia. On one of those occasions, DPRK Government Official 1 asked Balakaev to purchase an Altair 4X gas detector for the DPRK. The Altair 4X gas detector is a device manufactured by a company in the United States that can be used to detect deadly gases such as combustible gases, oxygen-deficient atmospheres, and toxic gases. The Altair 4X gas detector is subject to the EAR and designated as EAR99.¹¹

On approximately December 28, 2019, Balakaev purchased the Altair 4X gas detector on the internet in the United States and had it shipped to Individual 3's home in Richmond, Virginia. On January 2, 2020, the shipment arrived at Individual 3's home. Approximately two months later, on or about February 9, 2020, DPRK Government Official 1 sent Balakaev a photograph of a broken CD labeled "Altair 4XR Multigas Detector." Balakaev responded, in sum and substance, that he would send a

link for the gas detector software. As further described in the indictment and initial TDO, on or about February 10, 2020, Balakaev traveled from Russia to the United States to obtain the gas detector that was previously shipped to Individual 3's home. Approximately one week later, on or about February 17, 2020, Balakaev returned to Russia with the gas detector.

As the indictment and initial TDO further demonstrate, Balakaev was aware of the applicable U.S. export control laws which prohibited him from purchasing the electronic devices in the United States for ultimate end use by the FSB and DPRK. As described in the indictment, on or about November 5, 2019, Individual 3 emailed Balakaev a hyperlink to a BIS document titled "Don't Let This Happen To You!: Actual Investigations of Export Control and Antiboycott Violations." In the email, Individual 3 wrote to Balakaev to "Take a look just in case." The BIS document provided "an introduction to the consequences of violating U.S. export control law." In addition to explaining U.S. export control laws, the document noted specific examples of individuals who violated U.S. sanctions regulations by exporting items to Russia without a BIS license. Balakaev subsequently downloaded the document and saved the document to his computer.

2. Basis for Renewal of TDO

i. Recent Procurement Attempts

As noted in OEE's request for renewal, OEE's investigation, which remains ongoing, has identified evidence of multiple transactions involving Balakaev and the Balakaev Network dating back to 2017. As described in the indictment, Balakaev has demonstrated a pattern of conduct involving the illicit procurement and unauthorized exports of EAR-controlled items for end use by the FSB and DPRK. Further, on October 18, 2022, Balakaev made statements to law enforcement that he intended to continue to procure EAR-controlled items through other means and is still obtaining contracts through the FSB.

In addition, Balakaev informed agents that he had fulfilled FSB contracts he had obtained in January 2022 for the repair of six devices, and that he was currently negotiating with FSB Co-Conspirators for new contracts in January or February 2023. According to Balakaev, the new contracts were not public yet and the FSB Co-Conspirators would advise Balakaev to review the contracts. Accordingly, OEE has reason to believe that Balakaev and the other above-captioned parties continue to

engage in unlawfully purchasing and shipping dual-use items from U.S. manufacturers to the FSB and DPRK. These items include advanced electronics and sophisticated testing equipment, some of which can be used in sensitive foreign counterintelligence and military operations.

ii. Risk of Continued Evasion

Since the issuance of the TDO on February 24, 2023, an arrest warrant has been issued for Ilya Balakaev. Ilya Balakaev is presently a fugitive from U.S. law enforcement and resides in the Russian Federation. Because he has not yet been apprehended, OEE has reason to believe that his illicit procurement efforts will remain ongoing, given the length and nature of the conduct identified to date. Moreover, because Balakaev is familiar with methods of concealment, he is likely to use increasingly sophisticated methods to avoid detection by law enforcement, absent the renewal of the TDO.

III. Findings

I find that the evidence presented by BIS demonstrates that a violation of the Regulations by the above-captioned parties is imminent in both time and degree of likelihood. As such, a TDO is needed to give notice to persons and companies in the United States and abroad that they should cease dealing with Ilya Balakaev and Radiotester OOO a/k/a Radiotester LLC in export or reexport transactions involving items subject to the EAR. Such a TDO is consistent with the public interest to preclude future violations of the Regulations given the deliberate, covert, and determined nature of the misconduct and clear disregard for complying with U.S. export control laws.

This Order is being issued on an *ex parte* basis without a hearing based upon BIS's showing of an imminent violation in accordance with Section 766.24 and 766.23(b) of the Regulations.

It Is Therefore Ordered:

First, that ILYA BALAKAEV, with an address at Sharikopodshipnikovskaya 20–68 Moscow, Russian Federation; RADIOTESTER OOO A/K/A RADIOTESTER LLC, with an address at Sharikopodshipnikovskaya 11, Building 1, Moscow, 115088, Russian Federation, and Volgograd Prospect, House 2, Moscow, 109316, Russian Federation; and when acting for or on their behalf, any successors or assigns, agents, or employees (each a "Denied Person" and collectively the "Denied Persons") may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology

¹¹ The Altair 4X gas detector would not fall within the exception set forth in § 746.4 as it is not EAR99 food or medicine.

(hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to Ilya Balakaev and Radiotester OOO a/k/a Radiotester

LLC by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

In accordance with the provisions of section 766.24(e) of the EAR, Ilya Balakaev and Radiotester OOO a/k/a Radiotester LLC may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. Respondents Ilya Balakaev and Radiotester OOO a/k/a Radiotester LLC may oppose a request to renew this Order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be served on each denied person and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

Matthew S. Axelrod,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023–18311 Filed 8–24–23; 8:45 am]

BILLING CODE 3510-DT-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–909]

Certain Steel Nails From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that Shanghai Yueda Nails Co., Ltd., a.k.a. Shanghai Yueda Nails Industry Co., Ltd. (Shanghai Yueda), an exporter of certain steel nails from the People’s Republic of China (China), sold subject merchandise in the United States at prices below normal value (NV) during the period of review (POR) August 1, 2021, through July 31, 2022. Interested parties are invited to comment on these preliminary results.

DATES: Applicable August 25, 2023.

FOR FURTHER INFORMATION CONTACT: Bob Palmer or Bill Horn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–9068 or (202) 482–4868, respectively.

SUPPLEMENTARY INFORMATION:

Background

This administrative review is being conducted in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this administrative review on October 11, 2022.¹ On March 28, 2023, Commerce extended the preliminary results deadline until August 18, 2023.²

Scope of the Order³

The products covered by the *Order* are nails from China. A full description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.⁴

Preliminary Determination of No Shipments

Based on our analysis of U.S. Customs and Border Protection (CBP) information, and the no shipment certifications submitted by eight companies,⁵ Commerce preliminarily determines that these companies had no shipments of subject merchandise during the POR.

Consistent with our practice in non-market economy (NME) cases, we are not rescinding this review but instead intend to complete the review with respect to these eight companies for which we have preliminarily found no shipments and issue appropriate

¹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 FR 61278 (October 11, 2022).

² See Memorandum, “Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,” dated March 29, 2023.

³ See *Notice of Antidumping Duty Order: Certain Steel Nails from the People’s Republic of China*, 73 FR 44961 (August 1, 2008) (*Order*).

⁴ For a complete description of the scope of the *Order*, see Memorandum, “Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Certain Steel Nails from the People’s Republic of China; 2021–2022,” dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

⁵ The companies that we preliminarily determine had no shipments during the POR are: (1) Hebei Minmetals Co., Ltd.; (2) Nanjing Caiqing Hardware Co., Ltd.; (3) Nanjing Yuechang Hardware Co., Ltd.; (4) Shandong Qingyun Hongyi Hardware Products Co., Ltd.; (5) Shanxi Hairui Trade Co., Ltd.; (6) Suntec Industries Co., Ltd.; (7) Tianjin Jinchi Metal Products Co., Ltd.; and (8) Xi’an Metals & Minerals Import & Export Co., Ltd.

instructions to CBP based on the final results of the review.⁶

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. We calculated export prices in accordance with section 772 of the Act. Because China is an NME country within the meaning of section 771(18) of the Act, NV has been calculated in accordance with section 773(c) of the Act.

For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is included as an Appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum is available at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Verification

As provided in sections 782(i)(3)(A)–(B) of the Act, we intend to verify the information upon which we will rely in determining our final results of review with respect to the mandatory respondent, Shanghai Yueda.

Preliminary Results of the Review

Commerce preliminarily finds that two companies for which a review was requested, Dezhou Hualude Hardware Products Co., Ltd. and S-Mart (Tianjin) Technology Development Co., Ltd., did not establish eligibility for a separate rate because they failed to provide either a separate rate application, separate rate certification, or respond to section A of Commerce's NME questionnaire. As such, we preliminarily determine that these two companies are part of the China-wide entity.⁷

⁶ See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694, 65694–95 (October 24, 2011) (NME Practice).

⁷ Because no interested party requested a review of the China-wide entity and Commerce no longer considers the China-wide entity as an exporter conditionally subject to administrative reviews, we did not conduct a review of the China-wide entity. Thus, the rate (*i.e.*, 118.04 percent) for the China-wide entity is not subject to change as a result of this review. See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the*

As a result of our analysis of the information on the record, Commerce preliminarily determines the following estimated weighted-average dumping margin exists for the POR:

Exporter	Weighted-average dumping margin (percent <i>ad valorem</i>)
Shanghai Yueda Nails Co., Ltd., a.k.a. Shanghai Yueda Nails Industry Co., Ltd	20.49

Disclosure and Public Comment

Commerce intends to disclose the calculations performed for these preliminary results to the parties no later than five days after the date of publication of this notice in accordance with 19 CFR 351.224(b).

Because, as noted above, Commerce intends to verify the information upon which it will rely in making its final determination, interested parties may submit written comments in the form of case briefs within seven days after the issuance of the verification report and rebuttal comments in the form of rebuttal briefs within seven days after the time limit for filing case briefs.⁸ Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the case briefs are filed.⁹

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of 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 whether any of those individuals is a foreign national; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the responsive case and rebuttal briefs.¹⁰ If a request for a

hearing is made, Commerce intends to hold the hearing at a date and time to be determined.¹¹ Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

All submissions to Commerce must be filed electronically using ACCESS¹² and must also be served on interested parties.¹³ An electronically filed document must be received successfully in its entirety by ACCESS, by 5 p.m. Eastern Time (ET) on the date that the document is due. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.¹⁴

Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of the date of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act, unless this deadline is extended.

Assessment Rates

Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.¹⁵ Commerce intends to issue assessment instructions to CBP 35 days after the publication date of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

If Shanghai Yueda's *ad valorem* weighted-average dumping margin is not zero or *de minimis* (*i.e.*, less than 0.50 percent) in the final results of this review, Commerce will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total quantity of those sales, in accordance with 19 CFR 351.212(b)(1).¹⁶ Commerce will also calculate estimated *ad valorem* importer-specific assessment rates with which to assess whether the per-unit

¹¹ See 19 CFR 351.310(d).

¹² See 19 CFR 351.303.

¹³ See 19 CFR 351.303(f).

¹⁴ See *Temporary Rule*.

¹⁵ See 19 CFR 351.212(b)(1).

¹⁶ In these preliminary results, Commerce applied the assessment rate calculation method 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).

Nonmarket Economy Entity in NME Antidumping Duty Proceedings, 78 FR 65963, 65969–70 (November 4, 2013).

⁸ See 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1); see also 19 CFR 351.303 (for general filing requirements).

⁹ See 19 CFR 351.309(d); *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19; Extension of Effective Period*, 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

¹⁰ See 19 CFR 351.310(c).

assessment rate is *de minimis*.¹⁷ We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate calculated in the final results of this review is not zero or *de minimis*. Where Shanghai Yueda's *ad valorem* weighted-average dumping margin is zero or *de minimis*, or an importer-specific *ad valorem* assessment rate is zero or *de minimis*,¹⁸ we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the final results, if we continue to treat the two companies, identified above, as part of the China-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 118.04 percent to all entries of subject merchandise during the POR which was exported by those companies.

For entries that were not reported in the U.S. sales data submitted by Shanghai Yueda, Commerce will instruct CBP to liquidate such entries at the rate for the China-wide entity.¹⁹ Additionally, if Commerce 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 cash deposit rate) will be liquidated at the rate for the China-wide entity.²⁰

In accordance with section 751(a)(2)(C) of the Act, 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 antidumping duties, as applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for Shanghai Yueda, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except that if the *ad valorem* rate is *de minimis*, then the

cash deposit rate will be zero); (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the existing exporter-specific cash deposit rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity; and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. 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)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213, and 19 CFR 351.221(b)(4).

Dated: August 18, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Preliminary Determination of No Shipments
- V. Discussion of the Methodology
- VI. Recommendation

[FR Doc. 2023–18314 Filed 8–24–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–914]

Light-Walled Rectangular Pipe and Tube From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) continues to find that Hangzhou Ailong Metal Product Co., Ltd. (Ailong), the sole company subject to the administrative review of the antidumping duty order on light-walled rectangular pipe and tube from the People's Republic of China (China) covering the period of review (POR) August 1, 2021, through July 31, 2022, is not eligible for a separate rate and, thus, is part of the China-wide entity.

DATES: Applicable August 25, 2023.

FOR FURTHER INFORMATION CONTACT: Stephen Bailey, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0193.

SUPPLEMENTARY INFORMATION:

Background

On May 2, 2023, Commerce published the preliminary results for this administrative review.¹ We invited interested parties to comment on the *Preliminary Results*. No interested parties submitted comments. Accordingly, Commerce has made no changes to the *Preliminary Results*. Because Commerce received no comments on the *Preliminary Results*, we have not modified our analysis and no decision memorandum accompanies this **Federal Register** notice. We are adopting the *Preliminary Results* as the final results of this review. Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order²

The merchandise subject to this *Order* is certain welded carbon quality light-

¹⁷ For calculated (estimated) *ad valorem* importer-specific assessment rates used in determining whether the per-unit assessment rate is *de minimis*, see Memorandum, "Preliminary Results Margin Calculation for Shanghai Yueda Nails Co., Ltd.," dated concurrently with this notice, and accompanying Margin Calculation Program Logs and Outputs.

¹⁸ See 19 CFR 351.106(c)(2).

¹⁹ See *NME Practice* for a full discussion.

²⁰ *Id.*

¹ See *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2021–2022*, 88 FR 27444 (May 2, 2023) (*Preliminary Results*).

² See *Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the*

walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm. The term carbon-quality steel includes both carbon steel and alloy steel which contains only small amounts of alloying elements. Specifically, the term carbon-quality includes products in which none of the elements listed below exceeds the quantity by weight respectively indicated: 1.80 percent of manganese, or 2.25 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.15 percent vanadium, or 0.15 percent of zirconium. The description of carbon-quality is intended to identify carbon-quality products within the scope. The welded carbon-quality rectangular pipe and tube subject to this *Order* is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and CBP's customs purposes, our written description of the scope of the *Order* is dispositive.

Final Results of Administrative Review

As noted above, we received no comments on, and made no changes to, the *Preliminary Results*. We continue to find that the sole mandatory respondent, Ailong, is not eligible for a separate rate, and, thus, is part of the China-wide entity. In this administrative review, no party requested a review of the China-wide entity, and Commerce did not self-initiate a review of the China-wide entity. Because no review of the China-wide entity is being conducted, the China-wide entity rate is not subject to change as a result of this review. The rate previously established for the China-wide entity is 255.07 percent.³

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess,

Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value, 73 FR 45403 (August 5, 2008) (*Order*).

³ See *Order*, 73 FR 45403; see also *Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 77 FR 52683 (August 30, 2012).

antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. We intend to instruct CBP to apply an *ad valorem* assessment rate of 255.07 percent (*i.e.*, the China-wide entity rate), to all entries of subject merchandise during the POR which were exported by Ailong. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) for Ailong, that has not been found to be entitled to a separate rate, the cash deposit rate will be that for the China-wide entity; (2) for previously investigated or reviewed Chinese and non-Chinese exporters that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found eligible for a separate rate, the cash deposit rate will be that for the China-wide entity; and (4) for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification of Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order

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

Notification to Interested Parties

Commerce is issuing and publishing the final results of this review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: August 21, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023-18385 Filed 8-24-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-583-856]

Corrosion-Resistant Steel Products From Taiwan: Notice of Third Amended Final Determination of Sales at Less Than Fair Value Pursuant to Court Decision and Partial Exclusion From Antidumping Duty Order

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

SUMMARY: On June 23, 2023, the U.S. Court of International Trade (CIT) sustained the U.S. Department of Commerce's (Commerce) second remand redetermination concerning the antidumping duty investigation of certain corrosion-resistant steel products (CORE) from Taiwan, which: (1) reinstated the use of an adverse inference in the calculation of respondent Prosperity Tieh Enterprise Co., Ltd.'s (Prosperity) reporting of yield strength for CORE production, and (2) reversed Commerce's determination from the investigation to collapse mandatory respondent Prosperity with the other mandatory respondent, the Yieh Phui Enterprise Co., Ltd. (Yieh Phui) and Synn Industrial Co., Ltd. (Synn) single entity (collectively, Yieh Phui/Synn). Accordingly, Commerce is issuing a third amended final determination for the less-than-fair-value (LTFV) investigation of CORE

from Taiwan. The determination to not collapse Prosperity with the Yieh Phui/Synn entity results in a negative amended final determination of sales at LTFV for Yieh Phui/Synn and, thus, excludes Yieh Phui/Synn from the antidumping duty order.

DATES: Applicable July 3, 2023.

FOR FURTHER INFORMATION CONTACT:

Brendan Quinn, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-5848.

SUPPLEMENTARY INFORMATION:

Background

The litigation in this case relates to Commerce's final determination in the LTFV investigation of CORE from Taiwan, which was later amended. In the *Preliminary Determination*, Commerce determined that Yieh Phui and Synn comprised a single entity, and no party challenged this determination in its case brief. Thus, Commerce continued to find Yieh Phui and Synn to be a single entity in the *Final Determination*.¹ In the *Final Determination*, Commerce further determined that Prosperity was part of the Synn single entity.² With regard to Prosperity and Synn, Commerce found that Prosperity was affiliated with Synn, and that it should be treated as a part of the Synn single entity. As a result, Commerce concluded that “[s]ince Prosperity Tieh is collapsed with {Synn}, and Yieh Phui is collapsed with {Synn}, {as a result of} the potential for manipulation of price and production among the three companies comprising the two collapsed entities, we find that Prosperity Tieh/{Synn} and Yieh Phui/{Synn} should be collapsed as a single

entity for purposes of the final determination in this investigation.”³

Also, in the *Final Determination*, Commerce determined that Prosperity misreported the yield strength of certain of its sales of CORE, which resulted in Commerce's determination that Prosperity failed to cooperate to the best of its ability.⁴ To determine the costs of the sales found to have been misclassified by Prosperity, Commerce resorted to partial adverse facts available pursuant to sections 776(a)(2)(B) and (D) and 776(b) of the Tariff Act of 1930, as amended (the Act).⁵

Mandatory respondents, Prosperity and Yieh Phui, each a Taiwanese producer and exporter of CORE, challenged aspects of Commerce's final affirmative LTFV determination before the CIT, including Commerce's single entity determination with respect to Prosperity and the Yieh Phui/Synn entity and Commerce's use of facts otherwise available with an adverse inference in response to Prosperity's reporting of yield strength. In *Prosperity I*, the CIT ordered Commerce to: (1) reconsider its decision to collapse Prosperity with the Yieh Phui/Synn entity; and (2) “correct the errors resulting from {Commerce's} unlawful decision to use the facts otherwise available and an adverse inference pertaining to the yield strength classification and coding of Prosperity's home market and U.S. market sales.”⁶ In its *First Redetermination Results*, Commerce: (1) reconsidered the collapsing determination in accordance with the CIT's opinion, but continued to treat Prosperity, Yieh Phui, and Synn as a single-entity, consistent with 19 CFR 351.401(f); and (2) under respectful protest, revised the Yieh Phui/Prosperity/Synn entity's weighted-average dumping margin by using Prosperity's reported yield strength data rather than facts otherwise available with an adverse inference.⁷ In *Prosperity II*, the CIT sustained Commerce's *First Redetermination Results*.⁸ On February 26, 2019,

Commerce published the second amended final determination and notification of final judgment that is not in harmony with Commerce's amended final determination of the antidumping investigation.⁹

In *Prosperity III*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) vacated the CIT's judgment on the collapsing issue in *Prosperity II* by concluding that “Commerce acted contrary to law when it collapsed Prosperity, Yieh {Phui}, and Synn without considering the {19 CFR} 351.401(f) factors as between the relationships of Prosperity and Yieh {Phui} or between Prosperity and Yieh {Phui}/Synn . . . Commerce must consider the ‘totality of circumstances’ between all entities when it evaluates whether, for purposes of collapsing entities, there is significant potential for manipulation of price or production to circumvent antidumping duties.”¹⁰ Regarding Prosperity's yield strength, the Federal Circuit held that the CIT “erred when it reversed Commerce's finding that Prosperity misreported yield strength,” and that “[s]ubstantial evidence also supports Commerce's finding that Prosperity failed to provide yield strength information based on the ASTM industry standard.”¹¹

The Federal Circuit remanded to the CIT for further proceedings consistent with its opinion, and on September 1, 2021, the CIT issued its remand order, ordering Commerce to reach a new determination on whether collapsing is appropriate, reinstate the use of facts available with an adverse inference with respect to Prosperity's reporting of yield strength which Commerce used in its final and amended LTFV determinations, and redetermine margins, as appropriate, consistent with *Prosperity III*.¹² On February 14, 2022, Commerce issued the second remand redetermination, in which it reversed its determination to collapse Prosperity with the Yieh Phui/Synn single-entity based on the lack of record evidence to support a collapsing determination as to Prosperity and Yieh Phui and reinstated its use of AFA as to Prosperity's

¹ See *Certain Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value*, 81 FR 72 (January 4, 2016), and accompanying Preliminary Decision Memorandum (PDM) at 4; see also *Certain Corrosion-Resistant Steel Products from Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35313, 35314 (June 2, 2016) (*Final Determination*), and accompanying Issues and Decision Memorandum (IDM); and Memorandum, “Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from Taiwan: Final Affiliation and Collapsing Memorandum,” dated May 24, 2016 (*Final Collapsing Memo*).

² See *Certain Corrosion Resistant Steel Products (CORE) from India, Italy, China, Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 FR 48390 (July 26, 2016) (*Amended Final Determination and Order*). Although the *Amended Final Determination* changed the weighted-average dumping margins, it did not change the analysis from the *Final Determination*.

³ See *Final Affiliation and Collapsing Memorandum*, at 9.

⁴ See *Final Determination*, 81 FR 35314, and accompanying IDM at Comment 1.

⁵ *Id.*

⁶ See *Prosperity Tieh Enter. Co. v. United States*, 284 F. Supp. 3d 1364, 1382 (CIT 2018) (*Prosperity I*).

⁷ See *Final Results of Redetermination Pursuant to Court Remand, Prosperity Tieh Enterprise Co., Ltd. et al. v. United States*, Consol. Court No. 19–00138, Slip Op 18–5 (CIT 2018), dated May 23, 2018 (*First Redetermination Results*).

⁸ See *Prosperity Tieh Enter. Co. v. United States*, 358 F. Supp. 3d 1363, 1370 (CIT 2018) (*Prosperity II*).

⁹ See *Corrosion-Resistant Steel Products from Taiwan: Notice of Court Decision Not in Harmony With Final Determination of Antidumping Duty Investigation and Notice of Amended Final Determination of Investigation*, 84 FR 6129 (February 26, 2019) (*Second Amended Final Determination and Timken Notice*).

¹⁰ See *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320, 1326 (Fed. Cir. 2020) (*Prosperity III*); Federal Circuit Mandate in Appeal #19–1400 (September 8, 2020), ECF. No. 132; see also *Prosperity Tieh Enter. Co. v. United States*, 532 F. Supp. 3d 1401 (CIT 2021) (*Prosperity IV*).

¹¹ See *Prosperity III*, 965 F.3d at 1328.

¹² See *Prosperity IV*, 532 F. Supp. 3d at 1401.

reporting of yield strength for CORE production.¹³ On June 23, 2023, the CIT issued its final judgment to sustain the *Second Redetermination Results* concerning the underlying LTFV investigation of CORE from Taiwan.¹⁴

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually examined shall be equal to the weighted average of the estimated weighted-average dumping margins

established for exporters and producers individually investigated excluding rates that are zero, *de minimis*, or determined entirely under section 776 of the Act. Prosperity is the only respondent for which Commerce calculated an estimated weighted-average dumping margin that is not zero, *de minimis*, or based entirely on facts otherwise available. Therefore, for purposes of determining the “all-others” rate, and pursuant to section 735(c)(5)(A) of the Act, we are using the estimated weighted-average dumping

margin calculated for Prosperity, as referenced in the “Third Amended Final Determination” section below.

Third Amended Final Determination

Because there is now a final court decision, Commerce is amending the *Final Determination, Amended Final Determination and Order*, and *Second Amended Final Determination and Timken Notice*. The revised, amended weighted-average dumping margins for the period April 1, 2014, through March 31, 2015, are as follows:

Producer or exporter	Weighted-average dumping margin (percent)
Prosperity Tieh Enterprise Co., Ltd	11.04
Yieh Phui Enterprise Co., Ltd., and Synn Industrial Co., Ltd	* 1.20
All Others	11.04

* *De minimis*.

Partial Exclusion From Antidumping Duty Order

Pursuant to section 735(a)(4) of the Act, Commerce “shall disregard any weighted average dumping margin that is *de minimis* as defined in section 733(b)(3) of the Act.” Furthermore, and pursuant to section 735(c)(2) of the Act, “the investigation shall be terminated upon publication of that negative determination,” and Commerce shall “terminate the suspension of liquidation” and “release any bond or other security, and refund any cash deposit.” As a result of this amended final determination, in which Commerce has calculated a *de minimis* estimated weighted-average dumping margin of 1.20 percent for Yieh Phui/Synn, Commerce is hereby excluding merchandise produced and exported by Yieh Phui/Synn from the *Order*. Accordingly, if the CIT’s ruling is not appealed, or if appealed and upheld, Commerce will direct U.S. Customs and Border Protection (CBP) to refund cash deposits pertaining to any suspended entries produced and exported by Yieh Phui/Synn.

Commerce applies the exclusion from the *Order* to the producer/exporter combination that was examined in the investigation. Entries of subject merchandise in any other producer/exporter combination, *e.g.*, merchandise produced by a third party and exported by Yieh Phui or Synn, or produced by

Yieh Phui or Synn and exported by a third party, are subject to the cash deposit requirements at the all-others rate. We note, however, pursuant to *Timken*, the suspension of liquidation must continue during the pendency of the appeals process.¹⁵ Accordingly, we will instruct CBP to continue to suspend liquidation of all unliquidated Yieh Phui/Synn entries referenced above until appropriate liquidation instructions are sent. As of the date of the publication of this notice in the **Federal Register**, a cash deposit rate of 0.00 percent will be the applicable cash deposit rate for Yieh Phui/Synn entries referenced above.

Lastly, as a result of the exclusion of Yieh Phui/Synn from the *Order*, Commerce is: (1) discontinuing the ongoing administrative review of the *Order* covering the 7/1/2021 through 6/30/2022 period of review, in part, with respect to Yieh Phui and Synn; and (2) will not initiate any new administrative reviews of Yieh Phui’s or Synn’s entries pursuant to the *Order*.

Cash Deposit Requirements

Since the *Final Determination*, Commerce has established a new cash deposit rate for Prosperity.¹⁶ Therefore, this amended final determination has no effect on subsequent cash deposit rates determined for Prosperity. For all-other producers and/or exporters, except for companies that received their own rates

in subsequent administrative reviews, Commerce will issue revised cash deposit instructions to CBP, adjusting the cash deposit rate for all-other producers and/or exporters to 11.04 percent, effective as of the date of this publication of this notice.

Liquidation of Suspended Entries

At this time, Commerce remains enjoined by Court orders from liquidating entries that were produced and exported by: (1) Prosperity and imported by Prosperity Tieh USA; that were subject of the United States Department of Commerce’s final results in *Certain Corrosion-Resistant Steel Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 85 FR 16613 (Dep’t Commerce March 24, 2020); and that were entered, or withdrawn from warehouse, during the period 07/01/2017 through 6/30/2018 (*see* CBP message number 0101402, dated April 10, 2020); (2) Prosperity Tieh Enterprise Co., Ltd and imported by Prosperity Tieh USA, that were the subject of the United States Department of Commerce’s final results in *Certain Corrosion-Resistant Steel Products From Taiwan: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 83 FR 64527 (Dept Commerce Dec. 17, 2018), and that were entered, or withdrawn from warehouse, on or after June 2, 2016 up to and including June

¹³ See *Final Results of Redetermination Pursuant to Court Remand, Prosperity Tieh Enterprise Co., Ltd. et al. v. United States*, Consol. Court No. 19–00138, Slip Op. 21–113 (CIT 2021), dated February 14, 2022 (*Second Redetermination Results*).

¹⁴ See *Prosperity Tieh Enterprise Co., Ltd. and Yieh Phui Enterprise Co., Ltd. v. United States*, Consolidated Court No. 16–00138, Slip Op. 23–95 (CIT 2023) (*Prosperity V*).

¹⁵ See *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990) (*Timken*).

¹⁶ See *Certain Corrosion-Resistant Steel Products from Taiwan: Amended Final Results of Antidumping Duty Administrative Review; 2020–2021*, 88 FR 13779 (March 6, 2023).

30, 2017 (*see* CBP message number 9035305, dated February 24, 2023); (3) Yieh Phui Enterprise Co., Ltd; that were the subject of the United States Department of Commerce's final determination in the *Certain Corrosion-Resistant Steel Products from Taiwan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments 2020–2021*, 88 FR 7408 (February 3, 2023); and that were entered or withdrawn from warehouse, for consumption, during the period July 1, 2020, through June 30, 2021 (*see* CBP message 3055401, dated February 24, 2023); and (4) Yieh Phui Enterprise Co., Ltd and imported by Yieh Phui America, Inc.; that were subject of the United States Department of Commerce's final results in *Certain Corrosion-Resistant Steel Products from Taiwan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020*, 87 FR 7106 (Dep't Commerce Feb. 8, 2022); and that were entered or withdrawn from warehouse, on or after July 1, 2019 up to and including June 30, 2020 (*see* CBP message number 2074409, dated March 15, 2022).

These entries will remain enjoined pursuant to the terms of the injunctions issued in CIT Court No. 16–00138 during the pendency of any appeals process.

Notification to Interested Parties

This notice of the amended final determination is issued and published in accordance with sections 735(d) and 516A(c)(1) and (e) of the Act.

Dated: August 21, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–18386 Filed 8–24–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD089]

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops; Correction

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

ACTION: Notice of public workshops; correction.

SUMMARY: NMFS cancelled the Safe Handling, Release, and Identification Workshop originally scheduled for September 6, 2023, in Kenner, LA, and the Atlantic Shark Identification Workshop originally scheduled for September 14, 2023, in Virginia Beach, FL. The workshops were announced in the **Federal Register** on June 21, 2023. NMFS has rescheduled the Safe Handling, Release, and Identification Workshop for September 27, 2023 and the Atlantic Shark Identification Workshop for September 28, 2023.

DATES: The Safe Handling, Release, and Identification Workshop originally scheduled for September 6, 2023 is rescheduled to September 27, 2023. The Atlantic Shark Identification Workshop originally scheduled for September 14, 2023 is rescheduled to September 28, 2023.

ADDRESSES: The locations of the rescheduled workshops have not changed. The Safe Handling, Release, and Identification Workshop will be held in Kenner, LA. The Atlantic Shark Identification Workshop will be held in Virginia Beach, VA.

FOR FURTHER INFORMATION CONTACT:

Peter Cooper by email at peter.cooper@noaa.gov or by phone at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic highly migratory species (HMS) fisheries are managed under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan and its amendments are implemented by regulations at 50 CFR part 635. Section 635.8 describes the requirements for the Safe Handling, Release, and Identification Workshops and Atlantic Shark Identification Workshops. The workshop schedules, registration information, and a list of frequently asked questions regarding Safe Handling, Release, and Identification workshops and the Atlantic Shark Identification are available online at: <https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/safe-handling-release-and-identification-workshops> and <https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-shark-identification-workshops>.

Correction

In the **Federal Register** of June 21, 2023 (88 FR 40221) in FR Doc. 2023–13186, on page 40222, in the first column, the date of the second Atlantic Shark Identification Workshop listed under the heading “Workshop Dates,

Times, and Location” is corrected to read as follows:

2. September 28, 2023, 12 p.m.–4 p.m., Courtyard by Marriott-Virginia Beach Norfolk, 5700 Greenwich Road, Virginia Beach, VA 23462.

Also, in the **Federal Register** of June 21, 2023 (88 FR 40221) in FR Doc. 2023–13186, on page 40222, in the second column, the date of the third Safe Handling, Release, and Identification Workshop listed under the heading “Workshop Dates, Times, and Location” is corrected to read as follows:

3. September 27, 2023, 9 a.m.–5 p.m., Hilton New Orleans Airport, 901 Airline Drive, Kenner, LA 70062.

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

Dated: August 22, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–18365 Filed 8–24–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Assessing Public Preferences and Values To Support Coastal and Marine Management

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before October 24, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at NOAA.PRA@noaa.gov. Please reference OMB Control Number 0648–XXXX in the subject line of your

comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or specific questions related to collection activities should be directed to Sarah Gonyo, Economist, 1305 East West Highway, Silver Spring, MD 20910, 240–621–1999, sarah.gonyo@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a new information collection, which will include focus groups and pre-test to help guide revisions necessary to the survey instrument, to directly support decision-makers with the National Estuarine Research Reserve (NERR). The proposed data collection involves surveying randomly selected residents (aged 18 years and older) from households in counties surrounding the NERRs. The purpose of this information collection is to obtain data on the opinions, values, attitudes, and behaviors of visitors to National Ocean Service (NOS) special places, as well as residents from surrounding areas. The initial surveys will be conducted for the Chesapeake Bay National Estuarine Research Reserve in Virginia (CBNERR–VA), Weeks Bay NERR (WBNERR), and Grand Bay NERR (GNDNERR), and the survey will be repeated regularly in other NERRs based on information needs and budget.

The NERRS is a federal-state partnership program for the stewardship, education, and research of unique estuarine sites. This data collection supports the NERRS' vision of establishing healthy estuaries and coastal watersheds where human and ecological communities thrive. The NERRS has identified five priority research areas, including a focus on social science and economic processes within each NERR site. However, limited data exist characterizing stakeholder activities, attitudes, knowledge, and preferences, including their spatial aspects. Gathering such data is essential for effective management of stakeholder groups, regulatory proposals, and resource management decisions.

Designated in 1986, WBNERR is located along the eastern shore of Mobile Bay in Baldwin County, Alabama. CBNERR–VA, designated in 1991, comprises four reserve sites within the York River in the southern Chesapeake Bay subregion. Finally, GNDNERR was established in 1999 and is in the Grand Bay Savannah Complex along the Mississippi-Alabama state line

in Jackson County, Mississippi. All three NERRS prioritize public access and responsible use to protect ecosystems, identifying public sites, minimizing conflicts, and evaluating visitor use. Therefore, information is needed on who uses these NERR sites, their motivations, management preferences, and why some do not visit. This data supports conservation and management goals, strengthens decision-making, increases capacity, and extends education and outreach. It is also required by NOAA to meet objectives related to ocean and coastal planning and management. The data benefits state and local officials as well.

NOAA's mission is to provide science, service and stewardship for, among other activities, management of the nation's oceans and coasts. NOAA supports "comprehensive ocean and coastal planning and management" in order to facilitate use of oceans and coasts, while also ensuring "continued access to coastal areas, sustained ecosystems, maintained cultural heritage, and limited cumulative impacts." NOAA is subject to and supports mandates of the Coastal Zone Management Act (CZMA) (16 U.S.C. 1452(303)(2)(D)), which encourages the wise use of coastal resources, including energy activity. The CZMA also encourages the inclusion and participation of the public in carrying out the tenets of the act (16 U.S.C. 1452(303)(4)). The National Environmental Policy Act (NEPA) (40 CFR 1502.6) mandates federal agencies to use social science data to assess the impacts of federal actions on the human environment. Consequently, up-to-date sociological data is needed to support federal agency obligations under each of these acts.

Finally, NOAA is responding to Executive Orders 13707 and 13985. Executive Order 13707, Using Behavioral Science Insights to Better Serve the American People, requests federal agencies to, among other actions: "identify policies, programs, and operations where applying behavioral science insights may yield substantial improvements in public welfare, program outcomes, and program cost effectiveness" and "develop strategies for applying behavioral science insights to programs and, where possible, rigorously test and evaluate the impact of these insights." Executive Order 13985, On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, requires the federal government to allocate resources "in a manner that increases investment in underserved

communities, as well as individuals from those communities."

II. Method of Collection

Information will be collected with a combination of mail recruitment with push-to-web and mail-back survey instrument.

III. Data

OMB Control Number: 0648–XXXX.

Form Number(s): None.

Type of Review: Regular Submission [New information collection].

Affected Public: Individuals or households.

Estimated Number of Respondents: Focus groups: 144; Questionnaire: 10,256.

Estimated Time per Response: Focus groups: 1 hour; Questionnaire: 20 minutes.

Estimated Total Annual Burden Hours: 3,528.48.

Estimated Total Annual Cost to Public: \$0.

Respondent's Obligation: Voluntary.

Legal Authority: Coastal Zone Management Act (CZMA) (16 U.S.C. 1452(303)(2)(D)), National Environmental Policy Act (NEPA) (40 CFR 1502.6).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–18292 Filed 8–24–23; 8:45 am]

BILLING CODE 3510–JE–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete product(s) from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* September 24, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785–6404, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following product is proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s): 7210–00–266–9740—Cot Insect Net Protector, Olive Green

Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–18356 Filed 8–24–23; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds product(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) and service(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* September 24, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Additions

On 7/21/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the product(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) to the Government.
2. The action will result in authorizing small entities to furnish the product(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product(s) are added to the Procurement List:

Product(s)

NSN(s)—Product Name(s):

7930–01–690–9999—Cleaner, Glass, Biobased, Concentrate

7930–01–691–0002—Cleaner, Glass, Biobased, Ready-To-Use

7930–01–687–2546—Detergent, General Purpose, Cleaner/Degreaser, Biodegradable, Concentrated

Designated Source of Supply: Lighthouse for the Blind and Visually Impaired, San Francisco, CA

Contracting Activity: FEDERAL ACQUISITION SERVICE, GSA/FSS GREATER SOUTHWEST ACQUISITI

Distribution: A-List

Mandatory for: Total Government Requirement

Deletions

On 7/21/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) and service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the product(s) and service(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) and service(s) are deleted from the Procurement List:

*Product(s)**NSN(s)—Product Name(s):*

8415-00-245-2065—Jersey, Reversible, US Navy, Blue and Yellow, Large
 8415-00-245-2054—Jersey, Reversible, US Navy, Blue and Yellow, Medium
 8415-00-245-2052—Jersey, Reversible, US Navy, Blue and Yellow, Small
 8415-00-245-2073—Jersey, Reversible, US Navy, Blue and Yellow, X- Large
 8415-00-914-0313—Jersey, Flight Deck Crewman's, Blue, Medium
 8415-00-914-0312—Jersey, Flight Deck Crewman's, Blue, Small
 8415-00-914-0314—Jersey, Flight Deck Crewman's, USN, Blue, Large
 8415-00-914-0315—Jersey, Flight Deck Crewman's, USN, Blue, X-Large
 8415-00-914-0318—Jersey, Flight Deck Crewman's, USN, Brown, Large
 8415-00-914-0317—Jersey, Flight Deck Crewman's, USN, Brown, Medium
 8415-00-914-0316—Jersey, Flight Deck Crewman's, USN, Brown, Small
 8415-00-914-0319—Jersey, Flight Deck Crewman's, USN, Brown, X-Large
 8415-00-914-0323—Jersey, Flight Deck Crewman's, USN, Green, Large
 8415-00-914-0322—Jersey, Flight Deck Crewman's, USN, Green, Medium
 8415-00-914-0321—Jersey, Flight Deck Crewman's, USN, Green, Small
 8415-00-914-0324—Jersey, Flight Deck Crewman's, USN, Green, X-Large
 8415-00-914-0327—Jersey, Flight Deck Crewman's, USN, Purple, Large
 8415-00-914-0326—Jersey, Flight Deck Crewman's, USN, Purple, Medium
 8415-00-914-0325—Jersey, Flight Deck Crewman's, USN, Purple, Small
 8415-00-914-0328—Jersey, Flight Deck Crewman's, USN, Purple, X-Large
 8415-00-914-0331—Jersey, Flight Deck Crewman's, USN, Red, Large
 8415-00-914-9481—Jersey, Flight Deck Crewman's, USN, Red, Medium
 8415-00-914-0329—Jersey, Flight Deck Crewman's, USN, Red, Small
 8415-00-914-4143—Jersey, Flight Deck Crewman's, USN, Red, X-Large
 8415-00-914-0335—Jersey, Flight Deck Crewman's, USN, White, Large
 8415-00-914-0334—Jersey, Flight Deck Crewman's, USN, White, Medium
 8415-00-914-0333—Jersey, Flight Deck Crewman's, USN, White, Small
 8415-00-914-0336—Jersey, Flight Deck Crewman's, USN, White, X-Large
 8415-00-914-0339—Jersey, Flight Deck Crewman's, USN, Yellow, Large
 8415-00-914-0338—Jersey, Flight Deck Crewman's, USN, Yellow, Medium
 8415-00-914-0337—Jersey, Flight Deck Crewman's, USN, Yellow, Small
 8415-00-914-0340—Jersey, Flight Deck Crewman's, USN, Yellow, X-Large

Designated Source of Supply: The Arkansas Lighthouse for the Blind, Little Rock, AR
Designated Source of Supply: Winston-Salem Industries for the Blind, Inc, Winston-

Salem, NC

Designated Source of Supply: Industries of the Blind, Inc., Greensboro, NC

Designated Source of Supply: Westmoreland County Association, Greensburg, PA

Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

NSN(s)—Product Name(s):

7530-00-985-7097—Folder, File, Reinforced, 1/8" Cut, 11 pt., Natural Kraft, 11 3/4" x 9 1/4"

7530-00-02R-1357—Label, Pressure Sensitive

Designated Source of Supply: CLOVERNOOK CENTER FOR THE BLIND AND VISUALLY IMPAIRED, Cincinnati, OH

Contracting Activity: STRATEGIC ACQUISITION CENTER, FREDERICKSBURG, VA

Service(s)

Service Type: Custodial and Related Services

Mandatory for: GSA PBS Region 5, Federal Building, 105 South Sixth Street Mt. Vernon, IL

Designated Source of Supply: Jefferson County Comprehensive Services, Inc., Mt. Vernon, IL

Contracting Activity: PUBLIC BUILDINGS SERVICE, PBS R5

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-18355 Filed 8-24-23; 8:45 am]

BILLING CODE 6353-01-P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Renew Collection 3038-0092, Customer Clearing Documentation and Timing of Acceptance for Clearing

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission ("CFTC" or "Commission") is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 ("PRA"), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on the extension of information collection requirements relating to the obligation to maintain clearing documentation records between the customer and the customer's clearing member under the Commodity Exchange Act, OMB Control No. 3038-0092 (Customer Clearing

Documentation and Timing of Acceptance for Clearing).

DATES: Comments must be submitted on or before October 24, 2023.

ADDRESSES: You may submit comments, identified by "Customer Clearing Documentation and Timing of Acceptance for Clearing," Collection Number 3038-0092, by any of the following methods:

- **CFTC website:** <https://comments.cftc.gov/>. Follow the instructions for submitting comments through the website.

- **Mail:** Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- **Hand Delivery/Courier:** Same as Mail, above.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://www.cftc.gov>.

FOR FURTHER INFORMATION CONTACT:

Catherine Brescia, Attorney Advisor, Market Participants Division, Commodity Futures Trading Commission, (202) 418-6236; email: cbrescia@cftc.gov, and refer to OMB Control No. 3038-0092.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.*, Federal agencies must obtain approval from the Office of Management and Budget ("OMB") for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the Commission is publishing notice of the proposed collection of information listed below. 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.¹

¹ 44 U.S.C. 3512, 5 CFR 1320.5(b)(2)(i) and 1320.8(b)(3)(vi).

Title: Customer Clearing Documentation and Timing of Acceptance for Clearing (OMB Control No. 3038–0092). This is a request for extension of a currently approved information collection.

Abstract: Section 4d(c) of the Commodity Exchange Act (“CEA”) (7 U.S.C. 6d(c)), as amended by the Dodd-Frank Wall Street and Reform Consumer Protection Act (“Dodd-Frank Act”), directs the Commission to require futures commission merchants (“FCMs”) to implement conflict of interest procedures that address such issues the Commission determines to be appropriate. Similarly, CEA section 4s(j)(5) (7 U.S.C. 6s(j)(5)), as added by the Dodd-Frank Act, requires swap dealers (“SDs”) and major swap participants (“MSPs”) to implement conflict of interest procedures that address such issues the Commission determines to be appropriate. CEA section 4s(j)(5) also requires SDs and MSPs to ensure that any persons providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions from persons whose involvement in pricing, trading, or clearing activities might bias their judgment or contravene the core principle of open access. CEA section 4s(j)(6) prohibits an SD or MSP from adopting any process or taking any action that results in any unreasonable restraint on trade or imposes any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the Act. CEA section 2(h)(1)(B)(ii) (7 U.S.C. 2(h)(1)(B)(ii)) requires that derivatives clearing organization (“DCO”) rules provide for the nondiscriminatory clearing of swaps executed bilaterally or through an unaffiliated designated contract market or swap execution facility.

To address these provisions, the Commission promulgated regulations that prohibit arrangements involving FCMs, SDs, MSPs, and DCOs that would (a) disclose to an FCM, SD, or MSP the identity of a customer’s original executing counterparty;² (b) limit the number of counterparties with whom a customer may enter into a trade;³ (c) restrict the size of the position a customer may take with any individual counterparty, apart from an overall credit limit for all positions held by the customer at the FCM;⁴ (d) impair a customer’s access to execution of a trade on terms that have a reasonable

relationship to the best terms available;⁵ or (e) prevent compliance with specified time frames for acceptance of trades into clearing set forth in Commission regulations §§ 1.74(b), 23.610(b), or 39.12(b)(7).⁶ Additionally, the Commission requires, through regulation § 39.12(b)(7)(i)(B), DCOs to coordinate with clearing members to establish prompt processing of trades. Regulations §§ 1.74(a) and 23.610(a) require reciprocal coordination by FCMs, SDs, and MSPs that are clearing members.

Under the above regulations, SDs, MSPs, FCMs, and DCOs are required to develop and maintain written customer clearing documentation and trade processing procedures. Maintenance of contracts, policies, and procedures is prudent business practice. All SDs, MSPs, FCMs, and DCOs maintain documentation consistent with these regulations. The regulations are crucial both for effective risk management and for the efficient operation of trading venues among SDs, MSPs, FCMs, and DCOs. Each of these entities has a general recordkeeping obligation for these requirements under the Commission’s regulations (17 CFR 39.20 for DCOs; 17 CFR 23.606 for SDs and MSPs; and 17 CFR 1.73 for FCMs).

As indicated below, the information collection burden arising from the regulations primarily is restricted to the costs associated with the affected registrants’ obligation to maintain records related to clearing documentation between the customer and the customer’s clearing member, and trade processing procedures between DCOs and FCMs, SDs, and MSPs. The information collection obligations are necessary to implement certain provisions of the CEA, including ensuring that registrants exercise effective risk management and for the efficient operation of trading venues among SDs, MSPs, FCMs, and DCOs.

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

- Ways to minimize the burden of 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.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.⁷

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the Information Collection Request will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 180.

Estimated Average Burden Hours per Respondent: 40.

Estimated Total Annual Burden Hours per Respondent: 7,200.

Frequency of Collection: As needed.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: August 22, 2023.

Christopher Kirkpatrick,
Secretary of the Commission.

[FR Doc. 2023–18364 Filed 8–24–23; 8:45 am]

BILLING CODE 6351–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

[Docket No. CFPB–2023–0042]

Agency Information Collection Activities: Comment Request

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice and request for comment.

² 17 CFR 1.72(a), 23.608(a), and 39.12(a)(1)(vi).

³ 17 CFR 1.72(b), 23.608(b), and 39.12(a)(1)(vi).

⁴ 17 CFR 1.72(c), 23.608(c), and 39.12(a)(1)(vi).

⁵ 17 CFR 1.72(d), 23.608(d), and 39.12(a)(1)(vi).

⁶ 17 CFR 1.72(e), 23.608(e), and 39.12(a)(1)(vi).

⁷ 17 CFR 145.9.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (CFPB) is requesting the Office of Management and Budget's (OMB's) approval for a new information collection titled "CFPB National Age-Friendly Banking Survey."

DATES: Written comments are encouraged and must be received on or before September 25, 2023 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Anthony May, Paperwork Reduction Act Officer, at (202) 435-7278, or email: CFPB_PRA@cfpb.gov. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov. Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: CFPB National Age-Friendly Banking Survey.
OMB Control Number: 3170-00XX.
Type of Review: New collection.
Affected Public: Individuals or households.

Estimated Number of Respondents: 5,528.

Estimated Total Annual Burden Hours: 817.

Abstract: Older adults are increasingly becoming an important customer base for banks and credit unions. This proposed survey examines how banking experiences may vary as people age and how they may differ for specific subpopulations of older adults that face unique challenges related to accessibility and quality of banking services (such as older adults living in rural communities, older adults of color, and the oldest segment of the population (75 and older)). Additionally, the survey will enable the CFPB to understand the experiences of older adults with banking, including challenges and opportunities for adoption of "age-friendly" account features. The survey will collect

information on respondents' experiences with their primary bank or credit union specifically regarding:

- Background information about type of institution, length and quality of the relationship;
- Importance, availability, and use of "age-friendly" banking features;
- Experiences with fraud and scams and financial caregiving involving accounts with their primary bank;
- Use and accessibility of banking services; and
- Other aspects of the relationship with their primary financial institution, including credit and loans.

The survey is supplemented with existing panelists' responses to demographic, geographic, and financial questions. The results will inform:

- CFPB's age-friendly banking educational, regulatory, and policy work;
 - Banks, lenders, and financial institutions' initiatives and resources focused on financial inclusion of older adults; and
 - State, local, and community entities seeking to strengthen the financial inclusion component of their "age-friendly" community plans.
- The data gathered through this survey will empower many other governmental, nonprofit, and other entities to conduct analysis on topics of interest relevant to their work. These entities can apply their findings to enhance consumer protections and expand age-friendly banking products and services nationwide.

Request for Comments: The CFPB published a 60-day **Federal Register** notice on May 22, 2023 (88 FR 32757) under Docket Number: CFPB-2023-0035. The CFPB is publishing this notice and soliciting comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the CFPB, including whether the information will have practical utility; (b) The accuracy of the CFPB's estimate of the burden of the collection of information, including the validity of the methods and the 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 respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All

comments will become a matter of public record.

Anthony May,
Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.

[FR Doc. 2023-18349 Filed 8-24-23; 8:45 am]

BILLING CODE 4810-AM-P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Tuesday, August 22, 2023—10:00 a.m. Open; and Tuesday, August 29, 2023—11:00 a.m. Closed (See MATTERS TO BE CONSIDERED for each meeting).

PLACE: The meetings will be held remotely, and in person at 4330 East-West Highway, Bethesda, Maryland 20814.

STATUS: Commission Meetings—Open to the Public (10:00 a.m.) and Closed to the Public (11:00 a.m.)

MATTERS TO BE CONSIDERED:

Briefing Matter:
 Notice of Proposed Rulemaking—Safety Standard for Nursing Pillows.

To attend virtually, please use the following link and details below:
<https://cpssc.webex.com/cpssc/j.php?MTID=mf92f68fa850e5d90839f2d57480973e5>.

Join by phone: +1-415-527-5035 US Toll.

Access code: 276 320 94287.

Briefing Matter:
 Closed meeting topic.

CONTACT PERSON FOR MORE INFORMATION: Alberta E. Mills, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, 301-504-7479 (Office) or 240-863-8938 (Cell).

Dated: August 22, 2023.

Alberta E. Mills,
Commission Secretary.

[FR Doc. 2023-18441 Filed 8-23-23; 11:15 am]

BILLING CODE 6355-01-P

DEPARTMENT OF DEFENSE

Department of the Air Force

Department of the Air Force Scientific Advisory Board; Notice of Federal Advisory Committee Meeting

AGENCY: Department of the Air Force Scientific Advisory Board, Department of the Air Force.

ACTION: Notice of federal advisory committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this to announce that the following meeting of the Department of the Air Force Scientific Advisory Board will take place.

DATES: Closed to the public. 11 September 2023 from 8:00 a.m.–2:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held at The Mark Center, 4800 Mark Center Drive, Alexandria, VA 22311.

FOR FURTHER INFORMATION CONTACT: Lt Col Blythe Andrews, (240) 470–4566 (Voice), blythe.andrews@us.af.mil (Email). Mailing address is 1500 West Perimeter Road, Ste. #3300, Joint Base Andrews, MD 20762. website: <https://www.scientificadvisoryboard.af.mil/>. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10 of title 5, United States Code (as enacted on Dec. 27, 2022, by section 3(a) of Pub. L. 117–286) (formerly the Federal Advisory Committee Act, 5 U.S.C., appendix), section 552b of title 5, United States Code (popularly known as the Government in the Sunshine Act), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of this Department of the Air Force Scientific Advisory Board meeting is to provide dedicated time for members to begin collaboration on research and formally commence the Department of the Air Force Scientific Advisory Board's FY24 Secretary of the Air Force directed studies.

Agenda: [All times are Eastern Time] 8:00 a.m.–8:45 a.m. Opening Remarks and Status Update 8:45 a.m.–9:45 a.m. FY24 Study #1 Introduction 9:45 a.m.–10:00 a.m. Break 10:00 a.m.–11:00 a.m. FY24 Study #2 Introduction 11:00 a.m.–12:00 a.m. FY24 Study #3 Introduction 12:00 p.m.–1:00 p.m. Lunch 1:00 p.m.–2:00 p.m. FY24 Study #4 Introduction. In accordance with section 1009(d) of title 5, United States Code (formerly sec. 10(d) of the Federal Advisory Committee Act, 5 U.S.C. Appendix) and 41 CFR 102–3.155, the Administrative Assistant of the Air Force, in consultation with the Air Force General Counsel, has agreed that the public interest requires this meeting of the United States Department of the Air Force Scientific Advisory Board be closed to the public because it will involve discussions involving classified matters covered by section 552b(c)(1) of title 5, United States Code.

Written Statements: Any member of the public wishing to provide input to the United States Department of the Air

Force Scientific Advisory Board should submit a written statement in accordance with 41 CFR 102–3.140(c), section 1009(a)(3) of title 5, United States Code (formerly sec. 10(a)(3) of the Federal Advisory Committee Act), and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed above at any time. The Designated Federal Officer will review all submissions with the Department of the Air Force Scientific Advisory Board Chairperson and ensure they are provided to members of the Department of the Air Force Scientific Advisory Board. Written statements received after the meeting that is the subject of this notice may not be considered by the Scientific Advisory Board until the next scheduled meeting.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–18382 Filed 8–24–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2023–HQ–0006]

Submission for OMB Review; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by September 25, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Air Force Safety Automated

System; AF Form 978; OMB Control Number 0701–0164.

Type of Request: Extension.

Number of Respondents: 200.

Responses per Respondent: 1.

Annual Responses: 200.

Average Burden per Response: 1 hour.

Annual Burden Hours: 200.

Needs and Uses: The Air Force collects mishap and safety-related information via AF Form 978, Supervisor Mishap/Incident Report or direct input into the Air Force Safety Automated System (AFSAS), via the Mishap Worksheet, by an assigned investigator. If an investigator uses the AF Form 978, that information will be manually input into the AFSAS once completed. Information will be collected in the AFSAS from individuals (respondents) who were injured or directly involved in, or an eyewitness to, the Mishap. Respondents do not have direct access to the AFSAS or collected information.

Information collected in the AFSAS is utilized directly by assigned Safety Managers and Investigators, to evaluate mishap events for prevention analysis. Each organization staff will compare the information against DoD standards to determine if safety is enforced and to evaluate the safety profile of their organization. Included will be specific recommendations for risk mitigation/reduction in order to preserve assets and save lives. The Air Force Safety Program addresses the maintenance of safe and healthful conditions in the workplace or the occupational environment. It is applicable to all Air Force civilian and military personnel and operations, aviation or occupational functions.

Affected Public: Business or other for-profit; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Sehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: August 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-18390 Filed 8-24-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF-2023-HQ-0012]

Submission for OMB Review; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by September 25, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Cargo Movement Operations System; OMB Control Number 0701-0165.

Type of Request: Extension.
Number of Respondents: 180.
Responses per Respondent: 1.
Annual Responses: 180.
Average Burden per Response: 6 minutes.

Annual Burden Hours: 18.
Needs and Uses: The Cargo Movement Operations System (CMOS) is used by the DoD to plan, manage, and execute the movement of cargo and personnel. In addition to the deployment of active military personnel, the passenger manifest capability supports military retirees and

military family members traveling on a "Space A CAT VI" basis.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: August 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-18395 Filed 8-24-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2023-OS-0056]

Submission for OMB Review; Comment Request

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

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by September 25, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB

Number: Security Assistance Network;

OMB Control Number 0704-0555.

Type of Request: Extension.

Number of Respondents: 43,980.

Responses per Respondent: 1.

Annual Responses: 43,980.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 10,995.

Needs and Uses: The Security Assistance Network (SAN) is a web-based database used to exchange Security Cooperation training information between overseas Security Cooperation Offices, Geographical Combatant Commands, Military Departments, Defense Security Cooperation Agency, DoD Schoolhouses, Regional Centers, and International Host Nation Organizations. The Security Cooperation Training Management System is a tool used by the Security Cooperation community to manage International Military Student training data.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: August 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison
Officer, Department of Defense.

[FR Doc. 2023-18396 Filed 8-24-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2023-OS-0046]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSDP&R), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by September 25, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title: Associated Form; and OMB Number: Request for Reference; DD Form 370; OMB Control Number 0704-0167.

Type of Request: Extension.
Number of Respondents: 50,000.
Responses per Respondent: 1.
Annual Responses: 50,000.
Average Burden per Response: 10 minutes.

Annual Burden Hours: 8,333.
Needs and Uses: The information collection requirement is necessary to obtain personal reference data, in order to request a waiver, on a military applicant who has committed a civil or criminal offense and would otherwise be disqualified for entry into the Armed Forces of the United States. The DD Form 370 is used to obtain references information evaluating the character,

work habits, and attitudes of an applicant from a person of authority or standing within the community.

Affected Public: Business or other for-profit; individuals or households; State, Local, or Tribal government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Sehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: August 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison
Officer, Department of Defense.

[FR Doc. 2023-18391 Filed 8-24-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2023-SCC-0149]

Agency Information Collection Activities; Comment Request; Charter Online Management and Performance System (COMPS) CMO APR

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 24, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please

use <http://www.regulations.gov> by searching the Docket ID number ED-2023-SCC-0149. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave SW, LBJ, Room 6W203, Washington, DC 20202-8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Stephanie Jones, 202-453-7835.

SUPPLEMENTARY INFORMATION: The Department, 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. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department 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: Charter Online Management and Performance System (COMPS) CMO APR.

OMB Control Number: 1810–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 90.

Total Estimated Number of Annual Burden Hours: 2,970.

Abstract: This request is for a new OMB approval to collect the Annual Performance Report (APR) data from Charter School Programs (CSP) Replication and Expansion of High-Quality Charter Schools (CMO) grantees. The Charter School Programs (CSP) was originally authorized under Title V, Part B, Subpart 1, Sections 5201 through 5211 of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the No Child Left Behind (NCLB) Act of 2001. For fiscal year 2017 and thereafter, ESEA has been amended by the Every Student Succeeds Act (ESSA), (20 U.S.C. 7221–7221i), which reserves funds to improve education by supporting innovation in public education and to: (2) provide financial assistance for the planning, program design, and initial implementation of charter schools; (3) increase the number of high-quality charter schools available to students across the United States; (4) evaluate the impact of charter schools on student achievement, families, and communities, and share best practices between charter schools and other public schools; (5) encourage States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount States typically provide for traditional public schools; (6) expand opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging State academic standards; (7) support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools; and (8) support quality, accountability, and transparency in the operational performance of all authorized public chartering agencies, including State educational agencies, local educational agencies, and other authorizing entities.

The U.S. Department of Education (ED) is requesting authorization to collect data from CSP grantees within the CMO program through a new online platform. In 2022, ED began development of a new data collection system, the Charter Online Management

and Performance System (COMPS), designed specifically to reduce the burden of reporting for users and increase validity of the overall data. This new collection consists of questions responsive to the actions established in the program's final rule published in the **Federal Register** on July 6, 2022, as well as the CMO program Notice Inviting Applications (NIA). This collection request is a consolidation of all previously established program data collection efforts and provides a more comprehensive representation of grantee performance.

Dated: August 21, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–18291 Filed 8–24–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Board for Education Sciences

AGENCY: National Board for Education Sciences, Department of Education, Institute of Education Sciences (IES).

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the agenda, time, and instructions to access or participate in the National Board for Education Sciences (hereafter referred to as NBES or Board) virtual meeting scheduled for September 11, 2023. This notice provides information about the meeting to members of the public who may be interested in attending the meeting and/or providing written comment. Notice of this meeting is required under 5 U.S.C. chapter 10 (Federal Advisory Committees).

ADDRESSES: The meeting will be conducted virtually.

DATES: The NBES virtual meeting will be held on September 11, 2023, from 12:00 p.m.–4:30 p.m. (EST).

FOR FURTHER INFORMATION CONTACT:

Andrea Miralia, Designated Federal Officer (DFO) for NBES, (PCP 4126–1), U.S. Department of Education, IES: 550 12th St. SW, Washington, DC 20024, Telephone: (202) 245–6046, email: andrea.miralia@ed.gov.

SUPPLEMENTARY INFORMATION:

Statutory Authority and Function: The Board is authorized by § 116 of the Education Sciences Reform Act of 2002 (20 U.S.C. 9516). The Board is established as part of the U.S. Department of Education, IES, and shall,

consistent with 20 U.S.C. 9514, 9515(b) and (c), 9516, and 9567, function as a board of directors for IES. IES' mission is to provide national leadership in expanding fundamental knowledge and understanding of education from early childhood through postsecondary study, in order to provide parents, educators, students, researchers, policymakers, and the general public with reliable information about the condition and progress of education in the United States, the educational practices that support learning and improve academic achievement and access to educational opportunities for all students, and the effectiveness of Federal and other education programs.

The Board's responsibilities are: (1) advise and consult with the Director of IES (Director) on the policies of IES; (2) consider and approve priorities proposed by the Director under 20 U.S.C. 9515 to guide the work of IES; (3) transmit approved priorities to the appropriate congressional committee (20 U.S.C. 9515(b)); (4) ensure that the priorities of IES and the National Education Centers are consistent with the mission of IES (20 U.S.C. 9515(c)); (5) review and approve procedures for technical and scientific peer review of the activities of IES; (6) advise the Director on the establishment of activities to be supported by IES, including the general areas of research to be carried out by the National Center for Education Research and the National Center for Special Education Research; (7) present to the Director such recommendations as it may find appropriate for (a) the strengthening of education research, and (b) the funding of IES; (8) advise the Director on the funding of applications for grants, contracts, and cooperative agreements for research, after the completion of peer review; (9) review and regularly evaluate the work of IES, to ensure that scientifically valid research, development, evaluation, and statistical analysis are consistent with the standards for such activities under this title; (10) advise the Director on ensuring that activities conducted or supported by IES are objective, secular, neutral, and non-ideological, and are free of partisan political influence and racial, cultural, gender, or regional bias; (11) solicit advice and information from those in the educational field, particularly practitioners and researchers, to recommend to the Director topics that require long-term, sustained, systematic, programmatic, and integrated research efforts, including knowledge utilization and wide dissemination of research,

consistent with the priorities and mission of IES; (12) advise the Director on opportunities for the participation in, and the advancement of, women, minorities, and persons with disabilities in education research, statistics, and evaluation activities of IES; (13) recommend to the Director ways to enhance strategic partnerships and collaborative efforts among other Federal and State research agencies; (14) recommend to the Director individuals to serve as Commissioners of the National Education Centers; and (15) make recommendations to the President with respect to the appointment of the Director (20 U.S.C. 9514).

Meeting Agenda: The purpose of this meeting is to convene the members of NBES to conduct the following business: (1) call to order and welcome by the Director and the DFO for the Board; (2) member roll call; (3) housekeeping on meeting ground rules; (4) ceremonial swearing-in of NBES members by the Director; (5) review of member roles and duties; (6) Chair nomination and election; (7) remarks from the elected Chairperson; (8) introduction of the following IES Offices and Centers: Office of the Director, including Office of Science, Administration and Policy, and Data Sciences and Communications, National Center for Education Evaluation and Regional Assistance (NCEE), National Center for Education Research (NCER), National Center for Special Education Research (NCSE), and National Center for Education Statistics (NCES); (9) presentation by the Director on the priorities of IES, followed by Board discussion, (10) a presentation by the Director of the Institute of Education Sciences on the overview and status of National Center for Advanced Development in Education (NCAD) and ESRA (Education Sciences Reform Act); and (11) closing remarks.

Instructions for Accessing the Meeting: Members of the public interested in attending this virtual meeting may email the DFO listed in this notice no later than 11:59 p.m. Eastern Time (ET) on September 4, 2023. The DFO will provide a link and instructions on how to access the meeting via Microsoft Teams.

Public Comment: Members of the public interested in submitting written comments may do so by emailing the DFO listed in this notice no later than 11:59 p.m. ET on September 4, 2023. Please note that written comments should pertain to the work of NBES.

Reasonable Accommodations: The virtual meeting is accessible to individuals with disabilities. If you will need an auxiliary aid or service for the

meeting (e.g., interpreting service, assistive listening device, or materials in an alternate format), notify the DFO listed in this notice no later than Sunday, September 3, 2023. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Access to Records of the Meeting: The Department will post the official minutes of this meeting on the IES website, <https://ies.ed.gov/director/board/index.asp>, no later than 30 days after the meeting. Pursuant to 5 U.S.C. 1009(b), the public may also inspect NBES records at the U.S. Department of Education, IES, 550 12th St. SW, Washington, DC 2002, Monday–Friday, 8:30 a.m. to 5:00 p.m. ET. Please email andrea.miralia@ed.gov to schedule an appointment.

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

Authority: § 116 of the Education Sciences Reform Act of 2002 (20 U.S.C. 9516).

Mark Schneider,

Director, Institute of Education Sciences.

[FR Doc. 2023–18373 Filed 8–24–23; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice; Withdrawal

AGENCY: U.S. Election Assistance Commission.

ACTION: Sunshine Act notice; notice of public agenda, withdrawal.

SUMMARY: This action withdraws the Sunshine Act Notice published in the **Federal Register** on August 21, 2023, Public Meeting: U.S. Election Assistance Commission.

DATES: As of August 22, 2023, the Sunshine Act Notice published in the **Federal Register** on August 21, 2023 (88 FR 56811) is withdrawn.

FOR FURTHER INFORMATION CONTACT:

Kristen Muthig, Telephone: (202) 897–9285, Email: kmuthig@eac.gov.

Camden Kelliher,

Senior Associate Counsel, U.S. Election Assistance Commission.

[FR Doc. 2023–18425 Filed 8–23–23; 11:15 am]

BILLING CODE 4810–71–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23–85–000.

Applicants: Boomtown Solar Energy LLC, BREC Holding Company, LLC, Union Electric Company d/b/a Ameren Missouri.

Description: Ameren Missouri submits Response to July 14, 2023, Deficiency Letter re Amendment to Application.

Filed Date: 8/14/23.

Accession Number: 20230814–5104.

Comment Date: 5 p.m. ET 9/5/23.

Docket Numbers: EC23–123–000.

Applicants: Carroll County Energy LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Carroll County Energy LLC.

Filed Date: 8/17/23.

Accession Number: 20230817–5151.

Comment Date: 5 p.m. ET 9/7/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–261–000.

Applicants: Richfield Solar Energy LLC.

Description: Richfield Solar Energy LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 8/21/23.

Accession Number: 20230821–5089.

Comment Date: 5 p.m. ET 9/11/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL23–92–000;

QF13–402–008; QF13–436–001; QF13–437–001.

Applicants: Bennington Solar LLC, Apple Hill Solar LLC, Otter Creek Solar LLC, ALLCO Finance Limited, Otter

Creek Solar LLC, Apple Hill Solar LLC, Bennington Solar LLC.

Description: Petition for Enforcement Pursuant to Section 210(H) of the Public Utility Regulatory Policies Act of 1978 of Allco Finance Limited et al.

Filed Date: 8/14/23.

Accession Number: 20230814–5278.

Comment Date: 5 p.m. ET 9/5/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–2449–003.

Applicants: Assembly Solar II, LLC.

Description: Midcontinent

Independent System Operator, Inc. submits tariff filing per 35.19a(b): Refund Report Assembly Solar II, LLC to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5135.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER21–2892–002.

Applicants: Prairie Wolf Solar, LLC.

Description: Midcontinent

Independent System Operator, Inc. submits tariff filing per 35.19a(b): Refund Report Prairie Wolf Solar, LLC to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5137.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER22–424–001.

Applicants: Assembly Solar III, LLC.

Description: Midcontinent

Independent System Operator, Inc. submits tariff filing per 35.19a(b): Refund Report Assembly Solar III, LLC to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5134.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER22–1136–001.

Applicants: Sac County Wind, LLC.

Description: Midcontinent

Independent System Operator, Inc. submits tariff filing per 35.19a(b): Refund Report Sac County Wind, LLC to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5136.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER22–1610–002.

Applicants: Big River Solar, LLC.

Description: Midcontinent

Independent System Operator, Inc. submits tariff filing per 35.19a(b): Refund Report Big River Solar, LLC to be effective N/A.

Filed Date: 8/17/23.

Accession Number: 20230817–5138.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER22–2318–002.

Applicants: MATL LLP.

Description: Compliance filing:

Second Amendment to Order 881 Compliance Filing ER22–2318 to be effective 7/12/2025.

Filed Date: 8/21/23.

Accession Number: 20230821–5090.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2662–000.

Applicants: Kentucky Utilities

Company.

Description: Compliance filing:

Remand Compliance Filing LGE and KU Joint Rate Schedule FERC No. 525 to be effective 12/31/9998.

Filed Date: 8/18/23.

Accession Number: 20230818–5191.

Comment Date: 5 p.m. ET 9/8/23.

Docket Numbers: ER23–2663–000.

Applicants: PJM Interconnection,

L.L.C.

Description: § 205(d) Rate Filing:

Original ISA, SA No. 7038; Queue No. AE2–047 to be effective 7/21/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5050.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2664–000.

Applicants: Southwest Power Pool,

Inc.

Description: § 205(d) Rate Filing:

Revisions Concerning Critical Load and Demand Response Registration Requirements to be effective 12/31/9998.

Filed Date: 8/21/23.

Accession Number: 20230821–5051.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2665–000.

Applicants: Southwest Power Pool,

Inc.

Description: § 205(d) Rate Filing:

3Q2023 Tariff Clean-Up Filing to be effective 8/1/2022.

Filed Date: 8/21/23.

Accession Number: 20230821–5054.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2666–000.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: § 205(d) Rate Filing:

2023–08–21 SA 3372 Entergy Louisiana-Oak Ridge Solar 2nd Rev GIA (J697 J1436) to be effective 8/7/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5060.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2667–000.

Applicants: PJM Interconnection,

L.L.C.

Description: § 205(d) Rate Filing:

Amendment to ISA, SA No. 5561; Queue No. AC1–043/AD1–115 (amend) to be effective 10/21/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5063.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2668–000.

Applicants: Richfield Solar Energy

LLC.

Description: Baseline eTariff Filing:

Application for Market-Based Rate

Authorization to be effective 10/21/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5070.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2669–000.

Applicants: PJM Interconnection,

L.L.C.

Description: § 205(d) Rate Filing:

Original ISA, Service Agreement No. 7046; Queue No. AE1–149 to be effective 7/20/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5073.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2670–000.

Applicants: National Grid Generation LLC.

Description: § 205(d) Rate Filing:

Annual Reset of Pension and OPEB Expenses to be effective 1/1/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5076.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2671–000.

Applicants: PJM Interconnection,

L.L.C.

Description: § 205(d) Rate Filing:

Amendment to ISA, SA No. 5481; Queue No. AF1–014 (amend) to be effective 10/21/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5080.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2672–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits

Average System Cost Rate Filing for Sales of Electric Power to the Bonneville Power Administration, FY 2024–2025.

Filed Date: 8/17/23.

Accession Number: 20230817–5153.

Comment Date: 5 p.m. ET 9/7/23.

Docket Numbers: ER23–2673–000.

Applicants: Midcontinent

Independent System Operator, Inc., Ameren Illinois Company.

Description: § 205(d) Rate Filing:

Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii):2023–08–21 SA 4155 Ameren IL-Coles Wind E&P (J2128) to be effective 8/22/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5088.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2675–000.

Applicants: PJM Interconnection,

L.L.C.

Description: § 205(d) Rate Filing:

Original UCSA, Service Agreement No. 7048; Queue No. AF2–028 to be effective 7/20/2023.

Filed Date: 8/21/23.

Accession Number: 20230821–5118.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER23–2676–000.

Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-SMT McAllen II Generation Interconnection Agreement to be effective 7/31/2023.
Filed Date: 8/21/23.
Accession Number: 20230821-5136.
Comment Date: 5 p.m. ET 9/11/23.
Docket Numbers: ER23-2677-000.
Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA/CSA, Service Agreement Nos. 5852/5982; Queue No. AC2-079 to be effective 10/21/2023.
Filed Date: 8/21/23.
Accession Number: 20230821-5138.
Comment Date: 5 p.m. ET 9/11/23.
Docket Numbers: ER23-2678-000.
Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7041; Queue No. AE2-092 to be effective 7/20/2023.

Filed Date: 8/21/23.
Accession Number: 20230821-5150.
Comment Date: 5 p.m. ET 9/11/23.
 The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: August 21, 2023.
Debbie-Anne A. Reese,
Deputy Secretary.
 [FR Doc. 2023-18333 Filed 8-24-23; 8:45 am]
BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10489-020]

City of River Falls Municipal Utilities; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for subsequent license to continue to operate and maintain the River Falls Hydroelectric Project (project). The project is located on the Kinnickinnic River, in the City of River Falls (City), Pierce County, Wisconsin. Commission staff has prepared an Environmental Assessment (EA) for the project.

The EA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the EA via the internet through the Commission's Home Page (<http://www.ferc.gov/>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at FEROnlineSupport@ferc.gov, or toll-free at (866) 208-3676, or for TTY, (202) 502-8659.

You may also register online at <https://ferconline.ferc.gov/FEROnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 45 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>.

www.ferc.gov/docs-filing/ecomment.asp. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P-10489-020.

For further information, contact Michael Davis at 202-502-8339 or michael.davis@ferc.gov.

Dated: August 21, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-18392 Filed 8-24-23; 8:45 am]
BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD23-2-000]

Physical Security Technical Conference; Notice Inviting Post-Technical Conference Comments

On Thursday, August 10, 2023, the Federal Energy Regulatory Commission (Commission) and the North American Electric Reliability Corporation (NERC) convened a Physical Security Technical Conference to discuss physical security of the Bulk-Power System, including the adequacy of existing physical security controls, challenges, and solutions.

All interested persons are invited to file post-technical conference comments to address issues raised during the technical conference identified in the Final Notice of Joint Technical Conference issued on August 3, 2022. For reference, the questions included in the Final Notice are included below, and supplemental questions appear in *italics*. Commenters need not answer all of the questions but are encouraged to organize responses using the numbering and order in the below questions. Commenters are also invited to reference material previously filed in this docket but are encouraged to avoid repetition or replication of their previous comments. Comments must be submitted on or before 30 days from the date of this Notice.

Comments, identified by docket number, may be filed electronically or paper-filed. Electronic filing through <https://www.ferc.gov> is preferred. Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format. Instructions are available on the Commission's website: <http://www.ferc.gov/docs-filing/efiling.asp>.

Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, submissions sent via the U.S. Postal Service must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

For more information about this Notice, please contact:

Terrance Clingan (Technical Information), Office of Energy Reliability, (202) 502-8823, Terrance.Clingan@ferc.gov

Leigh Anne Faugust (Legal Information), Office of General Counsel, (202) 502-6396, Leigh.Faugust@ferc.gov

Dated: August 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

Post Technical Conference Questions

We are seeking comments on the topics discussed during the technical conference held on August 10, 2023, including responses to the questions listed in the Final Notice issued in this proceeding on August 3, 2023, as well as supplemental questions developed by Commission staff post-conference. The questions from the agenda and the supplemental questions are included below.

Panel 1: Effectiveness of Reliability Standard CIP-014-3

This panel explored the facilities subject to Reliability Standard CIP-014-3. While the NERC report filed with the Commission did not recommend revising the applicability section of the Standard at this time, the report determined that this could change based on additional information. Panelists discussed whether the applicability section of Reliability Standard CIP-014-3 identifies the appropriate facilities to mitigate physical security risks to better assure reliable operation of the Bulk-Power System. Panelists also discussed whether additional type(s) of substation configurations should be studied to

determine risks and the possible need for required protections.

Please address the following questions:

1. Is the applicability section of CIP-014-3 properly determining transmission station/substations to be assessed for instability, uncontrolled separation or cascading within the Interconnection? Specifically, are the correct facilities being assessed and what topology or characteristics should the applicable facilities have to be subject to CIP-014-3? For example, are there criteria other than those in Section 4.1.1 of CIP-014-3, such as connected to two vs. three other station/substations and exceeding the aggregated weighted value of 3,000, changing the weighting value of the table in the applicability section, or including lower transmission voltages?

2. Given the changing threat landscape, are there specific transmission station/substation configurations that should be included in the applicability section of CIP-014-3, including combinations of stations/substations to represent coordinated attacks on multiple facilities? What would they be and why?

3. What other assessments (e.g., a TPL-001 planning assessment) may be used to identify an at-risk facility or group of facilities that should be considered for applicability under CIP-014-3? How stringent are those assessments? Describe any procedural differences between those other assessments and the CIP-014-3 R1 Risk Assessment. Should CIP-014-3 apply to entities other than those transmission owners to which 4.1.1 applies or transmission operators to which 4.1.2 applies?

4. Should potential load loss or generation loss be considered? If so, why, and how would potential impact be determined (e.g., how would potential load loss be determined in advance of running an assessment?)

5. Should facilities that perform physical security monitoring functions that are not currently subject to CIP-014-3 (e.g., security operation centers) be covered by CIP-014-3 as well? If so, what criteria should be used?

6. *Are there additional studies that could be performed—either by industry, the ERO Enterprise, the national labs, or others—that could be used to determine whether there are unidentified CIP-014 “critical” transmission stations and transmission substations? Are there additional studies that would help determine whether the applicability section of the standard requires expansion to identify those transmission substations/stations that if lost or*

rendered inoperable would result in instability, uncontrolled separation or cascading within an Interconnection.

7. *How should extreme conditions be considered when identifying “critical” transmission substations/stations such as extended extreme weather events or disasters such as wildfires that weaken the resiliency of the Bulk-Power System?*

Panel 2: Minimum Level of Physical Protection

This panel discussed the reliability goal to be achieved and based on that goal, what, if any, mandatory minimum resiliency or security protections should be required against facility attacks, e.g., site hardening, ballistic protection, etc. This panel discussed the scope of reliability, resilience, and security measures that are inclusive of a robust, effective, and risk-informed approach to reducing physical security risks. The panel also considered whether any minimum protections should be tiered and discuss the appropriate criteria for a tiered approach.

Please address the following questions:

1. What is our reliability goal? What are we protecting against to ensure grid reliability beyond what is required in the current standards?

a. What are the specific physical security threats (both current and emerging) to all stations/substations on the bulk electric system?

b. As threats are continually evolving, how can we identify those specific threats?

c. How do threats vary across all stations/substations on the bulk electric system? How would defenses against those threats vary? To what extent should simultaneous attacks at multiple sites be considered?

2. Do we need mandatory minimum protections? If so, what should they be?

a. Should there be flexible criteria or a bright line?

b. Should minimum protections be tiered (i.e., stations/substations receive varying levels of protection according to their importance to the grid)? How should importance be quantified for these protections?

c. Should minimum protections be based on preventing instability, uncontrolled separation, or cascading or preventing loss of service to customers (e.g., as in Moore County, NC)? If minimum protections were to be based on something other than the instability, uncontrolled separation, or cascading, what burden would that have on various registered entities? If the focus is on loss of service, is it necessary to have state and local jurisdictions involved to

implement a minimum set of protections?

d. In what areas should any minimum protections be focused?

- i. Detection?
- ii. Assessment?
- iii. Response?

3. To what extent would minimum protections help mitigate the likelihood and/or reliability impact of simultaneous, multi-site attacks?

4. *To what extent would the placement of basic security-related data recording devices and associated equipment at stations/substations (varying based on the criticality of the stations/substations as determined by the transmission owner) to allow for an assessment of damage and the collection of evidence in the event of an attack provide any security benefit? Such devices and equipment could possibly provide alarms in real time to operating centers or merely be reviewed on demand when a singular disturbance alarm is sent to an operating center.*

5. *Are there basic levels of protection that all Bulk-Power System facilities use, such as fencing? Would minimum improvements to these protections, such as adding better security requirements to the present public safety requirements, better deter attacks?*

6. *Given the increasing number and severity of physical security threats and perpetrated attacks:*

i. *Should transmission owners annually evaluate evolving physical threats and implement corresponding security measures for CIP-014 critical facilities?*

ii. *What criteria should be considered in evaluating the impact of evolving threats and appropriate protections (e.g., criticality of load, likely duration of outage, location of station/substation)?*

iii. *How should transmission owners prioritize security measures for facilities that are not CIP-014 critical facilities? For example, should transmission owners document and implement a tiered approach to protecting bulk electric system (i.e., 100 kV and above) stations and substations based on criteria characterizing the level of impact (high(i.e., CIP-014 critical), medium, or low), similar to CIP-002-5.1a?*

Panel 3: Best Practices and Operational Preparedness

This panel discussed physical security best practices for prevention, protection, response, and recovery. The discussion included asset management strategies to prepare, incident training preparedness and response, and research and development needs.

Please address the following questions:

1. What is the physical security threat landscape for each of your companies? What best practices have been implemented to mitigate the risks and vulnerabilities of physical attacks on energy infrastructure?

2. What asset management and preparedness best practices have your member companies implemented to prevent, protect against, respond to, and recover from physical attacks on their energy infrastructure?

3. What research and development efforts are underway or needed for understanding and mitigating physical security risks to critical energy electrical infrastructure?

4. What research and development efforts, including the development of tools, would you like to see the National Labs undertake to assist your companies in addressing physical threats to your critical electrical infrastructure?

5. What do you need or would like to see from the energy industry to improve your ability and accuracy in addressing physical security risks to critical energy electrical infrastructure?

6. What best practices are in place to accelerate electric utility situational awareness of an incident and to involve local jurisdiction responders?

7. What can the federal and state regulators do to assist the energy industry in improving their physical security posture?

8. What training improvements can NERC and the Regional Entities implement to system operators to aid in real-time identification and recovery procedures from physical attacks?

9. What changes could be made to improve information sharing between the federal government and industry?

10. *How do these best practices comport with the objectives of CIP-014-3?*

Panel 4: Grid Planning To Respond to and Recover From Physical and Cyber Security Threats and Potential Obstacles

This panel explored planning to respond to and recovery from physical and cyber security threats and potential obstacles to developing and implementing such plans. This discussion focused on how best to integrate cyber and physical security with engineering, particularly in the planning phase. The panel discussed whether critical stations could be reduced through best practices and how to determine whether to mitigate the risk of a critical station or protect it. Finally, the panel considered the implications of the changing resource

mix on vulnerability of the grid and its resilience to disruptions.

Please address the following questions:

1. How can cyber and physical security be integrated with engineering, particularly planning? What aspects of cyber and physical security need to be incorporated into the transmission planning process?

2. What modifications could be made to TPL-001 to bring in broader attack focus (e.g., coordinated attack)? What sensitivities or examined contingencies might help identify vulnerabilities to grid attacks?

3. Currently, if a CIP-014-3 R1 assessment deems a transmission station/substation as “critical” that station/substation must be physically protected. Are there best practices for reconfiguring facilities so as to reduce the criticality of stations/substations?

4. When prioritizing resources, how should entities determine which “critical” stations/substations to remove from the list and which to protect? If the project is extensive and may have a long lead time to construct, to what degree does the station/substation need to be protected during the interim period?

5. How will the development of the grid to accommodate the interconnection of future renewable generation affect the resilience of the grid to attack? Will the presence of future additional renewable generation itself add to or detract from the resilience of the grid to physical attack?

6. What are the obstacles to developing a more resilient grid? What strategies can be used to address these obstacles?

- a. Cost?
- b. Siting?
- c. Regulatory Barriers?
- d. Staffing/training?

7. *How can transmission owners better work with state commissions on physical security? For example, are there opportunities to better work together as part of approval processes for projects (e.g., applications for certificates of public convenience and necessity)?*

8. *How can security protections be better integrated into the planning, engineering, and construction of projects that improve the security of the grid and overall performance and resilience, while keeping critical energy infrastructure information from being inappropriately released?*

[FR Doc. 2023-18336 Filed 8-24-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Combined Notice of Filings**

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–970–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement—8/19/2023 to be effective 8/19/2023.

Filed Date: 8/18/23.
Accession Number: 20230818–5153.
Comment Date: 5 p.m. ET 8/30/23.

Docket Numbers: RP23–971–000.
Applicants: Double E Pipeline, LLC.
Description: Annual System Balancing Adjustment Filing of Double E Pipeline, LLC.

Filed Date: 8/18/23.
Accession Number: 20230818–5182.
Comment Date: 5 p.m. ET 8/30/23.

Docket Numbers: RP23–973–000.
Applicants: Gulf Run Transmission, LLC.

Description: § 4(d) Rate Filing: Housekeeping Filing to be effective 9/21/2023.

Filed Date: 8/21/23.
Accession Number: 20230821–5085.
Comment Date: 5 p.m. ET 9/5/23.

Docket Numbers: RP23–974–000.
Applicants: Cheyenne Connector, LLC.

Description: § 4(d) Rate Filing: CC 2023–08–21 System Map URL to be effective 9/21/2023.

Filed Date: 8/21/23.
Accession Number: 20230821–5092.
Comment Date: 5 p.m. ET 9/5/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/>

[docs-filing/efiling/filing-req.pdf](#). For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: August 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–18334 Filed 8–24–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Project No. 6115–016]

Pyrites Hydro, LLC; Notice of Intent To Prepare an Environmental Assessment

On August 31, 2021, Pyrites Hydro, LLC filed a relicense application for the 8.2-megawatt Pyrites Hydroelectric Project No. 6115 (project). The project is located on the Grass River near the Town of Canton in St. Lawrence County, New York.

In accordance with the Commission's regulations, on June 13, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA Notice). Based on the information in the record, including comments filed on the REA Notice, staff does not anticipate that licensing the project would constitute a major Federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Assessment (EA) on the application to relicense the project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice

communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA	February 2024. ¹
Comments on EA	April 2024.

Any questions regarding this notice may be directed to Joshua Dub at (202) 502–8138 or Joshua.dub@ferc.gov.

Dated: August 21, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–18394 Filed 8–24–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Project No. 6115–016]

Pyrites Hydro, LLC; Notice of Waiver Period for Water Quality Certification Application

On August 3, 2023, Pyrites Hydro, LLC submitted to the Federal Energy Regulatory Commission (Commission) a copy of its application for a Clean Water Act section 401(a)(1) water quality certification filed with the New York State Department of Environmental Conservation (New York DEC), in conjunction with the above captioned project. Pursuant to 40 CFR 121.6 and section 4.34(b)(5) of the Commission's regulations,¹ we hereby notify New York DEC of the following:

Date of Receipt of the Certification Request: August 3, 2023.

Reasonable Period of Time to Act on the Certification Request: One year, August 3, 2024.

If New York DEC fails or refuses to act on the water quality certification request on or before the above date, then the

¹ The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) (2022) require that EAs be completed within 1 year of the Federal action agency's decision to prepare an EA. See National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, as amended by section 107(g)(1)(B)(iii) of the Fiscal Responsibility Act of 2023, Public Law 118–5, 4336a, 137 Stat. 42.

¹ 18 CFR 4.34(b)(5).

agency certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: August 21, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023–18393 Filed 8–24–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–083]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS)

Filed August 14, 2023, 10 a.m. EST
Through August 21, 2023, 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search>.

EIS No. 20230106, Final, USFS, MN,
Lutsen Mountains Ski Area Expansion Project, Review Period Ends: 10/10/2023, Contact: Orry Hatcher 218–626–4300.

EIS No. 20230107, Final, NRC, TN,
Environmental Impact Statement for the Construction Permit for the Kairos Hermes Test Reactor, Review Period Ends: 09/25/2023, Contact: Tamsen Dozier 301–401–2272.

Dated: August 22, 2023.

Julie A. Roemele,
Acting Director, NEPA Compliance Division,
Office of Federal Activities.

[FR Doc. 2023–18337 Filed 8–24–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2023–0435; FRL–11277–01–ORD]

Call for Information on the Integrated Science Assessment for Ozone and Related Photochemical Oxidants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; call for information.

SUMMARY: The Environmental Protection Agency (EPA) is preparing an Integrated Science Assessment (ISA) as part of the review of the air quality criteria and the primary (health-based) and secondary (welfare-based) National Ambient Air Quality Standards (NAAQS) for Ozone (O₃) and related photochemical oxidants. The ISA will be developed by the Center for Public Health and Environmental Assessment (CPHEA) within EPA's Office of Research and Development. When final, the ISA is intended to update the previous ISA for O₃ and related photochemical oxidants (EPA/600/R–20/012), published in 2020. Interested parties are invited to assist EPA in developing and refining the scientific information base for the review of the O₃ NAAQS by submitting research studies and data that have been published or accepted for publication since January 1, 2018.

DATES: All communications and information should be received by EPA by October 24, 2023.

ADDRESSES: Information may be submitted electronically, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions as provided in the section of this notice entitled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the ORD Docket at the EPA Headquarters Docket Center; phone: 202–566–1752; facsimile: 202–566–9744; or email: ord.docket@epa.gov. For technical information, contact Qingyu Meng; phone: 919–541–2563; or email: meng.qingyu@epa.gov; or Jeffrey Herrick; phone: 919–541–7745; or email: herrick.jeffrey@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Information About the Document

Section 108(a) of the Clean Air Act (the Act) directs the Administrator to identify and list certain air pollutants which, among other things, “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;”¹ and then to issue air quality criteria for them. The air quality criteria are to “accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be

expected from the presence of [the] pollutant in the ambient air”

Under section 109 of the Act, EPA is then to establish NAAQS for each pollutant for which EPA has issued criteria. Section 109(d)(1) of the Act additionally requires periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health and welfare. Under the same provision, EPA is also to periodically review and, if appropriate, revise the NAAQS, based on the revised air quality criteria. Documents and technical materials associated with NAAQS reviews are available at <https://www.epa.gov/naaqs>.

Photochemical oxidants, including O₃, are one of six “criteria” pollutants for which EPA has established NAAQS, and O₃ is the current indicator for that NAAQS. In its periodic review of the air quality criteria for these pollutants, EPA reviews the currently available science and prepares an ISA. The ISA provides the scientific foundation for EPA's NAAQS reviews, in conjunction with additional technical and policy assessments, and for the Administrator's decisions on the adequacy of the current NAAQS and the appropriateness of possible alternative standards. Early steps in this review process include announcing the initiation of the review of the air quality criteria and the NAAQS and the intention of the EPA to develop an ISA, and requesting that the public submit scientific literature that they want to bring to the attention of the Agency as it begins this process. The Clean Air Scientific Advisory Committee (CASAC), whose review and advisory functions are mandated by section 109(d)(2) of the Clean Air Act, is charged, among other things, with the independent scientific review of the air quality criteria. In conjunction with the CASAC review, the public will have an opportunity to review and comment on the draft ISA. The ISA developed in this review of the air quality criteria and O₃ NAAQS will build on the scientific assessment from the last review,² focusing on assessing and integrating the information newly available since that considered in the 2020 ISA. With regard to development of the ISA, the public is encouraged to assist in identifying relevant scientific information for the review by submitting research studies that were

¹ Under Clean Air Act section 302(h), welfare effects include, but are not limited to, “effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.”

² The scientific assessment for the last review is documented in the Integrated Science Assessment (ISA) for Ozone and Related Photochemical Oxidants (Final Report, April 2020). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–20/012, 2020; 85 FR 21849, April 20, 2020.

not part of the prior review, and that have been published or accepted for publication in a peer-reviewed journal. The Agency is interested in obtaining newly available information, particularly concerning toxicological studies of effects of controlled exposure to O₃ in laboratory animals, humans, and *in vitro* systems; epidemiologic (observational) studies of health effects associated with ambient O₃ exposures in human populations; studies examining populations and life stages that may be at increased risk of O₃-related health effects. For studies examining effects on welfare or the environment, studies that address or provide new information on terrestrial biota are of particular interest, including effects of O₃ on vegetation; communities and populations of plants and associated biota, as well as exposure-response relationships between O₃ in ambient air and specific welfare effects. The EPA also seeks recent information in other areas of O₃ research such as atmospheric chemistry and physics, sources and emissions, analytical methodology, transport and transformation in the environment, and ambient concentrations.

The Agency also seeks information regarding the design and scope of the review of the air quality criteria to ensure that it addresses key policy-relevant issues and considers the new science that is relevant to informing our understanding of these issues. The Agency seeks new scientific information that may address key uncertainties identified in the last O₃ NAAQS review, which are provided in section 3.6 of the 2020 Policy Assessment (EPA-452/R-20-001, May 2020).³ The Agency also seeks new scientific information or data that may address scientific and technical issues raised in two more recent letters from CASAC: one dated November 22, 2022 (EPA-CASAC-23-001)⁴ and the other dated June 9, 2023 (EPA-CASAC-23-002).⁵ Other

opportunities for submission of new peer-reviewed, published (or in-press) papers will be possible as part of public comment on the draft ISA that will be reviewed by the CASAC.

II. How To Submit Technical Comments to the Docket at www.regulations.gov

Submit your materials identified by Docket ID No. EPA-HQ-ORD-2023-0435 by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: ord.docket@epa.gov.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Office of Research and Development Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. The phone number is 202-566-1752.
- Hand Delivery or Courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal holidays). If you provide materials by mail or hand delivery, please submit three copies of these materials. For attachments, provide an index, number pages consecutively with the materials, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA-HQ-ORD-2023-0435. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked "late," and may only be considered if time permits. It is EPA's policy to include all materials it receives in the public docket without change and to make the materials available online at www.regulations.gov, including any personal information provided, unless materials include 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 www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the materials that are placed in the public

docket and made available on the internet. If you submit electronic materials, EPA recommends that you include your name and other contact information in the body of your materials and with any disk or CD-ROM you submit. If EPA cannot read your materials due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider the materials you submit. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EPA's Docket Center homepage at <https://www.epa.gov/dockets>.

Docket: 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 materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the ORD Docket in EPA's Headquarters Docket Center.

Wayne Cascio,

Director, Center for Public Health and Environmental Assessment.

[FR Doc. 2023-18335 Filed 8-24-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2023-0404; FRL-11284-01-OCSPP]

Ortho-Phthalaldehyde; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the National Aeronautics and Space Administration (NASA) to use the pesticide ortho-phthalaldehyde (OPA, CAS No. 643-79-8) to treat the coolant fluid of the internal active thermal control system of the International Space Station to control aerobic/microaerophilic bacteria in the aqueous coolant. The applicant proposes the use of a new chemical which has not been registered by EPA. Therefore, in accordance with the Code of Federal Regulations, EPA is soliciting public comment before making the

³ The 2020 Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards is available at: https://www.epa.gov/sites/default/files/2020-05/documents/o3-final_pa-05-29-20compressed.pdf.

⁴ Letter from Elizabeth A. Sheppard, Chair, Clean Air Scientific Advisory Committee, to Administrator Michael S. Regan. Re: CASAC Review of the EPA's Integrated Science Assessment (ISA) for Ozone and Related Photochemical Oxidants (Final Report—April 2020). November 22, 2022. EPA-CASAC-23-001. Available at: https://casac.epa.gov/ords/sab/f?p=105:18:8476900499267::RP,18:P18_ID:2614.

⁵ Letter from Elizabeth A. Sheppard, Chair, Clean Air Scientific Advisory Committee, to Administrator Michael S. Regan. Re: CASAC Review of the EPA's Policy Assessment (PA) for the Reconsideration of the Ozone National Ambient Air Quality Standards (External Review Draft Version 2) (June 9, 2023) (EPA-CASAC-23-002). Available at

https://casac.epa.gov/ords/sab/f?p=113:18:7093179574667::RP,18:P18_ID:2636#meeting.

decision whether to grant the exemption.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0404, through the *Federal eRulemaking Portal* at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Charles Smith, Director Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: RDfRNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are a pesticide manufacturer, North American Industrial Classification System (NAICS) (Code 32532) or involved with the International Space Station. This listing is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Other types of entities not listed could also be affected.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your

comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What action is the Agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the EPA Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the EPA Administrator determines that emergency conditions exist which require the exemption. NASA has requested the EPA Administrator to issue a specific exemption for the use of ortho-phthalaldehyde (OPA) in the coolant of the internal active thermal control system (IATCS) of the International Space Station (ISS) to control aerobic/microaerophilic bacteria in the aqueous coolant. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicant asserted that it has considered the registered biocide alternatives and has concluded that OPA is the most effective biocide that meets the requisite criteria including: The need for safe, non-intrusive implementation and operation in a functioning system; the ability to control existing planktonic and biofilm-residing micro-organisms; a negligible impact on system wetted materials of construction; and a negligible reactivity with existing coolant additives. The ISS would not have an adequate long-term solution for controlling the micro-organisms in the IATCS coolant without the use of OPA. The OPA is incorporated into a porous resin material contained in a stainless-steel canister. The canister containing the OPA-incorporated resin is inserted into a coolant system loop, using flexible hose and quick disconnects and is placed in line for 8 hours to deliver the OPA into the fluid. As the coolant fluid flows through the cannister, the

OPA elutes from the resin material into the coolant fluid. The total volume of the circulatory loops of the IATCS is 829 liters. The maximum concentration would be 350 milligrams (mg) of OPA per liter of coolant fluid. A total of 290,150 mg would be needed for the entire system. The OPA is incorporated into the resin at 210 mg OPA per cm³ resin, resulting in a potential total use of 1,382 cm³ of the OPA-containing resin. The level of OPA in the coolant is monitored periodically, and because OPA degrades over time, the concentration decreases to a level that is no longer effective in about 1 to 2 years. At this point, replenishment with new OPA-containing canisters is required. EPA has authorized similar emergency exemptions for this use since 2011. With the decision to extend the mission of the ISS to 2030, the need for this use is expected to continue for the duration of the program.

This notice does not constitute a decision by EPA on the application itself. The regulations governing FIFRA section 18 require publication of a notice of receipt of an application for a specific exemption proposing the use of a new chemical (*i.e.*, an active ingredient) which has not been registered by EPA.

The notice provides an opportunity for public comment on the application. The Agency will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the NASA.

Authority: 7 U.S.C. 136 *et seq.*

Dated: August 21, 2023.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2023–18389 Filed 8–24–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0027, 3060–0029, 3060–0850; FR ID 165823]

Information Collections Being Submitted for Review and Approval to 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, as required by the Paperwork Reduction Act (PRA) of 1995, 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. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before September 25, 2023.

ADDRESSES: Comments should be sent to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Your comment must be submitted into www.reginfo.gov per the above instructions for it to be considered. In addition to submitting in www.reginfo.gov also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to PRA@fcc.gov and to Cathy.Williams@fcc.gov. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called “Currently Under Review,” (3) click on the downward-pointing arrow in the “Select Agency” box below the “Currently Under Review” heading, (4) select “Federal Communications Commission” from the list of agencies presented in the “Select Agency” box, (5) click the “Submit” button to the right of the “Select Agency” box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) 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; (b) the accuracy of the Commission’s burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) 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. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

OMB Control Number: 3060–0027.

Type of Review: Extension of a currently approved collection.

Title: Application for Construction Permit for Commercial Broadcast Station, FCC Form 301; Form 2100, Schedule A—Application for Media Bureau Video Service Authorization; 47 Sections 73.3700(b)(1) and (b)(2) and Section 73.3800, Post Auction Licensing; Form 2100, Schedule 301–FM—Commercial FM Station Construction Permit Application.

Form Number: FCC Form 301; Form 2100, Schedule A; and Form 2100, Schedule 301–FM.

Respondents: Business or other for-profit entities; not-for-profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 3,092 respondents and 4,199 responses.

Estimated Time per Response: 0.075 to 6.25 hours.

Frequency of Response: On occasion reporting requirement; One time reporting requirement; third party disclosure requirement.

Total Annual Burden: 12,435 hours.

Total Annual Cost: \$62,308,388.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Needs and Uses: FCC Form 301, used by AM broadcast stations, and Form 2100, Schedule 301–FM, used by FM

broadcast stations, are used to apply for authority to construct a new commercial AM or FM broadcast station and to make changes to the existing facilities of such a station. They may be used to request a change of a station’s community of license by AM and non-reserved band FM permittees and licensees. In addition, FM licensees or permittees may request, by filing an application on FCC Form 301, upgrades on adjacent and co-channels, modifications to adjacent channels of the same class, and downgrades to adjacent channels.

Form 2100, Schedule 301–FM also accommodates commercial FM applicants applying in a Threshold Qualifications Window (TQ Window) or a Tribal Allotment. A commercial FM applicant applying in the TQ Window, who was not the original proponent of the Tribal Allotment at the rulemaking stage, must demonstrate that it would have qualified in all respects to add that particular Tribal Allotment for which it is applying. Additionally, a petitioner seeking to add a new Tribal Allotment to the FM Table of Allotments must file Form 2100, Schedule 301–FM when submitting its Petition for Rulemaking. The collection also accommodates applicants applying in a TQ Window for a Tribal Allotment that had been added to the FM Table of Allotments using the Tribal Priority under the “threshold qualifications” procedures.

Similarly, to receive authorization for commencement of Digital Television (DTV) operations, commercial broadcast licensees must file FCC Form 2100, Schedule A for a construction permit. The application may be filed any time after receiving the initial DTV allotment and before mid-point in the applicant’s construction period. The Commission will consider the application as a minor change in facilities. Applicants do not have to provide full legal or financial qualifications information.

OMB Control Number: 3060–0029.

Title: FCC Form 2100, Schedule 340—Noncommercial Educational Station for Reserved Channel Construction Permit Application.

Form Number: FCC Form 2100, Schedule 340.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and State, local or Tribal government.

Number of Respondents and Responses: 2,820 respondents; 2,820 responses.

Estimated Time per Response: 0.5–6 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 6,603 hours.

Total Annual Cost: \$30,039,119.

Needs and Uses: Schedule 340 is used by licensees and permittees to apply for authority to construct a new noncommercial educational (NCE) FM and DTV broadcast station (including a DTS facility), or to make changes in the existing facilities of such a station. Schedule 340 is only used if the station will operate on a channel that is reserved exclusively for NCE use, or in the situation where applications for NCE stations on non-reserved channels are mutually exclusive only with one another. Also, Schedule 340 is used by Native American Tribes and Alaska Native Villages (Tribes), tribal consortia, or entities owned or controlled by Tribes when qualifying for the "Tribal Priority" under 47 CFR 73.7000, 73.7002. Additionally, Schedule 340 contains a third party disclosure requirement, pursuant to section 73.3580. This rule requires local public notice of the filing of all applications to construct a new full-service NCE FM or DTV broadcast station. Notice is given by an NCE applicant by posting notice of the application filing on its station's website, its licensee's website, its parent entity's website, or on a publicly accessible, locally targeted website, for 30 consecutive days beginning within five business days of acceptance of the application for filing. Furthermore, the online notice must link to a copy of the application as filed, either in the station's Online Public Inspection File or in another Commission database. This recordkeeping information collection requirement is contained in OMB Control No. 3060-0214, which covers section 73.3527.

OMB Control No.: 3060-0850.

Title: Quick-Form Application for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services.

Form No.: FCC Form 605.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; business or other for-profit; not-for-profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 130,000 respondents, 130,000 responses.

Estimated Time per Response: 0.17 hours–0.44 hours.

Frequency of Response: On occasion reporting requirement; third party disclosure requirement, recordkeeping & other (5 & 10 yrs).

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. 154, 301 sections 4 and 301.

Total Annual Burden: 57,218 hours.

Total Respondent Cost: \$4,550,000.

Needs and Uses: FCC 605 application is a consolidated application form for Ship, Aircraft, Amateur, Restricted and Commercial Radio Operators, and General Mobile Radio Services and is used to collect licensing data for the Universal Licensing System. The Commission is requesting OMB approval for a minor revision to the reporting, recordkeeping and/or third party disclosure requirements. The Commission is removing Certification #3 for the General Mobile Radio Service, as well as making minor clarifications to the general filing instructions.

The data collected on this form includes the Date of Birth for Commercial Operator licensees however this information will be redacted from public view.

The FCC uses the information in FCC Form 605 to determine whether the applicant is legally, technically, and financially qualified to obtain a license. Without such information, the Commission cannot determine whether to issue the licenses to the applicants that provide telecommunication services to the public, and therefore, to fulfill its statutory responsibilities in accordance with the Communications Act of 1934, as amended. Information provided on this form will also be used to update the database and to provide for proper use of the frequency spectrum as well as enforcement purposes.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023-18351 Filed 8-24-23; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m. on August 29, 2023.

PLACE: This Board meeting will be open to public observation only by webcast. Visit <https://www.fdic.gov/news/board-matters/video.html> for a link to the

webcast. FDIC Board Members and staff will participate from FDIC Headquarters, 550 17th Street NW, Washington, DC.

Observers requiring auxiliary aids (e.g., sign language interpretation) for this meeting should email DisabilityProgram@fdic.gov to make necessary arrangements.

STATUS: Open to public observation via webcast.

MATTERS TO BE CONSIDERED: The Federal Deposit Insurance Corporation's Board of Directors will meet to consider the following matters:

Discussion Agenda

Memorandum and resolution re: Notice of Proposed Rulemaking on Long-term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions.

Memorandum and resolution re: Resolution Plans Required for Insured Depository Institutions with \$100 Billion or More in Total Assets; Informational Filings Required for Insured Depository Institutions with At Least \$50 Billion, but Less Than \$100 Billion in Total Assets.

Memorandum and resolution re: Publication of Proposed Guidance for Dodd-Frank Act Resolution Plan Submissions of Triennial Full Filers.

Memorandum and resolution re: Conditions to Certain Receivership Delegations of Authority and Procedures.

Memorandum and resolution re: Board Approval of Midsized and Large Failed Bank Sales.

Summary Agenda

No substantive discussion of the following items is anticipated. The Board will resolve these matters with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

CONTACT PERSON FOR MORE INFORMATION:

Direct requests for further information concerning the meeting to Debra A. Decker, Executive Secretary of the Corporation, at 202-898-8748.

Authority: 5 U.S.C. 552b.

Dated at Washington, DC, on August 22, 2023.

Federal Deposit Insurance Corporation.
James P. Sheesley,
Assistant Executive Secretary.
 [FR Doc. 2023–18421 Filed 8–23–23; 11:15 am]
BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue, NW, Washington DC 20551–0001, not later than September 11, 2023.

A. Federal Reserve Bank of Richmond (Brent B. Hassell, Assistant Vice President) P.O. Box 27622, Richmond, Virginia 23261. Comments can also be sent electronically to

Comments.applications@rich.frb.org:

1. *Piedmont Financial Holding Company, Winston-Salem, North Carolina*; to acquire Wake Forest Bancorp, M.H.C., and Wake Forest Bancshares, Inc., and thereby indirectly acquire Wake Forest Federal Savings and Loan Association, all of Wake

Forest, North Carolina, and thereby engage in operating a savings association pursuant to Section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,
Deputy Associate Secretary of the Board.
 [FR Doc. 2023–18371 Filed 8–24–23; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 221 0212]

EQT and Quantum; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: “EQT and Quantum; File No. 221 0212” on your comment and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex N), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Greta Burkholder (202–326–3225), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule § 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period

of 30 days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before September 25, 2023. Write “EQT and Quantum; File No. 221 0212” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. If you prefer to file your comment on paper, write “EQT and Quantum; File No. 221 0212” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex N), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on <https://www.regulations.gov>—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC website at <https://www.ftc.gov> to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before September 25, 2023. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from QEP Partners, LP, by itself and through the entities under its control (including Quantum Energy Partners VI, LP; Q–TH Appalachia (VI) Investment Partners, LLC) (collectively, “Quantum”), and EQT Corporation (“EQT,” and together with Quantum, “Respondents”). EQT has proposed acquiring THQ Appalachia I, LLC (“Tug Hill”) and THQ-XcL Holdings I, LLC (“XcL Midstream”) from Quantum for approximately \$5.2 billion: \$2.6 billion in cash and up to 55 million shares of EQT stock (“Proposed Transaction”). In addition to this consideration, and in connection with Quantum’s anticipated status as one of EQT’s largest shareholders, EQT agreed to facilitate the appointment of Quantum’s CEO, or another Quantum-designated

individual, to the EQT Board of Directors.

The Proposed Transaction raises several concerns. Specifically, both Quantum’s anticipated position as one of EQT’s largest shareholders and EQT’s obligation to facilitate the appointment of a Quantum designee to the EQT board raise concerns that Quantum or EQT could have access to each other’s competitively significant, non-public information and could participate in, or have influence over, competitive decision-making at each firm. Under Section 8 of the Clayton Act, it is per se illegal for directors and officers to serve simultaneously on the boards of competitors (subject to limited exceptions), as would occur here absent the Consent Agreement with the appointment of Quantum’s designee to the board of its competitor, EQT. In addition to these concerns, a pre-existing joint venture between EQT and Quantum, The Mineral Company (“TMC”), raises concerns with respect to the exchange of competitively sensitive business information regarding the acquisition of mineral rights within the Appalachian Basin.

The Consent Agreement is designed to remedy allegations in the Commission’s Complaint that: (1) Quantum’s proposed acquisition of up to 55 million shares of EQT stock, together with or separately from assurances that a Quantum-designee will be nominated for a seat on the EQT Board of Directors, would result in an illegal interlocking directorate in violation of Section 8 of the Clayton Act, 15 U.S.C. 19, and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 due to potential exchange of confidential, competitively sensitive information, and that (2) TMC, the pre-existing Quantum/EQT joint venture, is an unfair method of competition in violation of section 5 of the FTC Act, 15 U.S.C. 45.

The proposed settlement presents significant relief for these concerns. The Consent Agreement and proposed Decision and Order (“D&O”) prohibit Quantum from occupying an EQT Board seat and require Quantum to divest its EQT shares by a non-public date certain, effectively imposing a structural fix to concerns about the influence and information access that arise from Quantum’s sizable EQT shareholder position. The D&O contains provisions that incentivize Quantum’s rapid sale of the EQT shares, coupled with provisions effectively rendering Quantum’s ownership passive pending the sale of its EQT shares. The D&O also reduces opportunities for exchanging

confidential and competitively significant information between the firms beyond Quantum’s EQT share ownership, notably by requiring EQT and Quantum to unwind the TMC mineral rights acquisition joint venture. The D&O contemplates the appointment of a monitor to ensure compliance with the terms of the ten-year order.

The proposed D&O imposes effective and administrable relief, while setting important Commission precedent on the application of Section 8 of the Clayton Act, Section 5 of the FTC Act, and the use of structural remedies to address these theories of harm. By restricting future opportunities for the parties to engage in conduct that would result in Section 8 violations and other unfair methods of competition involving natural gas activities in the Appalachian Basin, the proposed D&O signals the antitrust risks of excessive influence and anticompetitive information exchange.

The Commission has placed the Consent Agreement on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the proposed Order final.

I. The Respondents

Respondent QEP Partners, LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located in Houston, Texas. Respondent QEP Partners, LP controls Respondents Quantum Energy Partners VI, LP and Q–TH Appalachia (VI) Investment Partners, LLC. Through its private equity, investment, and structured finance funds, Quantum owns, controls, or has influence over entities producing natural gas in the Appalachian Basin and throughout the country. Quantum-owned entities include Tug Hill, a natural gas producer in the Appalachian Basin, and XcL Midstream, a natural gas gatherer and processor in the Appalachian Basin, two entities sought for purchase by Respondent EQT.

Respondent EQT is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located in Pittsburgh, Pennsylvania. EQT is the nation’s largest producer of natural gas. EQT acquires mineral rights and produces natural gas and natural gas liquids primarily in the Appalachian

Basin, including areas close to Quantum's Tug Hill/XcL Midstream operations. EQT markets natural gas within and outside the Appalachian Basin.

II. The Agreements

On September 6, 2022, EQT and Quantum entered into a Purchase Agreement, under which EQT sought to acquire Tug Hill and XcL Midstream from Quantum for a total purchase price of approximately \$5.2 billion. Roughly half of the consideration to Quantum would take the form of up to 55 million shares of EQT stock.¹ The Proposed Transaction would make Quantum one of EQT's largest shareholders. As additional consideration, EQT agreed to "take all necessary action to facilitate" the appointment of Quantum CEO Wil VanLoh, or another Quantum designee, "to be included in a slate of director nominees recommended by the [EQT] Board" for election as an EQT director.

The Commission's Complaint alleges that the Proposed Transaction, as structured, would violate Section 8 of the Clayton Act, 15 U.S.C. 19, as an illegal interlocking directorate, and that the Proposed Transaction—the acquisition of up to 55 million EQT shares or EQT's obligation to use best efforts to nominate a Quantum director—also constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 due to risks of the exchange of competitively sensitive, non-public information.

In October 2020, EQT and a Quantum affiliate entered an agreement forming a joint venture, TMC. TMC served as a vehicle for EQT to purchase mineral rights in the Appalachian Basin, with funding largely supplied by Quantum. The TMC agreement requires EQT to offer a right of first refusal to TMC before EQT can purchase mineral rights within a specified geography. TMC receives forward-looking and competitively sensitive, non-public information about EQT's mineral rights acquisition plans, drilling plans, strategies, and operations. Quantum's participation in TMC management provided it with access to this information as well.

The Commission's Complaint alleges that the TMC joint venture is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

III. Line of Commerce

The production and sale of natural gas is a relevant line of commerce. Natural gas is a critical fuel source with highly varied uses in the United States and worldwide. Natural gas purchasers generally cannot switch to alternative fuels without substantial costs and delay.

The acquisition of mineral rights is also a relevant line of commerce. To produce natural gas, a firm must first purchase or lease mineral rights from landowners. The mineral rights held by a producer can indicate key aspects of the producer's future production plans, including the areas the producer may drill and the amount of drilling activity the producer anticipates within a reasonable timeframe.

The Appalachian Basin, consisting of the portions of West Virginia, Pennsylvania, Ohio, Maryland, Kentucky, and Virginia that lie in the Appalachian Mountains, is widely recognized as a major natural gas producing area in the United States, and one of the largest in the world. A current shortage of available pipeline capacity to transport natural gas from the Appalachian Basin to demand centers outside of the Basin is a distinguishing characteristic of the region. Stranded excess gas supply in the Basin has artificially depressed local prices relative to pricing locations outside the Basin. Given current pipeline constraints, customers located within the Appalachian Basin cannot economically purchase gas from outside the Basin.

IV. Effects of the Agreements

The Commission's Complaint addresses two theories of harm. First, Quantum's acquisition of up to 55 million EQT shares would make Quantum—an EQT rival in the production and sale of natural gas in the Appalachian Basin—one of the largest shareholders of EQT. This shareholder position would provide Quantum with the ability to sway or influence EQT's competitive decision-making and to access EQT's competitively sensitive information. As one of EQT's largest shareholders, Quantum would have the opportunity to communicate directly with EQT and could discuss confidential business information or direct or otherwise influence EQT's competitive actions or strategies. Knowledge gained via its relationship with EQT could also influence Quantum's own competitive decisions or development of new businesses involved in the production and sale of natural gas. The Commission's

Complaint alleges these opportunities are particularly problematic given certain actions by the Respondents, including the TMC joint venture and other activities involving providing nonpublic information that restricted competition, the natural gas industry's history of encouraging the exchange of competitively sensitive information, and competitors publicly signaling their strategic moves to other competitors.

Moreover, the Proposed Transaction explicitly contemplated Quantum CEO Wil VanLoh's appointment to EQT's Board of Directors. In addition to his role as CEO, Mr. VanLoh is the Chair of the Investment Committee for Quantum Energy Partners, Quantum's private equity subsidiary and the entity that oversees the investment decisions of Respondent Quantum Energy Partners VI, LP and its subsidiaries. Mr. VanLoh was previously a member of the Tug Hill Board of Directors and also sits on the Board of Directors of another natural gas company in which Quantum invests. As a result, Mr. VanLoh's appointment to EQT's Board of Directors while simultaneously serving as CEO of Quantum and Chair of Quantum's Investment Committee would create an illegal interlocking directorate between EQT and Quantum. Any other director appointed by Quantum would be, by virtue of the appointment, an agent of Quantum and under its control. Thus, appointing a Quantum-designated director (other than Mr. VanLoh) to EQT's Board of Directors would similarly create an illegal interlock between EQT and Quantum. The Complaint alleges that the above concerns violate both section 8 of the Clayton Act and section 5 of the Federal Trade Commission Act.

The Complaint's second theory of harm addresses the TMC joint venture specifically, as well as information exchange more generally. The TMC joint venture creates additional opportunities for sharing competitively sensitive business information. Respondents already may use TMC as a vehicle for information exchange, either with respect to competition for the purchase of mineral rights or in connection with EQT's future drilling plans. Via the TMC joint venture, EQT and Quantum (through portfolio companies involved in the acquisition of mineral rights and production and sale of natural gas in the Appalachian Basin) each can inform the other where it intends to procure mineral rights for future productions and how much it plans to bid. This information is forward-looking, non-public, and competitively sensitive, and its exchange among rivals, coupled with the non-compete agreements in place

¹ The number of shares ultimately due to Quantum is subject to customary purchase price adjustments, including adjustments for business proceeds and costs incurred during the interim period between signing and closing of the Proposed Transaction.

within the joint venture, harms competition in the acquisition of mineral rights. The Complaint also alleges that the TMC joint venture violates section 5 of the Federal Trade Commission Act.

V. The Proposed Order

The proposed Order imposes several terms to remedy these concerns. First, the Order requires Quantum to forego its right to a seat on EQT's Board. Quantum shall not, directly or indirectly, appoint any persons to EQT's Board, seek or obtain representation on EQT's Board, or have any of its agents or representatives serve simultaneously as an officer or director of EQT or in a decision-making capacity of any EQT entity. EQT, conversely, shall not, directly or indirectly, have any of its representatives serve simultaneously in any management capacity within Quantum, any operating entity controlled by Quantum, or any investment fund managed by Quantum. This Order provision makes it clear that Quantum is subject to the prohibition on interlocking directors and officers under section 8 of the Clayton Act, despite Quantum's limited liability and limited partnership corporate structure.

Second, absent prior Commission approval, the proposed Order prohibits Quantum from serving on the Board of any of the top seven Appalachian Basin natural gas producers, accounting for a substantial majority of the market.

Third, Quantum shall sell its EQT shares by a non-public date certain. Failure to sell by that date will result in the transfer of the shares to a trustee empowered to liquidate the shares unilaterally. Quantum cannot knowingly divest these shares to an entity that is one of the top seven natural gas producers in the Appalachian Basin without prior Commission approval. Quantum is also prohibited from sharing with EQT any non-public information regarding its stock position or intent to sell or hold any of the EQT shares.

Fourth, during the period when Quantum owns EQT shares, the shares will be held in a voting trust, and any votes will be carried out by the trustee pro rata with all other EQT shareholders. The proposed Order prohibits Quantum from engaging in the solicitation of proxies in connection with its EQT shareholder position, and further prohibits Quantum from directly or indirectly influencing EQT's Board of Directors, management, or operations. Together, these provisions effectively render Quantum's shares a passive investment until the shares are sold.

Fifth, for the duration of the proposed ten-year Order, Quantum is prohibited from acquiring additional EQT shares absent prior Commission approval. During the period when Quantum owns EQT shares, however, prior approval is not needed for shares acquired indirectly as consideration for EQT's acquisition of a Quantum business that is subject to a premerger notification under the Hart-Scott-Rodino Act. Prior approval is also not required during a period when Quantum no longer owns EQT shares for shares acquired indirectly as consideration for EQT's acquisition of a Quantum business.

Sixth, the proposed Order also requires Quantum and EQT to unwind TMC, including any noncompete provisions.

Seventh, the proposed Order imposes further limitations on future entanglements between EQT and Quantum. For example, as noted above, the proposed Order prohibits any of EQT's directors, officers, agents, or representatives from serving simultaneously in any management capacity within Quantum, any operating entity controlled by Quantum, or any investment fund managed by Quantum. The proposed Order also prohibits Quantum and EQT from entering into any noncompete agreements other than those in connection with and ancillary to the sale of a business, assets, or company.

Eighth, the proposed Order contains additional provisions designed to ensure the effectiveness of the relief. A monitor will be appointed to track compliance, and both Respondents must provide regular compliance reports. Provisions of the proposed Order that do not end upon the sale of EQT shares will last up to ten years.

And finally, the proposed Order requires EQT and Quantum to distribute the Order to each of their respective board members, officers, and directors, and to design, maintain, and operate an antitrust compliance program.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission.

April J. Tabor,
Secretary.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya

In September 2022, the nation's largest natural gas producer, EQT Corporation ("EQT"), proposed to acquire certain natural gas assets from private equity firm, Quantum Energy Partners, LP ("Quantum"). EQT agreed to offer \$2.6 billion in cash, up to 55 million shares of EQT stock, and a seat on EQT's Board of Directors. Quantum has a host of investments and operations across the oil and gas industry, and both companies and their affiliates compete head-to-head in the production of natural gas in the Appalachian Basin. The proposed transaction would make Quantum one of EQT's largest shareholders and secure Quantum a seat on the board of its direct competitor. After conducting a thorough investigation, the Commission determined it had reason to believe this deal was illegal.

Today, the Commission announces a settlement of charges that the proposed transaction would result in an illegal interlocking directorate in violation of Section 8 of the Clayton Act and an unfair method of competition in violation of Section 5 of FTC Act due to the potential for exchange of confidential and competitively significant information. Specifically, Quantum's anticipated position as one of EQT's largest shareholders and EQT's obligation to facilitate the appointment of a Quantum designee to the EQT board raise concerns that the firms could exchange non-public sensitive business information and participate in or influence each other's strategic decisions.

The potential risks to competition posed by this transaction are particularly concerning given the dense and tangled web of co-investments, joint operations, and other methods of coordination between and among natural gas producers and investors in the Appalachian Basin. The sector is characterized by a tight-knit set of players rife with entanglements and a history of suspicious ventures and information exchange. Along these lines, the Commission's complaint separately charges that a pre-existing joint venture between EQT and Quantum relating to mineral rights acquisitions constitutes an additional unfair method of competition in violation of the FTC Act.

The proposed consent order lays out several terms to remedy these concerns. The order prohibits Quantum from occupying an EQT Board seat and requires it to divest the EQT shares, imposing a structural remedy to address concerns about the influence and information access that arise from Quantum's sizable EQT shareholder position. The order additionally limits both current and future entanglements between the firms and reduces opportunities for exchanging confidential and competitively significant information between the firms, including by requiring EQT and Quantum to unwind their existing joint venture and any noncompete provisions.

I. Revitalizing Section 8

Section 8 of the Clayton Act states that "no person shall, at the same time, serve as a director or officer in any two corporations . . . that are (a) engaged in whole or in part in commerce; and (b) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws[.]"¹ It was designed to prevent "control of great aggregations of money, capital, and property through the medium of common directors."² Lawmakers recognized that interlocking directorates could facilitate undue coordination, influence, or other means of dampening competition. Congress adopted an incipency approach, seeking to eliminate the very structure that would facilitate these violations by "removing the opportunity or temptation to such violations through interlocking directorates."³ Interlocking directorates that violate Section 8 are *per se* illegal.⁴ Beyond requiring that the interlocked companies be "competitors" whereby the "elimination of competition" between them would violate the antitrust laws, Section 8 does not require any type of showing of harm to competition.⁵

Legislative efforts to address corporate interlocks were catalyzed by congressional reports in 1887, 1912, and 1913 that showed firms had used interlocks to win personal favors or exclusive treatment of suppliers or customers.⁶ One of the most vocal opponents of board interlocks was Louis Brandeis. Shortly before his appointment to the Supreme Court in 1916, Brandeis authored several books and articles that highlighted the need for addressing interlocking directorates.⁷ He believed that having influential individuals serve on the same corporate boards intrinsically and inevitably created a host of risks, including conflicts of interest, collusion, and improper exchange of competitively sensitive information. In his view, the prohibition on interlocking directorates "merely gl[ave] full legal sanction to the fundamental law of morals and of human nature: that 'No man can serve two masters.'"⁸

Though Section 8 has a clear purpose, it has rarely been enforced in the over 100 years since its passage, and even less so in the past four decades.⁹

of competitive interests between corporations sufficient to warrant concern over collusion or other outright market division should interlocked directors seek to share or exchange information.").

⁶ See Pacific Railway Commission, S. Exec. Doc. No. 51, 50th Cong., 1st Sess. (1887); Investigation of United States Steel Corp., H.R. Rep. No. 1127, 62d Cong., 1st Sess. (1912); House Comm. on Banking and Currency, Investigation of Concentration of Control of Money and Credit, H.R. Rep. No. 1593, 62d Cong., 3rd Sess. (1913). Congress recognized that the concentration of control via interlocking directorships "tended to suppress competition or to foster joint action against third party competitors" and concluded that because of "such [joint] control, the healthy competition of the free enterprise system had been stifled or eliminated." *Sears*, 111 F. Supp. at 616.

⁷ See L. Brandeis, *Breaking the Money Trusts*, Harper's Weekly, Nov. 22, 1913, at 10; *id.* Nov. 29, 1913, at 9; *id.* Dec. 6, 1913, at 13; *id.* Dec. 13, 1913, at 10; *id.* Dec. 20, 1913, at 10; *id.* Dec. 27, 1913, at 18; *id.* Jan. 3, 1914, at 11; *id.* Jan. 10, 1914, at 18; *id.* Jan. 17, 1914, at 18.

⁸ L. Brandeis, *Other People's Money and How the Bankers Use It* (1914). As Brandeis observed: "The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it tends to inefficiency; for it removes incentive and destroys soundness of judgment. It is undemocratic, for it rejects the platform: 'A fair field and no favors,'—substituting the pull of privilege for the push of manhood." *Id.*

⁹ According to one commentary, Section 8 enforcement has been "punctuated by a few bursts of mild activity and then followed by long periods of benign neglect." J. Randolph Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 Antitrust L.J. 317, 317 (1976); see ABA Section of Antitrust Law, *Interlocking Directorates: Handbook on Section 8 of the Clayton Act* 4 (2011) ("This sleepy enforcement

Historically, the antitrust agencies addressed Section 8 violations by dismissing actions or closing investigations after firms ended the offending interlock.¹⁰ However, the Commission eventually recognized that "informal settlements [we]re not producing an adequate level of compliance" and that "this policy did not accomplish what Congress set out to do."¹¹ Throughout the 1970s and 80s, the FTC challenged interlocking directorates under Section 8 on multiple occasions and entered consent orders in every one of those cases, even where the interlocks had been terminated.¹² In the wake of these actions, the defense bar and industry groups began lobbying Congress for Section 8 reform, resulting in the Antitrust Amendments Act of 1990.¹³ This law narrowed the types of interlocks that would be covered under Section 8. The years since have seen an overall decline in Section 8 enforcement.¹⁴ We worry that this has

effort has been noted by the courts. . . ." (citing *Bankamerica Corp. v. U.S.*, 462 U.S. 122, 130–31 (1983)).

¹⁰ From the effective date of the Clayton Act through 1965, when the Senate Judiciary Committee issued a report on corporate interlocks, the Commission filed only thirteen complaints challenging interlocking directorates. Of those cases, twelve were dismissed when the directors involved resigned on the directorships, and only one resulted in a consent order. During the same period, the Department of Justice brought only ten cases to enforce Section 8. A. H. Travers Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 821 n.8 (1968) (citing Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 227 (1965)); see Vern Countryman, *The Federal Trade Commission and the Courts*, 17 Wash. L. Rev. 1, 30 (1942); G.H. Montague, *The Commission's Jurisdiction Over Practice in Restraint of Trade*, 8 Geo. Wash. L. Rev. 365, 375 (1940).

¹¹ *In re Kraftco Corp.*, 89 F.T.C. 46 (1977).

¹² See *In re Kraftco Corp.*, 88 F.T.C. 362 (1976); *In re Kraftco Corp.*, 89 F.T.C. 46 (1977); *In re TRW Inc., et al.*, 90 F.T.C. 144 (1977); *In re Int'l Bus. Machines Corp.*, 89 F.T.C. 91 (1977); *In re Midland-Ross Corp.*, 96 F.T.C. 863 (1980); *In re Borg-Warner Corp.*, 101 F.T.C. 863 (1983); *In re Hughes Tool Co.*, 103 F.T.C. 17 (1984); *In re Big Three Indus., Inc.*, 103 F.T.C. 24 (1984).

¹³ Pub. L. 101–588, 104 Stat. 2879, § 2 (1990) (increasing the statute's jurisdictional threshold and creating three *de minimis* exceptions in cases of relatively insignificant competitive overlap).

¹⁴ See *Robert F. Booth Tr. v. Crowley*, 687 F.3d 314, 319–20 (7th Cir. 2012) ("Actually, the chance of suit by the United States or the FTC is not even 1%. The national government rarely sues under § 8. *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984), which began in 1978, may be the most recent contested case. When the Antitrust Division or the FTC concludes that directorships improperly overlap, it notifies the firm and gives it a chance to avoid litigation (or to convince the enforcers that the interlock is lawful)."; Debbie Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, *Have a Plan to Comply with the Bar on Horizontal Interlocks* (Jan. 23, 2017), <https://www.ftc.gov/enforcement/competition-matters/>

Continued

¹ 15 U.S.C. 19.

² Interlocks in Corporate Management, 1965 Staff Report to Antitrust Subcomm., 89th Cong., 1st Sess., 12 (1965).

³ See *U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953) ("[W]hat Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.").

⁴ Michael Blaisdell, Fed. Trade Comm'n, *Interlocking Mindfulness* (June 26, 2019), <https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness>.

⁵ *In re Borg-Warner Corp., et al.* 101 F.T.C. 863, 925 (1983) (The "role of competition analysis in Section 8 is not to measure market power or to assess competitive effects; it is to establish a nexus

over time led to under-deterrence and that corporate actors are not sufficiently appreciative of Section 8's prohibitions.

Over the past year, our colleagues at the Antitrust Division have sought to reactivate Section 8 and effectively put market participants back on notice.¹⁵ Today's complaint and consent order build on that effort, marking the Commission's first formal Section 8 enforcement in nearly 40 years.¹⁶ This action is notable not just because it signals a return to the Commission's prior approach of seeking binding prospective relief through consent orders, but also because it expands upon the remedies previously sought. Notably, the proposed order includes a prior approval provision that prohibits Quantum from taking a seat on the boards of any of the top seven natural gas producers in the Appalachian Basin, accounting for a substantial majority of the market.

The proposed order also puts industry actors on notice that they must follow Section 8 no matter what specific corporate form their business takes. Firms in the modern economy utilize a variety of corporate forms and structures to engage in commerce, and industry actors have become increasingly sophisticated at corporate organization and venture formation. This is especially true in the private equity and financial sectors, with various limited liability vehicles, limited partnerships, and structured funds intricately entangled through a web of corporate

and fiduciary relationships. Indeed, Quantum uses a limited liability structure when setting up its portfolio companies, and Quantum itself is a limited partnership. Section 8's specific prohibition of interlocks among competitor "corporations" pre-dates the development of other commonly used corporate structures, such as limited liability companies.¹⁷ Accordingly, we must update our application of the law to match the realities of how firms do business in the modern economy.¹⁸ Today's action makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations.

II. Standalone Section 5 Enforcement

The Commission's complaint charges that the proposed transaction would facilitate the exchange of confidential, competitively sensitive information in violation of Section 5 of the FTC Act. Specifically, Quantum's anticipated position as one of EQT's largest shareholders and EQT's obligation to facilitate the appointment of a Quantum designee to the EQT board raise concerns that Quantum or EQT could have access to one another's competitively significant, non-public information and could participate in, or have influence over, competitive decision-making at each firm. In addition to these concerns, a pre-existing joint venture between EQT and Quantum, The Mineral Company ("TMC"), may also facilitate the improper exchange of competitively sensitive business information regarding the acquisition of mineral rights within the Appalachian Basin.

In November 2022, the Commission issued a policy statement outlining the scope of Section 5 of the FTC Act.¹⁹ As the policy statement explains, Congress enacted Section 5 to create a new prohibition broader than, and different from, the Sherman Act. The text of the

statute, which prohibits "unfair methods of competition," distinguishes the FTC's authority from authority granted in the Sherman and Clayton Acts. Lawmakers also made clear that Section 5 was designed to extend beyond the reach of the other antitrust laws.²⁰ And the Supreme Court has repeatedly made clear that Section 5 prohibits not just those practices that violate the Sherman Act or Clayton Act.²¹

Through the late 1970s, the FTC frequently brought Section 5 cases against conduct that would not necessarily run afoul of the Sherman or Clayton Acts. We now call these "standalone" Section 5 cases. They included invitations to collude;²² price discrimination claims against buyers not covered by the Clayton Act;²³ de facto bundling;²⁴ exclusive dealing;²⁵ and

²⁰ Section 5 of the FTC Act expands these protections to encompass "conduct that violates the spirit of the antitrust laws," including "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act." Section 5 Policy Statement at 13, 15; see *In re Borg-Warner Corp. et al.*, 101 F.T.C. 863 (June 23, 1983); *In re TRW, Inc.*, 93 F.T.C. 325 (1979); *In re Perpetual Fed. Sav. & Loan Assoc.*, 90 F.T.C. 608 (1977).

²¹ See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (holding that "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws"); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair."); *FTC v. Texaco, Inc.*, 393 U.S. 223, 262 (1968) (holding that "[i]n large measure the task of defining 'unfair methods of competition' was left to the [FTC] . . . and that the legislative history shows that Congress concluded that the best check on unfair competition would be [a practical and expert administrative body] . . . [that applies] the rule enacted by Congress to particular business situations"); *FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (holding that the FTC "has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts").

²² *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate Section 5).

²³ *Alterman Foods v. FTC*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. FTC*, 450 F.2d 733 (5th Cir. 1971); *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Am. News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

²⁴ *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct that runs counter to the public policy declared in the Act . . . and that "there are many unfair methods of competition that do not assume the proportions of antitrust violations").

²⁵ *FTC v. Mot. Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (noting that "Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipency] which, when full blown, would violate those Acts[,] . . . as well as to condemn as 'unfair methods of competition' existing violations of them").

2017/01/have-plan-comply-bar-horizontal-interlocks ("The Commission has generally relied on self-policing to prevent Section 8 violations, and as a result, litigated Section 8 cases are rare (with none construing the 1990 amendments). In recent Section 8 investigations, once staff raised concerns, an individual agreed to step down from one company in order to eliminate the interlock."); cf. Press Release, U.S. Dep't of Justice, Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates (Jul. 14, 2016), <https://www.justice.gov/opa/pr/tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses-concerns>; Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Commscope's Acquisition of Andrew Corporation (Dec. 6, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/228330.htm.

¹⁵ See, e.g., Press Release, U.S. Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>; Press Release, U.S. Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates (Oct. 19, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

¹⁶ See *In re Hughes Tool Co.*, 130 F.T.C. 17 (1984); *In re Big Three Indus., Inc.*, 103 F.T.C. 24 (1984).

¹⁷ Holian et al, *21st Century Section 8 Enforcement: Legislative Origins and the 1990 Amendments*, American Bar Association, Antitrust Magazine Online (April 2023).

¹⁸ See Makan Delrahim, AAG., Antitrust Div., U.S. Dep't of Justice, Remarks at Fordham University School of Law (May 1, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law> ("Moreover, whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too.").

¹⁹ Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of The Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

many other practices.²⁶ The Commission also initiated multiple actions challenging mergers or series of acquisitions on the basis of Section 5 violations, separate and aside from Sherman or Clayton Act liability.²⁷ In the 1980s, however, the Commission backed away from bringing standalone Section 5 cases. In 2015, the Commission effectively collapsed the distinction between Section 5 and the other antitrust statutes. Today's action represents the first time in decades that the Commission has challenged a deal as a standalone violation of Section 5. It should remind market participants that transactions that might not strictly violate Section 7 can still pose a risk to competition that the FTC has a statutory obligation to address.

Quantum's position on EQT's board of directors and its role as one of EQT's largest shareholders would provide Quantum with the ability to sway or influence EQT's competitive decision-making and to access EQT's competitively sensitive information. The Commission's complaint alleges these risks are particularly serious given certain past actions by the parties, as well as the natural gas industry's history of encouraging the exchange of competitively sensitive information and public signaling to competitors. The complaint alleges that the two firms' TMC joint venture separately violates Section 5 of the FTC Act as it creates additional opportunities for sharing competitively sensitive business information. Further, there is reason to believe that EQT and Quantum already may use TMC as a vehicle for information exchange for the purchase of mineral rights and in connection with EQT's future drilling plans. This information is forward-looking, non-public, and competitively sensitive, and its exchange among rivals, coupled with the noncompete agreements in place within the joint venture, harms competition.

The proposed order is designed to remedy these concerns. The order prohibits Quantum from occupying an EQT Board seat and requires it to divest the EQT shares, which would structurally eliminate key mechanisms for undue influence and information exchange. The order also limits both current and future entanglements between the firms and reduces opportunities for exchanging

confidential and competitively significant information between the firms, including by requiring EQT and Quantum to unwind their existing joint venture and any noncompete provisions.

[FR Doc. 2023-18272 Filed 8-24-23; 8:45 am]

BILLING CODE 6750-01-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000-0135; Docket No. 2023-0053; Sequence No. 3]

Submission for OMB Review; Prospective Subcontractor Requests for Bonds

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding prospective subcontractor requests for bonds.

DATES: Submit comments on or before September 25, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function.

Additionally, submit a copy to GSA through <https://www.regulations.gov> and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000-0135, Prospective Subcontractor Requests for Bonds. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov,

approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202-969-7207, or zenaida.delgado@gsa.gov.

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000-0135, Prospective Subcontractor Requests for Bonds.

B. Need and Uses

Part 28 of the Federal Acquisition Regulation (FAR) contains guidance related to obtaining financial protection against losses under Federal contracts (e.g., bonds, bid guarantees, etc.). Part 52 contains the corresponding provisions and clauses. These collectively implement the statutory requirement for Federal contractors to furnish payment bonds under construction contracts subject to 40 U.S.C. chapter 31, subchapter III, Bonds.

This information collection is mandated by section 806(a)(3) of Public Law 102-190, as amended by sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994 (10 U.S.C. 4601 note prec.) (Pub. L. 103-335). Accordingly, the FAR clause at 52.228-12, Prospective Subcontractor Requests for Bonds, requires prime contractors to promptly provide a copy of a payment bond, upon the request of a prospective subcontractor or supplier offering to furnish labor or material under a construction contract for which a payment bond has been furnished pursuant to 40 U.S.C. chapter 31.

C. Common Form

The General Services Administration is the sponsor agency of this common form. All executive agencies covered by the FAR will use this common form. Each executive agency will report their agency burden separately, and the reported information will be available at Reginfo.gov.

D. Annual Burden

General Services Administration

Respondents: 317.

Total Annual Responses: 793.

Total Burden Hours: 270.

E. Public Comment

A 60-day notice was published in the **Federal Register** at 88 FR 39850, on June 20, 2023. No comments were received.

²⁶ *Atl. Refin. Co.*, 381 U.S. 357.

²⁷ See, e.g., *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972); *In re Dean Foods Co.*, 70 F.T.C. 1146 (1966); *In re Nat'l Tea Co.*, 69 F.T.C. 226 (1966); *In re Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *In re Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956).

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing GSARegSec@gsa.gov. Please cite OMB Control No. 9000–0135, Prospective Subcontractor Requests for Bonds.

Janet Fry,

*Director, Federal Acquisition Policy Division,
Office of Governmentwide Acquisition Policy,
Office of Acquisition Policy, Office of
Governmentwide Policy.*

[FR Doc. 2023–18353 Filed 8–24–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0138; Docket No. 2023–0053; Sequence No. 2]

Submission for OMB Review; Contract Financing

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding contract financing.

DATES: Submit comments on or before September 25, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function.

Additionally, submit a copy to GSA through <https://www.regulations.gov> and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0138, Contract Financing. Comments received generally will be posted without change to <https://www.regulations.gov>,

including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or zenaida.delgado@gsa.gov.

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0138, Contract Financing.

B. Need and Uses

This clearance covers the information that offerors and contractors must submit to comply with the following Federal Acquisition Regulation (FAR) requirements:

- FAR 52.232–28, Invitation to Propose Performance-Based Payments.

This provision requires an offeror, when invited to propose terms under which the Government will make performance-based contract financing payments during contract performance, to include the following: the proposed contractual language describing the performance-based payments; information addressing the contractor's investment in the contract and a listing of—

- (i) The projected performance-based payment dates and the projected payment amounts; and

- (ii) The projected delivery date and the projected payment amount.

- FAR 52.232–29, Terms for Financing of Purchases of Commercial Products and Commercial Services.

- FAR 52.232–30, Installment Payments for Commercial Products and Commercial Services.

These clauses require contractors, under commercial purchases pursuant to FAR part 12, to include with their payment requests an appropriately itemized statement of the financing payments requested and other supporting information, prepared in concert with the contracting officer.

- FAR 52.232–31, Invitation to Propose Financing Terms.

This provision requires an offeror, when invited to propose terms under which the Government will make contract financing payments during contract performance under commercial purchases pursuant to FAR part 12, to include the following: the proposed contractual language describing the

contract financing; and a listing of the earliest date and greatest amount at which each contract financing payment may be payable and the amount of each delivery payment.

- FAR 52.232–32, Performance-Based Payments.

This clause requires the contractor's request for performance-based payment to include any information and documentation as required by the contract's description of the basis for payment; and a certification by a contractor official authorized to bind the contractor.

The contracting officer uses the collected information to review and approve contract financing requests, and establish and administer contract financing terms.

C. Common Form

The General Services Administration is the sponsor agency of this common form. All executive agencies covered by the FAR will use this common form. Each executive agency will report their agency burden separately, and the reported information will be available at Reginfo.gov.

D. Annual Burden

General Services Administration

Respondents: 49.

Total Annual Responses: 371.

Total Burden Hours: 742.

E. Public Comment

A 60-day notice was published in the **Federal Register** at 88 FR 39849, on June 20, 2023. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing GSARegSec@gsa.gov. Please cite OMB Control No. 9000–0138, Contract Financing.

Janet Fry,

*Director, Federal Acquisition Policy Division,
Office of Governmentwide Acquisition Policy,
Office of Acquisition Policy, Office of
Governmentwide Policy.*

[FR Doc. 2023–18354 Filed 8–24–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

[OMB Control No. 9000–0011; Docket No. 2023–0053; Sequence No. 4]

**Submission for OMB Review;
Preaward Survey Forms (Standard
Forms 1403, 1404, 1405, 1406, 1407,
and 1408)**

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding preaward survey forms.

DATES: Submit comments on or before September 25, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function.

Additionally, submit a copy to GSA through <https://www.regulations.gov> and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408). Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or zenaida.delgado@gsa.gov.

SUPPLEMENTARY INFORMATION:**A. OMB Control Number, Title, and Any Associated Form(s)**

9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408).

B. Need and Uses

Contracting officers, prior to award, must make an affirmative determination that the prospective contractor is responsible, *i.e.*, capable of performing the contract. Before making such a determination, the contracting officer must have or obtain sufficient information to establish that the prospective contractor: has adequate financial resources; or the ability to obtain such resources; is able to comply with required delivery schedule; has a satisfactory record of performance; has a satisfactory record of integrity; and is otherwise qualified and eligible to receive an award under appropriate laws and regulations. If such information is not readily available to the contracting officer, it is obtained through a preaward survey conducted by the contract administration office or another organization designated by the agency to conduct the surveys. The necessary data is collected from available data or through plant visits, phone calls, and correspondence in detail commensurate with the dollar value and complexity of the procurement. This clearance covers the information that prospective contractors must provide to ensure proper completion of the following preaward survey forms prescribed by the Federal Acquisition Regulation (FAR):

- Standard Form 1403 Preaward Survey of Prospective Contractor (General)
- Standard Form 1404 Preaward Survey of Prospective Contractor (Technical)
- Standard Form 1405 Preaward Survey of Prospective Contractor (Production)
- Standard Form 1406 Preaward Survey of Prospective Contractor (Quality Assurance)
- Standard Form 1407 Preaward Survey of Prospective Contractor (Financial Capability)
- Standard Form 1408 Preaward Survey of Prospective Contractor (Accounting System)

C. Common Form

The General Services Administration is the sponsor agency of this common form. All executive agencies covered by the FAR will use this common form. Each executive agency will report their agency burden separately, and the reported information will be available at Reginfo.gov.

D. Annual Burden

General Services Administration

Respondents: 168.

Total Annual Responses: 168.

Total Burden Hours: 4,032.

E. Public Comment

A 60-day notice was published in the **Federal Register** at 88 FR 39849, on June 20, 2023. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing GSARegSec@gsa.gov. Please cite OMB Control No. 9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408).

Janet Fry,

*Director, Federal Acquisition Policy Division,
Office of Governmentwide Acquisition Policy,
Office of Acquisition Policy, Office of
Governmentwide Policy.*

[FR Doc. 2023–18352 Filed 8–24–23; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF HEALTH AND
HUMAN SERVICES****Centers for Disease Control and
Prevention**

[Docket No. CDC–2023–0060]

**Advisory Committee on Immunization
Practices**

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice and request for comment.

SUMMARY: In accordance with regulatory provisions, the Centers for Disease Control and Prevention (CDC) announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. Time will be available for public comment.

DATES: The meeting will be held on September 12, 2023, 10 a.m. to 4 p.m., EDT (date and times subject to change; see the ACIP website for updates: <https://www.cdc.gov/vaccines/acip/index.htm>).

Written comments will be received between August 25–September 8, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0060, by either of the methods listed below. CDC does not accept comments by email.

• **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.

• *Mail:* Ms. Stephanie Thomas, ACIP Meeting, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24–8, Atlanta, Georgia 30329–4027. Attn: Docket No. CDC–2023–0060.

Instructions: All submissions received must include the Agency name and docket number. All relevant comments received in conformance with the <https://www.regulations.gov> suitability policy will be posted without change to <https://www.regulations.gov>, including any personal information provided. For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

The meeting will be webcast live via the World Wide Web. The webcast link can be found on the ACIP website at <https://www.cdc.gov/vaccines/acip/index.html>.

FOR FURTHER INFORMATION CONTACT: Ms. Stephanie Thomas, Committee Management Specialist, Advisory Committee on Immunization Practices, National Center for Immunization and Respiratory Diseases, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24–8, Atlanta, Georgia 30329–4027. Telephone: (404) 639–8836; Email: ACIP@cdc.gov.

SUPPLEMENTARY INFORMATION:

Purpose: The Advisory Committee on Immunization Practices (ACIP) is charged with advising the Director, Centers for Disease Control and Prevention (CDC), on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the Committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines For Children program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under applicable provisions of the Affordable Care Act and section 2713 of the Public Health Service Act, immunization recommendations of ACIP that have been approved by the Director, CDC, and appear on CDC immunization schedules generally must be covered by applicable health plans.

Matters To Be Considered: The agenda will include discussion of COVID–19 vaccines. Recommendation votes for COVID–19 vaccines are scheduled. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda, visit <https://www.cdc.gov/vaccines/acip/meetings/index.html>.

Meeting Information: The meeting will be webcast live via the World Wide

Web. For more information on ACIP, please visit the ACIP website: <https://www.cdc.gov/vaccines/acip/index.html>.

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on <https://www.regulations.gov>. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near-duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket.

Written Public Comment: The docket will be opened to receive written comments on August 25, 2023. Written comments must be received by September 8, 2023.

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the September 12, 2023, ACIP meeting must submit a request at <https://www.cdc.gov/vaccines/acip/meetings/index.html> no later than 11:59 p.m., EDT, September 8, 2023, according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email on September 11, 2023. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to three minutes, and each speaker may only speak once per meeting.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, 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.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–18288 Filed 8–24–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60–Day–23–23HS; Docket No. CDC–2023–0074]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Program Evaluation for PS22–2208 Component 2. This information collection request is designed to monitor and evaluate the PS22–2208 Component 2 funding opportunity's overall goal of supporting syringe services program (SSP) subrecipients in meeting the needs of people who use drugs (PWUD) and reducing infectious disease and other harms related to drug use during the 5-year PS22–2208 Cooperative Agreement.

DATES: CDC must receive written comments on or before October 24, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0074 by either of the following methods:

• *Federal eRulemaking Portal:* www.regulations.gov. Follow the instructions for submitting comments.

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to www.regulations.gov.

Please note: Submit all comments through the Federal eRulemaking portal (www.regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: omb@cdc.gov.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

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;

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; and

5. Assess information collection costs.

Proposed Project

Program Evaluation for PS22–2208 Component 2—New—National Center for HIV, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

PS22–2208 Component 2 (Strengthening Syringe Services Programs) serves as a coordinated and accountable mechanism for distribution of funding to syringe services programs (SSPs) to support implementation and expansion of services in areas of the United States, Territories, and Tribal Nations disproportionately affected by infectious disease consequences of injection drug use. Project activities will directly contribute to establishing and expanding a national SSP infrastructure and prevention of infectious disease consequences of drug use. CDC has funded the National Alliance of State and Territorial AIDs Directors (NASTAD) to implement this project. NASTAD, in partnership with University of Washington will collect monitoring and evaluation data from funded SSPs through their internal mechanisms, both for their internal evaluation as well as to report semi-annual and annual project performance reports and stratified aggregate data to CDC.

The primary purpose of this information collection is to monitor and evaluate the PS22–2208 Component 2 funding opportunity's overall goal of supporting SSP subrecipients in meeting the needs of people who use drugs (PWUD) and reducing infectious disease and other harms related to drug use. During the first year of this Cooperative Agreement, all PS22–2208 SSP subrecipients will be sent a 25-minute baseline program evaluation survey at the start of project implementation, and a 15-minute quarterly program evaluation survey in the following three quarters of the project period. For Years 2–5, new PS22–2208 SSP subrecipients will be sent the baseline survey at the start of project implementation, and all existing subrecipients will receive the quarterly program evaluation survey in the following three quarters of the project period. SSP subrecipients will primarily complete the survey online in REDCap, with options to complete via telephone or videoconferencing modalities. Subrecipients will be asked to complete the surveys within one month of receipt and will receive weekly reminders until the survey is completed. SSP subrecipients may be reminded informally during meetings with NASTAD and may also work with their NASTAD point-of-contact to determine an alternate method of survey completion. The survey will include questions on operational and programmatic characteristics, and quantity of prevention and treatment services provided in-person, through tele-health, and through navigation to off-site care, during the specified evaluation period.

Approximately 200 SSPs will participate in the survey. We estimate that it will take 70 minutes to complete the baseline survey and three quarterly surveys, regardless of how the respondent chooses to complete it (*i.e.*, self-administered online or NASTAD staff-administered by phone or videoconferencing). CDC requests OMB approval for an estimated 233 annual burden hours. There is no cost to survey participants other than their time.

ESTIMATES OF ANNUALIZED BURDEN HOURS

Respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response (hours)	Total burden (in hours)
All participating SSPs	Strengthening Syringe Services Programs Baseline Survey.	200	1	25/60	83
All participating SSPs	Strengthening Syringe Services Programs Quarterly Survey.	200	3	15/60	150

ESTIMATES OF ANNUALIZED BURDEN HOURS—Continued

Respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response (hours)	Total burden (in hours)
Total					233

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.

[FR Doc. 2023–18363 Filed 8–24–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–1309]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Enterprise Laboratory Information Management System” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on June 09, 2023, to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Enterprise Laboratory Information Management System (OMB Control No. 0920–1309, Exp. 11/30/2023)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The collection of specimen information designated for testing by the CDC occurs on a regular and recurring basis (multiple times per day) using an electronic PDF file called the *CDC Specimen Submission 50.34 Form* or an electronic XSLX file called the *Global File Accessioning Template*. Hospitals, doctor’s offices, medical clinics, commercial testing labs, universities, state public health laboratories, U.S. Federal institutions and foreign institutions use the *CDC Specimen Submission 50.34 Form* when submitting a single specimen to CDC Infectious Diseases laboratories for testing. The *CDC Specimen Submission 50.34 Form* consists of over 200 data

entry fields (of which five are mandatory fields that must be completed by the submitter) that captures information about the specimen being sent to the CDC for testing. The type of data captured on the *50.34 Form* identifies the origin of the specimen (human, animal, food, environmental, medical device or biologic), CDC test order name/code, specimen information, patient information (as applicable), animal information (as applicable) information about the submitting organization requesting the testing, patient history (as applicable), owner information and animal history (as applicable) and epidemiological information. The collection of this type of data is pertinent in ensuring a specimen’s testing results are linked to the correct patient and the final test reports are delivered to the appropriate submitting organization to aid in making proper health-related decisions related to the patient. Furthermore, the data provided on this form may be used by the CDC to identify sources of potential outbreaks and other public-health related events. When the form is filled out, a user in the submitting organization prints a hard copy of it that will be included in the specimen’s shipping package sent to the CDC. The printed form has barcodes on it that allow the CDC testing laboratory to scan its data directly into ELIMS where the specimen’s testing lifecycle is tracked and managed.

Likewise, the *Global File Accessioning Template* records the same data as the *50.34 Form* but provides the capability to submit information for a batch of specimens (typically 50–1,000 specimens per batch) to a specific CDC laboratory for testing. The CDC testing laboratory electronically uploads the *Global File Accessioning Template* into ELIMS where the batch of specimens are then logged and are ready to be tracked through their respective testing and reporting workflow.

CDC requests OMB approval for an estimated 2,153 annualized burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Medical Scientists, Except Epidemiologists, State Public Health Lab, Medical Assistant, Doctor's Office/Hospital.	<i>CDC Specimen Submission 50.34 Form.</i>	2,098	12	5/60
Medical Assistant, Doctor's Office/Hospital	<i>Global File Accessioning Template.</i>	15	11	20/60

Jeffrey M. Zirger,

*Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.*

[FR Doc. 2023–18362 Filed 8–24–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Award of a Single-Source Cooperative Agreement To Fund icddr,b (International Centre for Diarrhoeal Disease Research, Bangladesh)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the award of approximately \$6,000,000, for Year 1 funding to icddr,b. The award will support high quality public health research and surveillance activities to further strengthen the ability of the Government of Bangladesh and other global partners to detect, prevent, and respond to disease threats. Funding amounts for years 2–5 will be set at continuation.

DATES: The period for this award will be September 30, 2024 through September 29, 2029.

FOR FURTHER INFORMATION CONTACT: Lata Kumar, Global Health Center, Centers for Disease Control and Prevention, Atlanta, GA, 30033, Telephone: 404–639–7618, email: lek7@cdc.gov.

SUPPLEMENTARY INFORMATION: The single-source award will support high quality public health and implementation science research that will guide stakeholders to prioritize resources, develop policies, and implement practices and interventions that will help mitigate the impact of health threats on the Bangladeshi

population and globally. icddr,b is in a unique position to conduct this work, as it is the only non-diplomatic partner that CDC is aware of that has the legal authority and operational expertise to process the import of laboratory supplies and reagents, including time sensitive reagents. Surveillance activities contemplated under this award detect and isolate high-consequence pathogens whose handling and storage require advanced biocontainment skills and capacity. icddr,b's clinical microbiology laboratory meets the international standards of quality and is ISO 15189–2012 accredited and the institute has a strong and active institutional biosafety committee and Senior Biosafety Officer. icddr,b is the most biosafety capable institution in the country to execute critical ongoing studies on pathogens having pandemic potential such as Nipah virus, the testing of human, avian and bovine surveillance samples with unknown etiology, and studies of *C. auris* and influenza. To CDC's knowledge, icddr,b is the only institution in Bangladesh with the capability to handle such pathogens according to international biosecurity standards. Furthermore, icddr,b has agreements with major biomedical transportation organizations and maintains a material transfer agreement (MTA) with CDC for the shipping of swabs, blood, serum and DNA.

Summary of the Award

Recipient: icddr,b (International Centre for Diarrhoeal Disease Research, Bangladesh).

Purpose of the Award: The purpose of this award is to further strengthen the ability of the Government of Bangladesh and other global partners to detect, prevent, and respond to disease threats through high quality public health research and surveillance activities. Specifically, the individual activities under this cooperative agreement will: (a) determine burden, trends, etiology, and risk factors of priority diseases in Bangladesh, (b) develop and evaluate interventions and diagnostics, (c) evaluate the effectiveness of

vaccinations to inform global policy, and (d) strengthen the Government of Bangladesh's surveillance, laboratory, and outbreak response capacity.

Amount of Award: The approximate year 1 funding amount will be \$6,000,000 in Federal Fiscal Year (FY) 2024 funds, subject to the availability of funds. Funding amounts for years 2–5 will be set at continuation.

Authority: This program is authorized under section 301(a) of the Public Health Service Act [42 U.S.C. 241(a)], as amended and section 307 of the Public Health Service Act [42 U.S.C. 242].

Period of Performance: September 30, 2024 through September 29, 2029.

Dated: August 22, 2023.

Terrance Perry,

Chief Grants Management Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–18369 Filed 8–24–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10143]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

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 the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by October 24, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. 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, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786-4669.

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-10143 State Data for the Medicare Modernization Act (MMA)

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:* State Data for the Medicare Modernization Act (MMA); *Use:* The monthly data file is provided to CMS by states on dual eligible beneficiaries. The phase-down process requires a monthly count of all full benefit dual eligible beneficiaries with an active Part D plan enrollment in the month. CMS will make this selection of records using dual eligibility status codes contained in the person-month record to identify all full-benefit dual eligible beneficiaries. *Form Number:* CMS-10143 (OMB Control Number: 0938-0958); *Frequency:* Monthly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 612; *Total Annual Hours:* 4,896. (For policy questions regarding this collection contact Linda King at 410-786-1312.)

Dated: August 22, 2023.

William N. Parham, III,
Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023-18387 Filed 8-24-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS-10305]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice, correction.

SUMMARY: On August 11, 2023, CMS published a notice in the **Federal**

Register that sought comment on a collection of information concerning CMS-10305 (OMB control number 0938-1115) entitled "Medicare Part C and Part D Data Validation." The point of contact for policy questions is incorrect. This document corrects the error.

FOR FURTHER INFORMATION CONTACT: William N. Parham, III, (410) 786-4669.
SUPPLEMENTARY INFORMATION:

I. Background

In the August 11, 2023, issue of the **Federal Register** (88 FR 54613), we published a Paperwork Reduction Act notice requesting a 30-day public comment period for the information collection request identified under CMS-10305, OMB control number 0938-1115, and titled "Medicare Part C and Part D Data Validation."

II. Explanation of Error

In the August 11, 2023, notice, the point of contact for policy questions is incorrect. The incorrect language is on located at the top of the right column on page 54614, beginning on line 6 with "Chanelle Jones" and ending at the end of line 6. All of the other information contained in the August 11, 2023, notice is correct and remains unchanged. The related public comment period remains in effect and ends September 11, 2023.

III. Correction of Error

In FR Doc. 2023-16804 of August 11, 2023, (88 FR 54613), page 54614, the language at the top of the right column beginning on line 6 with "Chanelle Jones" and ending at the end of line 6, is corrected to read as follows:

Abigale Sanft at 410-786-6068.

Dated: August 21, 2023.

William N. Parham, III,
Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023-18279 Filed 8-24-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2023-N-3167]

Notice of Opportunity for Public Comment on Proposal To Withdraw Approval of New Drug Application for PEPAXTO, Equivalent to 20 Milligrams Base per Vial

AGENCY: Center for Drug Evaluation and Research, Food and Drug Administration, HHS.

ACTION: Notice of opportunity for public comment.

SUMMARY: The Center for Drug Evaluation and Research (CDER) of the Food and Drug Administration (FDA, the Agency) is proposing to withdraw approval of PEPAXTO (melfalan flufenamide) for injection, equivalent to (EQ) 20 milligrams (mg) BASE/VIAL, once every 28 days, new drug application (NDA) 214383, held by Oncopeptides AB (Oncopeptides). This notice is intended to provide an opportunity for public comment on CDER's proposed withdrawal of PEPAXTO, in accordance with the expedited withdrawal of approval procedures described in the Federal Food, Drug and Cosmetic Act (FD&C Act).

DATES: Either electronic or written comments on this proposal to withdraw PEPAXTO must be submitted by September 25, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 25, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2023-N-3167 for "Notice of Opportunity for Public Comment on Proposal To Withdraw Approval of New Drug Application for PEPAXTO, Equivalent to 20 Milligrams Base per Vial." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

Anuj Shah, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6224, Silver Spring, MD 20993-0002, 301-796-2246.

SUPPLEMENTARY INFORMATION:

I. Background

FDA approved NDA 214383 for PEPAXTO on February 26, 2021, under the accelerated approval pathway (section 506(c) of the FD&C Act (21 U.S.C. 356(c)) and 21 CFR part 314, subpart H) for use in combination with dexamethasone for the treatment of adult patients with relapsed or refractory multiple myeloma who have received at least four prior lines of therapy and whose disease is refractory to at least one proteasome inhibitor, one immunomodulatory drug, and one CD38-directed monoclonal antibody (triple class refractory).¹

NDA 214383 relied on evidence from Trial OP-106 (ClinicalTrials.gov NCT number, NCT02963493), also known as HORIZON, a single-arm, open-label, phase 2 multicenter clinical trial that enrolled patients with relapsed or refractory multiple myeloma and who received at least two lines of prior therapy including an immunomodulatory drug and a proteasome inhibitor. The primary endpoint was overall response rate (ORR),² as assessed by the investigator.

At the time of approval under the accelerated approval pathway, the applicant was required to conduct an appropriate post-approval study to verify and describe the clinical benefit of PEPAXTO.³ CDER has determined

¹ Most patients in the United States with relapsed disease will have been exposed to lenalidomide (an immunomodulatory agent), a proteasome inhibitor, corticosteroids, and an anti-CD38 monoclonal antibody after one or two lines of treatment, and retreatment with previously used agents or agents in the same class of drug can be effective.

² ORR was defined as the proportion of patients with a best confirmed response of stringent complete response, complete response, very good partial response, or partial response according to the International Myeloma Working Group Uniform Response Criteria.

³ Section 506(c)(2)(A)(i) of the FD&C Act (as renumbered by the Consolidated Appropriations

withdrawal of approval is warranted because the required post-approval confirmatory trial failed to verify clinical benefit and because available evidence demonstrates PEPAXTO is not shown to be safe or effective under its conditions of use. The Oncologic Drugs Advisory Committee (ODAC) convened on September 22, 2022, to discuss issues related to this proposed withdrawal. The ODAC voted 14 to 2 that the benefit-risk profile of melphalan flufenamide was not favorable for the currently indicated patient population. For additional background, please refer to CDER's letter to Oncopeptides Re: Section 506(c)(3)(B) Notice of Proposed Withdrawal of Approval; PEPAXTO (melphalan flufenamide) for injection; NDA 214383 ("Notice to Oncopeptides of Proposed Withdrawal of PEPAXTO") and CDER's Proposed Withdrawal of PEPAXTO Decisional Memorandum, available at Docket No. FDA-2023-N-3167, <https://www.regulations.gov>.

II. Legal Standard for Withdrawal of Approval

Section 506(c) of the FD&C Act, as amended most recently by the Consolidated Appropriations Act of 2023 (Pub. L. 117-328), describes the accelerated approval of new drug applications and the procedures and authority governing expedited withdrawal of approval. FDA has the legal authority to use the expedited procedures to withdraw approval of a product that has received accelerated approval if, among other reasons, "a study required to verify and describe the predicted effect on irreversible morbidity or mortality or other clinical benefit of the product fails to verify and describe such effect or benefit" (section 506(c)(3)(A)(ii) of the FD&C Act) or "other evidence demonstrates that the product is not shown to be safe or effective under the conditions of use." (section 506(c)(3)(A)(iii) of the FD&C Act.)

III. Explanation for the Proposed Withdrawal

CDER proposes to withdraw approval of PEPAXTO because the required confirmatory study, Trial OP-103, also known as OCEAN, failed to verify clinical benefit and because available evidence demonstrates PEPAXTO is not shown to be safe or effective under its conditions of use. More specifically, the results failed to show that PEPAXTO had a significant effect on the primary endpoint of progression-free survival. Furthermore, the observed median

overall survival was 5.3 months shorter in the PEPAXTO arm compared to the control arm. After considering all the available data and the discussion at the ODAC held in September 2022, CDER recommends withdrawing the accelerated approval for PEPAXTO. Please refer to CDER's "Notice to Oncopeptides of Proposed Withdrawal of PEPAXTO" and "Proposed Withdrawal of PEPAXTO Decisional Memorandum" for additional explanation.

IV. Opportunity for Public Comment on CDER's Proposal To Withdraw Approval of PEPAXTO

In accordance with the expedited withdrawal of approval procedures described in section 506(c)(3)(B)(ii) and (iii) of the FD&C Act, CDER is providing an opportunity for public comment on its proposal to withdraw approval of NDA 214383 (PEPAXTO) through the issuance of a **Federal Register** Notice. FDA will consider any such public comments it receives in making its decision on CDER's proposal to withdraw approval of NDA 214383 (PEPAXTO) and make available on its website and in the public docket a summary of such comments and FDA's response to them.

Dated: August 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-18320 Filed 8-24-23; 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; Information Collection Request Title: Standardized Work Plan Form for Use With Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements OMB No. 0906-0049—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, 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 ICR should be received no later than October 24, 2023.

ADDRESSES: Submit your comments to paperwork@hrsa.gov or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 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 Joella Roland, the HRSA Information Collection Clearance Officer, at (301) 443-3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Standardized Work Plan (SWP) Form for Use with Applications to the Bureau of Health Workforce (BHW) Research and Training Grants and Cooperative Agreements OMB No. 0906-0049—Extension.

Abstract: BHW requires applicants for training and research grants and cooperative agreements to submit work plans via the SWP form. Information in the SWP describes the timeframes and progress required during the grant period of performance to address each of the needs detailed in the Purpose and Need section of the application, as required in the Notice of Funding Opportunity announcement. Applicants use the SWP form when they submit their proposals, and award recipients and Project Officers use the SWP information to assist in monitoring progress once HRSA makes the awards. After awards are made, recipients complete a Quarterly Progress Update (QPU) to provide information to BHW on a quarterly basis on each activity listed in the SWP.

Need and Proposed Use of the Information: Information collected by the SWP form and QPUs standardizes and streamlines the data used by HRSA in reviewing applications and monitoring awardees. The form asks applicants to provide a description of the activities or steps the applicant will take to achieve each of the objectives proposed during the entire period of performance. The current standardized format and data submission by applicants increases efficiency in reviewing, awarding, and monitoring each project.

The QPU is completed via HRSA's Electronic Handbook system and

prompts recipients to report on progress of activities that were submitted using the SWP in the original application. The QPU automatically populates activities from the recipient's SWP form on a quarterly basis. For each activity listed in the submitted SWP for any particular quarter within the project period, recipients select and submit a single selection response for each activity status from a pull-down menu with five options: Activity is on Schedule, Activity is Complete, Timing is off track, Activity will be missed if action is not taken, and Activity cannot be achieved. Information provided is utilized by the program staff to regularly assess overall progress of program requirements and analyze data in order to monitor award recipient compliance

and track progress against proposed targets and goals. Information gathered allows an improved and more efficient method for identifying whether projects' goals are being advanced or achieved, as set forth in 45 CFR 75.342. Program staff also use information provided over the period of performance to see emerging trends and to assess whether an award recipient requires technical assistance to address challenges that the award recipient may be experiencing with the implementation of the project. Seeking OMB extension approval comports with the regulatory requirement imposed by 45 CFR 75.206(a), Paperwork clearances.

Likely Respondents: Respondents are applicants for, and recipients of, BHW's research and training grants and cooperative agreements.

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 ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total annual burden hours
Standardized Work Plan (SWP)	1,000	1	1,000	1.00	1,000
Quarterly Progress Update (QPU) Form	1,000	4	4,000	.10	400
Total	¹ 1,000	.....	5,000	.....	1,400

¹ The 1,000 Standardized Work Plan (SWP) respondents reflects the number of new grant applications submitted annually. The 1,000 Quarterly Progress Update (QPU) respondents reflects the current volume of funded, active grants.

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.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023-18360 Filed 8-24-23; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Career Development for Established Investigators and Conference Grants Study Section.

Date: October 26-27, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rajasri Roy, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institutes of Health, National Institute on Aging, 7201 Wisconsin Avenue, RM: 2W200, Bethesda, MD 20892, 301-496-6477, rajasri.roy@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 21, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18380 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute on Alcohol Abuse and Alcoholism.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute on Alcohol Abuse and Alcoholism, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute on Alcohol Abuse and Alcoholism.

Date: September 13-14, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5625 Fishers Lane, Rockville, MD 20852 (Virtual Meeting).

Contact Person: David Lovinger, Ph.D., Scientific Director, Laboratory for Integrative Neuroscience, Section on Synaptic Pharmacology, National Institute of Alcohol Abuse and Alcoholism, National Institutes of Health, 5625 Fishers Lane, Room TS-11, Rockville, MD 20852, (301) 443-2445, lovindav@mail.nih.gov.

Information is also available on the Institute's/Center's home page: <https://www.niaaa.nih.gov/research/division-intramural-clinical-and-biological-research/office-scientific-director>, where an agenda and any additional information for the meeting will be posted when available. (Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: August 22, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18375 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 30 Day Comment Request Application Process for Clinical Research Training and Medical Education at the Clinical Center and Its Impact on Course and Training Program Enrollment and Effectiveness

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Clinical Center, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, contact: Tom Burklow, MD, Office of Clinical Research Training and Medical Education, NIH Clinical Center, National Institutes of Health, 10 Center Drive, Room 1N262, Bethesda, MD 20892-1158, or call non-toll-free number 301-435-8015, or Email your request, including your address to: tom.burklow@nih.gov. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on March 30, 2023, page 19158 (88 FR 19158) and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The Clinical Center, National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number. In compliance with section 3507(a)(1)(D)

of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection Title: Application Process for Clinical Research Training and Medical Education at the NIH Clinical Center, Revision OMB #0925-0698, Expiration date August 31, 2023, National Institutes of Health Clinical Center (CC), National Institutes of Health (NIH).

Need and Use of Information

Collection: The primary objective of the application process is to allow the Office of Clinical Research Training and Medical Education (OCRTME) at the NIH Clinical Center to evaluate applicants' qualifications to determine applicants' eligibility for training programs managed by the Office. Applicants must provide the required information requested in the respective applications to be considered a candidate for participation. Information submitted by candidates for training programs is reviewed initially by OCRTME administrative staff to establish eligibility for participation. Eligible candidates are then referred to the designated training program director/administrator or training program selection committee for review and decisions regarding acceptance for participation. Upon acceptance, OCRTME will collect required eligibility documents for respective training programs. A secondary objective of the application process is to track enrollment in training programs over time.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours 633.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
Clinical Electives Program	Pre Doctoral Students	300	1	20/60	100
Graduate Medical Education	Physicians	100	1	20/60	33
Medical Research Scholars Program	Pre Doctoral Students	200	1	20/60	67
Resident Electives Program	Physicians	100	1	20/60	33
Bioethics Fellowship Program	Pre Doctoral, Post-Doctoral	300	1	20/60	100
OCRTME Onboarding Application	Pre Doctoral Students	300	1	20/60	100
Total .....	.....	1,300	.....	.....	433

Frederick D. Vorck, Jr.,

Project Clearance Liaison, NIH Clinical Center, National Institutes of Health.

[FR Doc. 2023–18384 Filed 8–24–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; DNA Repair and Cellular Aging.

Date: October 18, 2023

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gianina Ramona Dumitrescu, Ph.D., M.P.H., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room: 4193–C, Bethesda, MD 20892, 301–827–0696, dumitrescu@csr.nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 21, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–18383 Filed 8–24–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: NIGMS Initial Review Group Training and Workforce Development Study Section—C Review of MARC and U–RISE Applications.

Date: October 19–20, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Sonia Ivette Ortiz-Miranda, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200, Bethesda, Maryland 20892, 301–402–9448, sonia.ortiz-miranda@nih.gov.

Name of Committee: National Institute of General Medical Sciences, Special Emphasis Panel; Review of Modules for Enhancing Biomedical Research Workforce Training (BRW) Applications.

Date: October 19–20, 2023.

Time: 1:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Sonia Ivette Ortiz-Miranda, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200 Bethesda, Maryland 20892, 301–402–9448, sonia.ortiz-miranda@nih.gov.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; NIGMS Review of Support for Research Excellence (SuRE) (R16) Applications.

Date: October 30–31, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Manas Chattopadhyay, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12N, Bethesda, Maryland 20892, 301–827–5320, manasc@mail.nih.gov.

Name of Committee: National Institute of General Medical Sciences Special Emphasis

Panel; Review of Support for Research Excellence (SuRE) Program (R16).

Date: November 3, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Sonia Ivette Ortiz-Miranda, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200, Bethesda, Maryland 20892, 301–402–9448, sonia.ortiz-miranda@nih.gov.

Jason M. Chan, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, 45 Center Drive, MSC 6200, Bethesda, Maryland 20892, 301–594–3663, jason.chan2@nih.gov.

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: August 21, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–18376 Filed 8–24–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Career Development for Clinicians/Health Professionals Study Section.

Date: October 3–4, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maurizio Grimaldi, M.D., Ph.D., Scientific Review Officer, Scientific

Review Branch, National Institutes of Health, National Institute on Aging, 7201 Wisconsin Avenue RM: 2W200, Bethesda, MD 20892, 301-496-9374, maurizio.grimaldi@nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 21, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18368 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; Institutional Research Training Grants (IT).

Date: September 29, 2023.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Complementary and Integrative Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael Eric Authement, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH, NIH, 6707 Democracy Boulevard, Bethesda, MD 20817, michael.authement@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: August 21, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18281 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Infrastructure Advancement for Interdisciplinary Elderly Studies

Date: November 2, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bitu Nakhai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room: 2C212, Bethesda, MD 20892, 301-402-7701, nakhaib@nia.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 21, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18377 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose

confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Sleep and Alzheimer's Disease.

Date: October 23, 2023.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nesar Uddin Akanda, M.D., Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room: 2E405, Bethesda, MD 20892, (301) 555-1212, nesar.akanda@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 21, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18378 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Institutional Training Program (T32) Review.

Date: October 18, 2023.

Time: 09:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Dem II, Suite 920, 6707 Democracy Boulevard, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: John K. Hayes, Ph.D., Scientific Review Officer National Institute of Biomedical Imaging and Bioengineering National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892, (301) 451-3398 hayesj@mail.nih.gov.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 NCBIB Review E-SEP.

Date: October 19, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Dem II, Suite 920, 6707 Democracy Blvd., Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Tianhong Wang, MD, Ph.D., Scientific Review Officer National Institute of Biomedical Imaging and Bioengineering National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892 (301) 435-1189, wangt3@nih.gov.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 NCBIB Review D-SEP.

Date: October 25-27, 2023.

Time: 09:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Dem II, Suite 920, 6707 Democracy Boulevard, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: John K. Hayes, Ph.D., Scientific Review Officer National Institute of Biomedical Imaging and Bioengineering National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892, (301) 451-3398, hayesj@mail.nih.gov.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Biomaterials Network RFA (U24) Review.

Date: November 2, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Dem II, Suite 920, 6707 Democracy Blvd., Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Tianhong Wang, MD, Ph.D., Scientific Review Officer National Institute of Biomedical Imaging and Bioengineering National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892, (301) 435-1189, wangt3@nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.866, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health.)

Dated: August 21, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-18280 Filed 8-24-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2023-0245]

National Commercial Fishing Safety Advisory Committee; May 2023 Meetings

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability of recommendations and request for comments.

SUMMARY: The Coast Guard announces the availability of recommendations from the National Commercial Fishing Safety Advisory Committee. The Committee met in May 2023 and sent five recommendations to the Secretary of Homeland Security. The U.S. Coast Guard issues this Notice as the mechanism for receiving public comments and requests public comments on the recommendations.

DATES: Comments must be submitted on or before November 24, 2023.

ADDRESSES: You may submit comments identified by docket number USCG-2023-0245 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document email questions to Jonathan.G.Wendland@uscg.mil or call 202-372-1245.

SUPPLEMENTARY INFORMATION:

Public Participation and Comments

We encourage you to submit comments (or related material) on the committee recommendations. If you submit a comment, please include the docket number for this notice, indicate the specific recommendation to which each comment applies, and provide a reason for each suggestion.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at <http://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG-2023-0245 in the search box and click "Search." Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using <http://www.regulations.gov>, contact the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Viewing material in docket. To view documents mentioned in this notice as

being available in the docket, find the docket as described in the previous paragraph, and then select "Supporting & Related Material" in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked Questions web page. We review all comments received, but we may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. You may wish to view the Privacy & Security Notice and the User Notice, which are both available on the homepage of <https://www.regulations.gov>, and DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Discussion

The National Commercial Fishing Safety Advisory Committee is authorized by section 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018*, (Pub. L. 115-282, 132 Stat. 4190), and is codified in 46 U.S.C. 15102. The Committee operates under the provisions of the Federal Advisory Committee Act and 46 U.S.C. 15109.

The National Commercial Fishing Safety Advisory Committee provides advice and recommendations to the Secretary of Homeland Security through the Commandant of the U.S. Coast Guard, on matters relating to the safe operation of vessels. Additionally, the Committee will review regulations proposed under chapter 45 of Title 46 of U.S. Code (during preparation of the regulations) and review marine casualties and investigations of vessels covered by chapter 45 of Title 46 U.S. Code and make recommendations to the Secretary to improve safety and reduce vessel casualties.

The National Commercial Fishing Safety Advisory Committee (the committee) met from May 23, 2023 to May 25, 2023 (88 FR 26585).¹ The U.S. Coast Guard issued 3 tasks to the committee, and the committee sent 5 recommendations to the Secretary based on those tasks. As required by 46 U.S.C. 15109(j)(3)(B), the Coast Guard is establishing a mechanism for the submission of public comments on these recommendations.

- Task #01-23 tasked the committee with reviewing 10 Marine Casualty investigation cases related to Personal

¹ The U.S. Coast Guard gave public notice of this meeting on May 1, 2023. 88 FR 26585.

Flotation Devices (PFD) and making recommendations to the Secretary of Homeland Security.

- Task #02–23 tasked the committee with reviewing 8 Marine Casualty investigation cases related to Cold Water and making recommendations to the Secretary of Homeland Security.

- Task #03–23 tasked the committee with reviewing 2 Marine Casualty investigation cases related to Falls Overboard and making recommendations to the Secretary of Homeland Security.

The recommendations are available in the docket and also can be found on our website at <https://www.dco.uscg.mil/NCFSAC2023/> or going to <https://www.uscg.mil> and clicking on the following links: *United States Coast Guard > Our Organization > Assistant Commandant for Prevention Policy (CG-5P) > Inspections & Compliance (CG-5PC) > Commercial Vessel Compliance > Fishing Vessel Safety Division > NATIONAL COMMERCIAL FISHING VESSEL ADVISORY COMMITTEE > MEETINGS* and clicking on the link “*Norfolk NCFSAC RECO to USCG DFO Task 1,2,3.*”

We invite public comments on these recommendations.

Dated: August 21, 2023.

Amy M. Beach,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2023–18321 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at <https://msc.fema.gov>.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to

section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65. The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

(Catalog of Federal Domestic Assistance No. 97.022, “Flood Insurance.”)

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alabama: St. Clair (FEMA Docket No.: B–2341).	Unincorporated areas of St. Clair County (23–04–0305P).	Stan Bateman, Chair, St. Clair County Board of Commissioners, 165 5th Avenue, Ashville, AL 35953.	St. Clair County, Highway Department, 31588 U.S. Highway 231, Ashville, AL 35953.	Aug. 11, 2023	010290
Colorado: Adams (FEMA Docket No.: B–2334).	City of Northglenn (22–08–0327P).	The Honorable Meredith Leighty, Mayor, City of Northglenn, 11701 Community Center Drive, Northglenn, CO 80233.	City Hall, 11701 Community Center Drive, Northglenn, CO 80233.	Jul. 28, 2023	080257
Adams (FEMA Docket No.: B–2334).	City of Thornton (22–08–0327P).	The Honorable Jan Kulmann, Mayor, City of Thornton, 9500 Civic Center Drive, Thornton, CO 80229.	City Hall, 9500 Civic Center Drive, Thornton, CO 80229.	Jul. 28, 2023	080007
Arapahoe (FEMA Docket No.: B–2341).	City of Centennial (21–08–0505P).	The Honorable Stephanie Piko, Mayor, City of Centennial, 13133 East Arapahoe Road, Centennial, CO 80112.	Southeast Metro Stormwater Authority, 7437 South Fairplay Street, Centennial, CO 80112.	Jul. 24, 2023	080315

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Arapahoe (FEMA Docket No.: B-2341).	City of Greenwood Village (21-08-0505P).	The Honorable George Lantz, Mayor, City of Greenwood Village, 6060 South Quebec Street, Greenwood Village, CO 80111.	City Hall, 6060 South Quebec Street, Greenwood Village, CO 80111.	Jul. 24, 2023	080195
Arapahoe (FEMA Docket No.: B-2335).	Unincorporated areas of Arapahoe County (21-08-0505P).	Carrie Warren-Gully, Chair, Arapahoe County Board of Commissioners, 5334 South Prince Street, Littleton, CO 80120.	Arapahoe County Public Works and Development Department, 6924 South Lima Street, Littleton, CO 80112.	Jul. 24, 2023	080011
Denver (FEMA Docket No.: B-2335).	City and County of Denver (21-08-0294P).	The Honorable Michael B. Hancock, Mayor, City and County of Denver, 1437 Bannock Street, Suite 300, Denver, CO 80202.	Department of Transportation and Infrastructure, 201 West Colfax Avenue, Department 608, Denver, CO 80202.	Jul. 24, 2023	080046
Douglas (FEMA Docket No.: B-2334).	Unincorporated areas of Douglas County (22-08-0219P).	Abe Laydon, Chair, Douglas County Board of Commissioners, 100 3rd Street, Castle Rock, CO 80104.	Douglas County Public Works Department, Engineering Division, 100 3rd Street, Castle Rock, CO 80104.	Jul. 28, 2023	080049
Weld (FEMA Docket No.: B-2341).	Town of Johnstown (22-08-0435P).	Matt LeCerc, Town of Johnstown Manager, P.O. Box 609, Johnstown, CO 80534.	Town Hall, 450 South Parish Avenue, Johnstown, CO 80534.	Jul. 28, 2023	080250
Weld (FEMA Docket No.: B-2341).	Unincorporated areas of Weld County (22-08-0435P).	Scott James, Chair, Weld County Board of Commissioners, P.O. Box 758, Greeley, CO 80631.	Weld County Commissioner's Office, 1150 O Street, Greeley, CO 80632.	Jul. 28, 2023	080266
Florida:					
Hillsborough (FEMA Docket No.: B-2335).	City of Plant City (22-04-3498P).	Bill McDaniel, Manager, City of Plant City, 302 West Reynolds Street, Plant City, FL 33563.	City Hall, 302 West Reynolds Street, Plant City, FL 33563.	Jul. 20, 2023	120113
Hillsborough (FEMA Docket No.: B-2335).	City of Tampa (23-04-0603P).	The Honorable Jane Castor, Mayor, City of Tampa, 306 East Jackson Street, Tampa, FL 33602.	Planning Department, 1400 North Boulevard, Tampa, FL 33607.	Jul. 27, 2023	120114
Palm Beach (FEMA Docket No.: B-2335).	Unincorporated areas of Palm Beach County (22-04-0127P).	Verdenia C. Baker, Palm Beach County Administrator, 301 North Olive Avenue, Suite 1101, West Palm Beach, FL 33401.	Palm Beach County Planning, Zoning, and Building Department, 2300 North Jog Road, West Palm Beach, FL 33411.	Jul. 24, 2023	120192
Volusia (FEMA Docket No.: B-2348).	City of Edgewater (23-04-1432P).	The Honorable Diezel DePew, Mayor, City of Edgewater, P.O. Box 100, Edgewater, FL 32132.	Stormwater Department, 409 Mango Tree Drive, Edgewater, FL 32132.	Aug. 4, 2023	120308
Maryland: Frederick (FEMA Docket No.: B-2341).	Unincorporated areas of Frederick County (23-03-0342P).	Jessica Fitzwater, Frederick County Executive, 12 East Church Street, Frederick, MD 21701.	Frederick County Division of Planning and Permitting, 30 North Market Street, Frederick, MD 21701.	Aug. 4, 2023	240027
Montana: Gallatin (FEMA Docket No.: B-2341).	City of Bozeman (22-08-0557P).	Jeff Mihelich, Manager, City of Bozeman, P.O. Box 1230, Bozeman, MT 59771.	Engineering Department, 20 East Olive Street, 1st Floor, Bozeman, MT 59715.	Jul. 26, 2023	300028
North Carolina: Moore (FEMA Docket No.: B-2341).	Village of Whispering Pines (22-04-5068P).	The Honorable Glenn Bernhard, Mayor, Village of Whispering Pines, 10 Pine Ridge Drive, Whispering Pines, NC 28327.	Moore County Planning and Inspections Department, 1048 Carriage Oaks Drive, Carthage, NC 28327.	Aug. 10, 2023	370464
South Carolina:					
Berkeley (FEMA Docket No.: B-2335).	Town of Moncks Corner (22-04-1920P).	The Honorable Michael A. Locklear, Mayor, Town of Moncks Corner, P.O. Box 700, Moncks Corner, SC 29461.	Community Development Department, 118 Carolina Avenue, Moncks Corner, SC 29461.	Jul. 20, 2023	450031
Berkeley (FEMA Docket No.: B-2335).	Unincorporated areas of Berkeley County (22-04-1920P).	Johnny Cribb, Supervisor, Berkeley County Council, 1003 North Highway 52, Moncks Corner, SC 29461.	Berkeley County Building and Codes Enforcement Department, 1003 North Highway 52, Moncks Corner, SC 29461.	Jul. 20, 2023	450029
Tennessee:					
Hamilton (FEMA Docket No.: B-2335).	City of Collegedale (22-04-3380P).	The Honorable Morty Lloyd, Mayor, City of Collegedale, 4910 Swinyar Drive, Collegedale, TN 37315.	Public Works Department, 9751 Sanborn Drive, Collegedale, TN 37315.	Jul. 24, 2023	475422
Hamilton (FEMA Docket No.: B-2335).	Unincorporated areas of Hamilton County (22-04-3380P).	The Honorable Weston Wamp, Mayor, Hamilton County, 625 Georgia Avenue, Collegedale, TN 37402.	Hamilton County Public Works Division, 4005 Cromwell Road, Chattanooga, TN 37421.	Jul. 24, 2023	470071
Wilson (FEMA Docket No.: B-2348).	City of Mt. Juliet (23-04-1901P).	The Honorable James Maness, Mayor, City of Mt. Juliet, 2425 North Mt. Juliet Road, Mt. Juliet, TN 37122.	Public Works and Engineering Department, 71 East Hill Street, Mt. Juliet, TN 37122.	Aug. 3, 2023	470290
Wilson (FEMA Docket No.: B-2348).	Unincorporated areas of Wilson County (23-04-1901P).	The Honorable Randall Hutto, Mayor, Wilson County, 228 East Main Street, Lebanon, TN 37087.	Wilson County Planning Department, 228 East Main Street, Lebanon, TN 37087.	Aug. 3, 2023	470207
Texas:					
Dallas (FEMA Docket No.: B-2348).	City of Dallas (23-06-0244P).	The Honorable Eric Johnson, Mayor, City of Dallas, 1500 Marilla Street, Room 5EN, Dallas, TX 75201.	Oak Cliff Municipal Center, 320 East Jefferson Boulevard, Room 312, Dallas, TX 75203.	Aug. 7, 2023	480171
Denton (FEMA Docket No.: B-2341).	City of Denton (22-06-2546P).	The Honorable Gerard Hudspeth, Mayor, City of Denton, 215 East McKinney Street, Denton, TX 76201.	Development Services Department, 401 North Elm Street, Denton, TX 76201.	Jul. 31, 2023	480194
Denton (FEMA Docket No.: B-2341).	City of Denton (23-06-0063P).	The Honorable Gerard Hudspeth, Mayor, City of Denton, 215 East McKinney Street, Denton, TX 76201.	Capital Projects/Engineering Department, 401 North Elm Street, Denton, TX 76201.	Jul. 31, 2023	480194
Denton (FEMA Docket No.: B-2341).	City of Fort Worth (22-06-1732P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	City Hall, 200 Texas Street, Fort Worth, TX 76102.	Aug. 7, 2023	480596

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Denton (FEMA Docket No.: B-2341).	Unincorporated areas of Denton County (23-06-0063P).	The Honorable Andy Eads, Denton County Judge, 1 Courthouse Drive, Suite 3100, Denton, TX 76208.	Denton County Development Services Department, 3900 Morse Street, Denton, TX 76208.	Jul. 31, 2023	480774
Ellis (FEMA Docket No.: B-2341).	City of Ennis (22-06-2915P).	The Honorable Angeline L. Juenemann, Mayor, City of Ennis, 115 West Brown Street, Ennis, TX 75119.	Planning, Development and Inspection Department, 108 West Knox Street, Ennis, TX 75119.	Aug. 7, 2023	480207
Ellis (FEMA Docket No.: B-2341).	City of Midlothian (22-06-1316P).	Chris Dick, Manager, City of Midlothian, 104 West Avenue E, Midlothian, TX 76065.	City Hall, 104 West Avenue E, Midlothian, TX 76065.	Aug. 4, 2023	480801
Ellis (FEMA Docket No.: B-2341).	City of Waxahachie (22-06-1316P).	Michael Scott, Manager, City of Waxahachie, 401 South Rogers Street, Waxahachie, TX 75165.	City Hall, 401 South Rogers Street, Waxahachie, TX 75165.	Aug. 4, 2023	480211
Ellis (FEMA Docket No.: B-2341).	Unincorporated areas of Ellis County (22-06-1316P).	The Honorable Todd Little, Ellis County Judge, 101 West Main Street, Waxahachie, TX 75165.	Ellis County District Court House, 109 South Jackson Street, Waxahachie, TX 75165.	Aug. 4, 2023	480798
Harris (FEMA Docket No.: B-2341).	Unincorporated areas of Harris County (22-06-0678P).	The Honorable Lina Hidalgo, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permits Office, 1111 Fannin Street, 8th Floor, Houston, TX 77002.	Jul. 24, 2023	480287
Harris (FEMA Docket No.: B-2341).	Unincorporated areas of Harris County (22-06-2197P).	The Honorable Lina Hidalgo, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permits Office, 1111 Fannin Street, 8th Floor, Houston, TX 77002.	Jul. 24, 2023	480287
Tarrant (FEMA Docket No.: B-2335).	City of Fort Worth (22-06-2617P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works Department, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.	Jul. 20, 2023	480596
Tarrant (FEMA Docket No.: B-2335).	City of Keller (22-06-2447P).	The Honorable Armin R. Mizani, Mayor, City of Keller, P.O. Box 770, Keller, TX 76244.	Town Hall, 1100 Bear Creek Parkway, Keller, TX 76248.	Jul. 24, 2023	480602
Virginia: Loudoun (FEMA Docket No.: B-2341).	Unincorporated areas of Loudoun County (22-03-0882P).	Tim Hemstreet, Loudoun County Administrator, P.O. Box 7000, Leesburg, VA 20175.	Loudoun County Government Center, 1 Harrison Street Southeast, 3rd Floor, MSC #60, Leesburg, VA 20175.	Jul. 31, 2023	510090

[FR Doc. 2023-18287 Filed 8-24-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2360]****Proposed Flood Hazard Determinations****AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.**ACTION:** Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report

are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before November 24, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2360, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit

the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be

considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an

appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by

the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Clay County, Illinois and Incorporated Areas Project: 16-05-2969S Preliminary Date: July 21, 2022	
City of Flora	City Hall, 131 East 2nd Street, Flora, IL 62839.
Unincorporated Areas of Clay County	Clay County Courthouse, 111 East Chestnut Street, Room 106, Louisville, IL 62858.
Village of Clay City	Village Hall, 318 South Walnut Street, Clay City, IL 62824.
Village of Louisville	Village Hall, 177 South Main Street, Louisville, IL 62858.
Village of Sailor Springs	Village Hall, 107 South Washington Street, Sailor Springs, IL 62824.
St. Louis County, Minnesota and Incorporated Areas Project: 14-05-2193S Preliminary Date: October 28, 2022	
Bois Forte Band of Chippewa	Bois Forte Band of Chippewa Tribal Office, 5344 Lakeshore Drive, Nett Lake, MN 55772.
City of Aurora	City Hall, 16 West 2nd Avenue North, Aurora, MN 55705.
City of Babbitt	City Hall, 71 South Drive, Babbitt, MN 55706.
City of Biwabik	City Hall, 321 North Main Street, Biwabik, MN 55708.
City of Brookston	City Hall, 8757 1st Street South, Brookston, MN 55711.
City of Cook	City Hall, 127 South River Street, Cook, MN 55723.
City of Duluth	City Hall, 411 West First Street, Duluth, MN 55802.
City of Ely	City Hall, 209 East Chapman Street, Ely, MN 55731.
City of Floodwood	City Hall, 111 West 8th Avenue, Floodwood, MN 55736.
City of Hermantown	City Hall, 5105 Maple Grove Road, Hermantown, MN 55811.
City of Hibbing	City Hall, 401 East 21st Street, Hibbing, MN 55746.
City of Hoyt Lakes	Municipal Building, 206 Kennedy Memorial Drive, Hoyt Lakes, MN 55750.
City of Iron Junction	City Office, 4141 Merritt Avenue, Iron Junction, MN 55751.
City of Meadowlands	Meadowlands Community Center, 7758 Western Avenue, Meadowlands, MN 55765.
City of Mountain Iron	City Hall, 8586 Enterprise Drive South, Mountain Iron, MN 55768.
City of Orr	City Hall, 4429 Highway 53, Orr, MN 55771.
City of Proctor	City Hall, 100 Pionk Drive, Proctor, MN 55810.
City of Rice Lake	Rice Lake City Hall, 4107 West Beyer Road, Duluth, MN 55803.
City of Tower	City Hall, 602 Main Street, Tower, MN 55790.
City of Virginia	City Hall, 327 South First Street, Virginia, MN 55792.
City of Winton	Winton Community Center, 102 North Main Street, Winton, MN 55796.
Fond du Lac Band of Lake Superior Chippewa	Fond du Lac Band of Lake Superior Chippewa Tribal Center, 1720 Big Lake Road, Cloquet, MN 55720.
Unincorporated Areas of St. Louis County	St. Louis County Courthouse, 100 North 5th Avenue West, Duluth, MN 55802.
Township of Gnesen	Gnesen Community Center, 6356 Howard Gnesen Road, Duluth, MN 55803.
Township of Lakewood	Lakewood Town Hall, 3110 Strand Road, Duluth, MN 55803.
Township of Midway	Midway Town Hall, 3230 Midway Road, Duluth, MN 55810.
Summers County, West Virginia and Incorporated Areas Project: 21-03-0008S Preliminary Date: September 30, 2022 and May 01, 2023	
City of Hinton	City Hall, 322 Summers Street, Hinton, WV 25951.
Unincorporated Areas of Summers County	Summers County Courthouse, 120 Ballengee Street, Suite 203, Hinton, WV 25951.

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2359]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before November 24, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally,

the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2359, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown

on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,
Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Collin County, Texas and Incorporated Areas	
Project: 20-06-0102S Preliminary Date: October 18, 2022	
City of Dallas	Water Utilities, Stormwater Operations, 2245 Irving Boulevard, Second Floor, Dallas, TX 75207.
City of Plano	Municipal Center, 1520 K Avenue, Suite 250, Plano, TX 75074.

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2351]****Proposed Flood Hazard Determinations****AGENCY:** Federal Emergency Management Agency; Department of Homeland Security.**ACTION:** Notice; correction.

SUMMARY: On July 31, 2023, FEMA published in the **Federal Register** a proposed flood hazard determination notice that contained an erroneous table. This notice provides corrections to that table to be used in lieu of the erroneous information. The table provided here represents the proposed flood hazard determinations and communities affected for Kenai Peninsula Borough, Alaska and Incorporated Areas.

DATES: Comments are to be submitted on or before October 30, 2023.

ADDRESSES: The Preliminary Flood Insurance Rate Map (FIRM), and where applicable, the Flood Insurance Study (FIS) report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2351, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and

Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed in the table below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide

recommendations for resolution. Use of the SRP may only be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://floodsrp.org/pdfs/srp_fact_sheet.pdf.

The communities affected by the flood hazard determinations are provided in the table below. Any request for reconsideration of the revised flood hazard determinations shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations will also be considered before the FIRM and FIS report are made final.

Correction

In the proposed flood hazard determination notice published at 88 FR 49487 in the July 31, 2023, issue of the **Federal Register**, FEMA published a table titled Kenai Peninsula Borough, Alaska and Incorporated Areas. This table contained inaccurate information as to the community map repository for the City of Soldotna featured in the table. In this document, FEMA is publishing a table containing the accurate information. The information provided below should be used in lieu of that previously published.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Kenai Peninsula Borough, Alaska and Incorporated Areas Project: 20-10-0002S Preliminary Date: January 31, 2023	
City of Kenai	City Hall, 210 Fidalgo Avenue, Kenai, AK 99611.
City of Soldotna	City Hall, 177 North Birch Street, Soldotna, AK 99669.
Kenai Peninsula Borough	Kenai Peninsula Borough Administration Building, 144 North Binkley Street, Soldotna, AK 99669.

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2365]

Changes in Flood Hazard Determinations**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.**ACTION:** Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these

changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, “Flood Insurance.”)

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						
Maricopa	City of Glendale (22–09–1673P).	The Honorable Jerry Weiers, Mayor, City of Glendale, 5850 West Glendale Avenue, Suite 451, Glendale, AZ 85301.	City Hall, 5850 West Glendale Avenue, Glendale, AZ 85301.	https://msc.fema.gov/portal/advanceSearch .	Nov. 24, 2023	040045
Maricopa	Unincorporated Areas of Maricopa County (22–09–1673P).	The Honorable Clint L. Hickman, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Glendale, AZ 85301.	https://msc.fema.gov/portal/advanceSearch .	Nov. 24, 2023	040037
Yuma	Town of Wellton (22–09–1369P).	The Honorable Scott Blitz, Mayor, Town of Wellton, 28634 Oakland Avenue, Wellton, AZ 85356.	Town Hall, 28634 Oakland Avenue, Wellton, AZ 85356.	https://msc.fema.gov/portal/advanceSearch .	Dec. 6, 2023	040112
Arkansas:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Benton	City of Lowell (22-06-2961P).	The Honorable Chris Moore, Mayor, City of Lowell, 216 North Lincoln Street, Lowell, AR 72745.	City Hall, 216 North Lincoln Street, Lowell, AR 72745.	https://msc.fema.gov/portal/advanceSearch .	Nov. 2, 2023	050342
Benton	City of Springdale (22-06-2961P).	The Honorable Doug Sprouse, Mayor, City of Springdale, 201 Spring Street, Springdale, AR 72764.	City Hall, 201 Spring Street, Springdale, AR 72764.	https://msc.fema.gov/portal/advanceSearch .	Nov. 2, 2023	050219
California: Orange	City of San Juan Capistrano (23-09-0982X).	The Honorable Howard Hart, Mayor, City of San Juan Capistrano, 30448 Rancho Viejo Road, San Juan Capistrano, CA 92675.	City Hall, 32400 Paseo Adelanto, San Juan Capistrano, CA 92675.	https://msc.fema.gov/portal/advanceSearch .	Nov. 17, 2023	060231
Riverside	City of Corona (22-09-1531P).	The Honorable Tony Daddario, Mayor, City of Corona, 400 South Vicentia Avenue, Corona, CA 92882.	City Hall, 400 South Vicentia Avenue, Corona, CA 92882.	https://msc.fema.gov/portal/advanceSearch .	Dec. 6, 2023	060250
Riverside	City of Corona (23-09-0461P).	The Honorable Tony Daddario, Mayor, City of Corona, 400 South Vicentia Avenue, Corona, CA 92882.	City Hall, 400 South Vicentia Avenue, Corona, CA 92882.	https://msc.fema.gov/portal/advanceSearch .	Nov. 9, 2023	060250
Riverside	City of Riverside (22-09-1386P).	The Honorable Patricia Lock Dawson, Mayor, City of Riverside, 3900 Main Street, Riverside, CA 92522.	Public Works Department, 3900 Main Street, 4th Floor, Riverside, CA 92522.	https://msc.fema.gov/portal/advanceSearch .	Dec. 6, 2023	060260
Riverside	City of Riverside (23-09-0172P).	The Honorable Patricia Lock Dawson, Mayor, City of Riverside, 3900 Main Street, Riverside, CA 92522.	Public Works Department, 3900 Main Street, 4th Floor, Riverside, CA 92522.	https://msc.fema.gov/portal/advanceSearch .	Nov. 14, 2023	060260
Riverside	Unincorporated Areas of Riverside County (22-09-1531P).	The Honorable Kevin Jeffries, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	https://msc.fema.gov/portal/advanceSearch .	Dec. 6, 2023	060245
Riverside	Unincorporated Areas of Riverside County (23-09-0172P).	The Honorable Kevin Jeffries, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92522.	Riverside County Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	https://msc.fema.gov/portal/advanceSearch .	Nov. 14, 2023	060245
San Joaquin ...	Unincorporated Areas of San Joaquin County (23-09-0364P).	The Honorable Robert Rickman, Chair, Board of Supervisors, San Joaquin County, 44 North San Joaquin Street, Suite 627, Stockton, CA 95202.	San Joaquin County, Public Works Department, 1810 East Hazelton Avenue, Stockton, CA 95205.	https://msc.fema.gov/portal/advanceSearch .	Nov. 9, 2023	060299
Florida: Walton	City of Freeport (22-04-4474P).	The Honorable Russ Barley, Mayor, City of Freeport, 112 Highway 20 West, Freeport, FL 32439.	City Hall, 112 Highway 20 West, Freeport, FL 32439.	https://msc.fema.gov/portal/advanceSearch .	Nov. 9, 2023	120319
Walton	Unincorporated Areas of Walton County (22-04-4474P).	Danny Glidewell, District 2 Commissioner-Chair, Walton County, 76 North 6th Street, DeFuniak Springs, FL 32433.	Walton County Planning and Development Services Department, 31 Coastal Centre Boulevard, Santa Rosa Beach, FL 32459.	https://msc.fema.gov/portal/advanceSearch .	Nov. 9, 2023	120317
Hawaii: Maui	Maui County (22-09-0588P).	The Honorable Richard T. Bissen, Jr., Mayor, County of Maui, 200 South High Street, Kalana O Maui Building 9th Floor, Wailuku, HI 96793.	County of Maui Planning Department, One Main Plaza, 2200 Main Street, Suite 315, Wailuku, HI 96793.	https://msc.fema.gov/portal/advanceSearch .	Nov. 29, 2023	150003
Illinois: Kane	Village of Huntley (23-05-0909P).	Timothy J. Hoeft, Village President, Village of Huntley, 10987 Main Street, Huntley, IL 60142.	Village Hall, Engineering Department, 10987 Main Street, Huntley, IL 60142.	https://msc.fema.gov/portal/advanceSearch .	Nov. 13, 2023	170480
Minnesota:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Carver	City of Waconia (22-05-1488P).	The Honorable Nicole Warden, Mayor, City of Waconia, 201 South Vine Street, Waconia, MN 55387.	City Call, 201 South Vine Street, Waconia, MN 55387.	https://msc.fema.gov/portal/advanceSearch .	Nov. 24, 2023	270055
Carver	Unincorporated Areas of Carver County (22-05-1488P).	John P. Fahey, Chair, Carver County Board of County Commissioners, 211 Park Place, Norwood Young America, MN 55368.	Carver County Public Health and Environment, 600 East 4th Street, Chaska, MN 55318.	https://msc.fema.gov/portal/advanceSearch .	Nov. 24, 2023	270049
Ohio: Butler	Unincorporated Areas of Butler County (22-05-1307P).	T.C. Rogers, President, Butler County Board of Commissioners, Government Services Center, 315 High Street, 6th Floor, Hamilton, OH 45011.	Butler County Administrator Center, Building and Zoning Department, 130 High Street, 1st Floor, Hamilton, OH 45011.	https://msc.fema.gov/portal/advanceSearch .	Nov. 27, 2023	390037
Franklin	Unincorporated Areas of Franklin County (22-05-1492P).	John O'Grady, Commissioner, Franklin County Board of Commissioners, 373 South High Street, 26th Floor, Columbus, OH 43215.	Franklin County, Development Department, 280 East Broad Street, Columbus, OH 43215.	https://msc.fema.gov/portal/advanceSearch .	Dec. 5, 2023	390167
Franklin	Village of Canal Winchester (22-05-1492P).	The Honorable Michael Ebert, Mayor, Village of Canal Winchester, Municipal Building, 45 East Waterloo Street, Canal Winchester, OH 43110.	Planning and Zoning, 36 South High Street, Canal Winchester, OH 43110.	https://msc.fema.gov/portal/advanceSearch .	Dec. 5, 2023	390169
New York: Suffolk	Town of Southampton (23-02-0078P).	Jay Schneiderman, Town Supervisor, Town of Southampton, 116 Hampton Road, Southampton, NY 11968.	Town Hall, 116 Hampton Road, Southampton, NY 11968.	https://msc.fema.gov/portal/advanceSearch .	Dec. 21, 2023	365342
Suffolk	Village of Westhampton Beach (23-02-0078P).	The Honorable Gary Vegliante, Mayor, Village of Westhampton, 165 Mill Road, Westhampton Beach, NY 11978.	Village Hall, 165 Mill Road, Westhampton Beach, NY 11978.	https://msc.fema.gov/portal/advanceSearch .	Dec. 21, 2023	365345
Texas: Dallas	City of Grand Prairie (22-06-0112P).	The Honorable Ron Jensen, Mayor, City of Grand Prairie, 300 West Main Street, Grand Prairie, TX 75053.	City Development Center, 206 West Church Street, Grand Prairie, TX 75050.	https://msc.fema.gov/portal/advanceSearch .	Nov. 22, 2023	485472
Dallas	City of Irving (22-06-0112P).	The Honorable Rick Stopfer, Mayor, City of Irving, City Hall, 825 West Irving Boulevard, Irving, TX 75060.	Capital Improvement Program Department, 825 West Irving Boulevard, Irving, TX 75060.	https://msc.fema.gov/portal/advanceSearch .	Nov. 22, 2023	480180
Tarrant	City of Arlington (22-06-2179P).	The Honorable Jim Ross, Mayor, City of Arlington, P.O. Box 90231, Arlington, TX 76004.	City Hall, 101 West Abram Street, Arlington, TX 76010.	https://msc.fema.gov/portal/advanceSearch .	Nov. 6, 2023	485454
Tarrant	City of Fort Worth (23-06-1016X).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, 1000 Throckmorton Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480596
Tarrant	City of Haltom City (21-06-2662P).	The Honorable An Truong, Mayor, City of Haltom City, City Hall, 5024 Broadway Avenue, Haltom City, TX 76117.	City Hall, 5024 Broadway Avenue, Haltom City, TX 76117.	https://msc.fema.gov/portal/advanceSearch .	Nov. 22, 2023	480599
Tarrant	City of North Richland Hills (21-06-2662P).	The Honorable Oscar Trevino, Jr., Mayor, City of North Richland Hills, City Hall, P.O. Box 820609, North Richland Hills, TX 76182.	City Hall, 4301 City Point Drive, North Richland Hills, TX 76180.	https://msc.fema.gov/portal/advanceSearch .	Nov. 22, 2023	480607
Washington: Kittitas	City of Cle Elum (21-10-1313P).	The Honorable Jay McGowan, Mayor, City of Cle Elum, 119 West 1st Street, Cle Elum, WA 98922.	City Hall, 119 West 1st Street, Cle Elum, WA 98922.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	530096

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Kittitas	City of Roslyn (21–10–1313P).	The Honorable Brent Hals, Mayor, City of Roslyn, P.O. Box 451, Roslyn, WA 98941.	City Hall, 201 South 1st Street, Roslyn, WA 98941.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	530299
Kittitas	Unincorporated Areas of Kittitas County (21–10–1313P).	Cory Wright, Commissioner, Kittitas County Board of Commissioners, 205 West 5th Avenue, Suite 108, Ellensburg, WA 98926.	Kittitas County, Department of Public Works, 411 North Ruby Street, Suite 1, Ellensburg, WA 98926.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	530095

[FR Doc. 2023–18285 Filed 8–24–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****[234A2100DD/AAKC001030/
AOA501010.99900]****Receipt of Documented Petition for Federal Acknowledgment as an American Indian Tribe****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Notice.

SUMMARY: The Department of the Interior (Department) gives notice that the group known as the Fernandeño Tataviam Band of Mission Indians has filed a documented petition for Federal acknowledgment as an American Indian Tribe with the Assistant Secretary—Indian Affairs. The Department seeks comment and evidence from the public on the petition.

DATES: Comments and evidence must be postmarked by January 2, 2024.

ADDRESSES: Copies of the narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under 25 CFR 83.21(b)), and other information are available at the Office of Federal Acknowledgment's website: www.bia.gov/as-ia/ofa. Submit any comments or evidence to: Department of the Interior, Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, Mail Stop 4071 MIB, 1849 C Street NW, Washington, DC 20240, or by email to: lee.fleming@bia.gov.

FOR FURTHER INFORMATION CONTACT: Mr. R. Lee Fleming, OFA Director, Office of the Assistant Secretary—Indian Affairs, Department of the Interior, telephone: (202) 513–7650.

SUPPLEMENTARY INFORMATION: On July 31, 2015, the Department's revisions to 25 CFR part 83 became final and effective (80 FR 37861). A key goal of the revisions was to improve

transparency through increased notice of petitions and providing improved public access to petitions. Today the Department informs the public that a complete documented petition has been submitted under the current regulations, that portions of that petition are publicly available on the website identified above for easy access, and that we are seeking public comment early in the process on this petition.

Under 25 CFR 83.22(b)(1), the Office of Federal Acknowledgment (OFA) publishes notice that the following group has filed a documented petition for Federal acknowledgment as an American Indian Tribe to the Assistant Secretary—Indian Affairs: Fernandeño Tataviam Band of Mission Indians c/o Mr. Rudy J. Ortega, Jr., 1019 Second Street, Box 1, San Fernando, California 91340.

Also, under 25 CFR 83.22(b)(1), OFA publishes on its website the following:

- i. The narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under 25 CFR 83.21(b));
- ii. The name, location, and mailing address of the petitioner and other information to identify the entity;
- iii. The date of receipt;
- iv. The opportunity for individuals and entities to submit comments and evidence supporting or opposing the petitioner's request for acknowledgment within 120 days of the date of the website posting; and
- v. The opportunity for individuals and entities to request to be kept informed of general actions regarding a specific petitioner.

The Department publishes this notice and request for comment in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Bryan Newland,*Assistant Secretary—Indian Affairs.*

[FR Doc. 2023–18296 Filed 8–24–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR**National Park Service****[NPS–WASO–NRNHL–DTS#–36413;
PPWOCRADIO, PCU00RP14.R50000]****National Register of Historic Places;
Notification of Pending Nominations
and Related Actions****AGENCY:** National Park Service, Interior.**ACTION:** Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before August 12, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by September 11, 2023.

ADDRESSES: Comments are encouraged to be submitted electronically to *National Register Submissions@nps.gov* with the subject line “Public Comment on <property or proposed district name, (County) State>.” If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT:

Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, sherry_frear@nps.gov, 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before August 12, 2023. Pursuant to section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State or Tribal Historic Preservation Officers:

Key: State, County, Property Name, Multiple Name (if applicable), Address/ Boundary, City, Vicinity, Reference Number.

CALIFORNIA

Alameda County

Immanuel Evangelical Lutheran Church of Alameda, 1420 Lafayette St., Alameda, SG100009369

Los Angeles County

Higgins Building, 108 West 2nd St., Los Angeles, SG100009358
Doctors House, 1601 West Mountain St., Glendale, SG100009362

ILLINOIS

Cook County

Pioneer Trust and Savings Bank, 4000 West North Ave., Chicago, SG100009372

Will County

Illinois State Penitentiary-Joliet Historic District, 1125 Collins St., Joliet, SG100009371

MAINE

Cumberland County

Franklin Towers, 211 Cumberland Ave. (Tax ID address 61 Wilmot St.), Portland, SG100009363

Penobscot County

Great Northern Paper Company Administration Historic District, 1 Katahdin Ave., Millinocket, SG100009368

Piscataquis County

Genthner, Ernest and Louise, House, 24 Elm St., Guilford, SG100009364
First Universalist Church of Sangerville, 11 Church St., Sangerville, SG100009367

Sagadahoc County

Malaga Island, Malaga Island, Phippsburg, SG100009365

MARYLAND

Worcester County

Showell House, 11206 Worcester Hwy., Showell vicinity, SG100009376

OHIO

Medina County

Wadsworth Downtown Historic District, Roughly bounded by 101–161 and 102–146 High, 117–129 Broad, 111–273, 102–156 and 246–258 Main, 188 South Lyman, 105 Garfield, and 107–155 and 112–116 College Sts., 110–122, Watrusa Ave., Wadsworth, SG100009356

WISCONSIN

Brown County

Lenfestey, Agnes and Ruth Lenfestey Mark, House, 1336 Ridgeway Blvd., De Pere, SG100009375

Additional documentation has been received for the following resources:

ARIZONA

Pima County

Blenman-Elm Historic District (Additional Documentation), 2820 East Adams St., Tucson, AD03000318

OHIO

Summit County

Akron Soap Company (Additional Documentation), 237–243 Furnace St., Akron, AD14000811

Nomination submitted by Federal Preservation Officer:

The State Historic Preservation Officer reviewed the following nomination and responded to the Federal Preservation Officer within 45 days of receipt of the nomination and supports listing the property in the National Register of Historic Places.

CALIFORNIA

Humboldt County

U.S. Coast Guard Station Humboldt Bay, (U.S. Government Lifesaving Stations MPS), 200 New Navy Base Rd. Samoa vicinity, MP100009370

Authority: Section 60.13 of 36 CFR part 60.

Dated: August 16, 2023.

Sherry A. Frear,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2023–18329 Filed 8–24–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0013]

Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 261

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Final notice of sale.

SUMMARY: On Wednesday, September 27, 2023, the Bureau of Ocean Energy Management (BOEM) will open and publicly announce bids received for blocks offered in the Gulf of Mexico (GOM) Outer Continental Shelf (OCS) Oil and Gas Lease Sale 261 (GOM Lease Sale 261), in accordance with the Outer Continental Shelf Lands Act (OCSLA), as amended, and its implementing regulations. The Inflation Reduction Act of 2022 (IRA) requires BOEM to hold GOM Lease Sale 261 by September 30,

2023. The GOM Lease Sale 261 Final Notice of Sale (Final NOS) package contains information essential to potential bidders and comprises this notice, Information to Lessees, and Lease Stipulations.

DATES: BOEM will hold GOM Lease Sale 261 at 9:00 a.m. on Wednesday, September 27, 2023. All times referred to in this document are Central time, unless otherwise specified.

Bid submission deadline: BOEM must receive all sealed bids prior to the Bid Submission Deadline of 10:00 a.m. on Tuesday, September 26, 2023, the day before the lease sale. For more information on bid submission, see Section VII of this document, “Bidding Instructions.”

ADDRESSES: Bids will be accepted by MAIL ONLY through any parcel delivery service (e.g., FedEx, UPS, U.S. Postal Service, DHL), prior to the bid submission deadline, at 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123. Public bid reading for GOM Lease Sale 261 will be held at 1201 Elmwood Park Boulevard, New Orleans, Louisiana. The venue will not be open to the general public, media, or industry during bid opening or reading. Bid opening will be available for public viewing on BOEM’s website at <https://www.boem.gov/Sale-261/> via live-streaming video beginning at 9:00 a.m. on the date of the sale. The results will be posted on BOEM’s website upon completion of bid opening and reading. Interested parties may download the Final NOS package from BOEM’s website at <https://www.boem.gov/Sale-261/>. Copies of the sale maps can be obtained by contacting the BOEM GOM Region: Gulf of Mexico Region Public Information Office, Bureau of Ocean Energy Management, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, (504) 736–2519 or (800) 200–GULF.

FOR FURTHER INFORMATION CONTACT: The New Orleans Office Lease Sale Coordinator, Bridgette Duplantis, at BOEMGOMRLeaseSales@boem.gov or 504–736–1729.

Authority: This notice of sale is published pursuant to 43 U.S.C. 1331 *et seq.* (Outer Continental Shelf Lands Act, as amended) and 30 CFR 556.308(a).

Table of Contents

- I. Lease Sale Area
- II. Statutes and Regulations
- III. Lease Terms and Economic Conditions
- IV. Lease Stipulations
- V. Information to Lessees
- VI. Maps
- VII. Bidding Instructions
- VIII. Bidding Rules and Restrictions
- IX. Forms

X. The Lease Sale
XI. Delay of Sale

I. Lease Sale Area

Blocks Offered for Leasing: BOEM will offer for bid in this lease sale all of the available unleased acreage in the GOM OCS as identified on the map, "Final Notice of Sale, Gulf of Mexico OCS Oil and Gas Lease Sale 261,

September 2023, Final Sale Area" (<https://www.boem.gov/Sale-261/>), except those blocks listed below in "Blocks Not Offered for Leasing."

Blocks Not Offered for Leasing: BOEM will exclude the following whole and partial blocks from this sale. The BOEM Official Protraction Diagrams (OPDs) and Supplemental OPDs are available

online at <https://www.boem.gov/oil-gas-energy/mapping-and-data>.

- Whole and Partial Blocks withdrawn from leasing by Presidential Withdrawal in the September 8, 2020, *Memorandum on the Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition:*

GOM protraction areas	Block
Pensacola (Leasing Map NH 16-05)	Whole Blocks: 751-754, 793-798, 837-842, 881-886, 925-930, 969-975.
Destin Dome (Leasing Map NH 16-08)	Whole Blocks: 1-7, 45-51, 89-96, 133-140, 177-184, 221-228, 265-273, 309-317, 353-361, 397-405, 441-450, 485-494, 529-538, 573-582, 617-627, 661-671, 705-715, 749-759, 793-804, 837-848, 881-892, 925-936, 969-981.
DeSoto Canyon (Leasing Map NH 16-11)	Whole Blocks: 1-15, 45-59, 92-102.
Henderson (Leasing Map NG 16-05)	Partial Blocks: 16, 60, 61, 89-91, 103-105, 135-147.
	Partial Blocks: 114, 158, 202, 246, 290, 334, 335, 378, 379, 422, 423.

- Whole and Partial Blocks within the boundary of the Flower Garden Banks National Marine Sanctuary (East and

West Flower Garden Banks and the Stetson Bank) as of the July 14, 2008, *Memorandum on Modification of the*

Withdrawal of Areas of United States Outer Continental Shelf from Leasing Disposition:

GOM protraction areas	Block
High Island, East Addition, South Extension (Leasing Map TX7C).	Whole Block: A-398.
	Partial Blocks: A-366, A-367, A-374, A-375, A-383, A-384, A-385, A-388, A-389, A-397, A-399, A-401.
High Island, South Addition (Leasing Map TX7B).	Partial Blocks: A-502, A-513.

- Whole and Partial Blocks that are adjacent to or beyond the U.S. Exclusive

Economic Zone in the area known as the northern portion of the Eastern Gap:

GOM protraction areas	Block
Lund South (Leasing Map NG 16-07)	Whole Blocks: 128, 129, 169-173, 208-217, 248-261, 293-305, 349.
Henderson (Leasing Map NG 16-05)	Whole Blocks: 466, 508-510, 551-554, 594-599, 637-643, 679-687, 722-731, 764-775, 807-819, 849-862, 891-905, 933-949, 975-992.
	Partial Blocks: 335, 379, 423, 467, 511, 555, 556, 600, 644, 688, 732, 776, 777, 820, 821, 863, 864, 906, 907, 950, 993, 994.
Florida Plain (Leasing Map NG 16-08)	Whole Blocks: 5-24, 46-67, 89-110, 133-154, 177-197, 221-240, 265-283, 309-327, 363-370.

- Depth-restricted, segregated block portion(s). The current block meeting this criterion is: Block 299, Main Pass Area, South and East Addition (as shown on Louisiana Leasing Map LA10A), containing 1,125 acres from the surface of the earth down to a subsea depth of 1,900 feet with respect to the following described portions:
SW¹/₄NE¹/₄; NW¹/₄SE¹/₄NE¹/₄;
W¹/₂NE¹/₄SE¹/₄NE¹/₄; S¹/₂S¹/₂NW¹/₄NE¹/₄;
S¹/₂SW¹/₄NE¹/₄NE¹/₄;

S¹/₂SW¹/₄SE¹/₄NE¹/₄NE¹/₄; N¹/₂SW¹/₄SE¹/₄NE¹/₄;
NE¹/₄; SW¹/₄SW¹/₄SE¹/₄NE¹/₄; NW¹/₄SE¹/₄SE¹/₄NE¹/₄;
N¹/₂NW¹/₄SW¹/₄SE¹/₄NE¹/₄;
N¹/₂SE¹/₄SW¹/₄SE¹/₄NE¹/₄;
N¹/₂S¹/₂SE¹/₄SW¹/₄SE¹/₄NE¹/₄;
S¹/₂NE¹/₄NW¹/₄; S¹/₂S¹/₂N¹/₂NE¹/₄NW¹/₄;
N¹/₂SE¹/₄NW¹/₄; S¹/₂SE¹/₄NW¹/₄NW¹/₄;
NE¹/₄SE¹/₄NW¹/₄NW¹/₄;
E¹/₂NE¹/₄SW¹/₄NW¹/₄;
N¹/₂SE¹/₄SE¹/₄NW¹/₄;
NE¹/₄SW¹/₄SE¹/₄NW¹/₄;

N¹/₂NW¹/₄SW¹/₄SE¹/₄NW¹/₄;
SE¹/₄SE¹/₄SE¹/₄NW¹/₄;
E¹/₂SW¹/₄SE¹/₄SE¹/₄NW¹/₄;
N¹/₂NW¹/₄NE¹/₄SW¹/₄NW¹/₄;
N¹/₂S¹/₂NW¹/₄NE¹/₄SW¹/₄NW¹/₄;
N¹/₂N¹/₂NE¹/₄NE¹/₄NE¹/₄SW¹/₄;
N¹/₂N¹/₂N¹/₂NW¹/₄NW¹/₄SE¹/₄;
N¹/₂N¹/₂NW¹/₄NE¹/₄NW¹/₄SE¹/₄.

- Whole and Partial Blocks that were previously subject to the Blocks South of Baldwin County, Alabama, Stipulation:

GOM protraction areas	Block
Mobile (Leasing Map NH16-04)	826-830, 869-874, 913-918, 957-962, 1001-1006.
Viosca Knoll (Leasing Map NH 16-07)	33-35.

- Whole and Partial Blocks that were previously subject to the Topographic Features Stipulation:

GOM protraction areas	Block
East Breaks (Leasing Map NG 15-01)	121-124, 165-168, 173, 217.
East Cameron Area (Leasing Map LA2)	361-363, 377-379.
Eugene Island Area (Leasing Map LA4)	335, 355-356, 381-383, 390-391, 397.
Ewing Bank (Leasing Map NH 15-12)	903, 932-933, 944-945, 947, 975-977.
Garden Banks (Leasing Map NG 15-02)	26-31, 33, 61-63, 70-77, 81-85, 95-98, 102-110, 119-121, 126-128, 133-136, 138-146, 148-155, 177-180, 192-198, 237-239.
Green Canyon (Leasing Map NG 15-03)	4-7, 49-50, 90.
High Island Area, East Addition (Leasing Map TX7A).	A311-312, A 327-A 332, A 340, A 346-A403, A446-A448, A463-A465, A486-A488, A501-A503, A512-A514, A527-A529, A534-A535, A573, A578-A580, A589-A591, A596.
Mississippi Canyon (Leasing Map NH 16-10)	316.
Mustang Island Area (Leasing Map TX3)	A3-4, A9, A16, A54, A61-A62, A86-A87, A95, A117-A118, A136-A137.
North Padre Island Area (Leasing Map TX2)	PN A30-A31, A40-A41, A72, A83-A84.
South Marsh Island Area, North Addition (Leasing Map LA3D).	161-163, 169-173, 176-180, 185-188, 193-197, 200-204.
Ship Shoal Area (Leasing Map LA5)	325-329, 334-339, 348-353, 356-359.
South Timbalier Area (Leasing Map LA6)	314-317.
Vermilion Area (Leasing Map LA3)	284-286, 297-300, 303-306, 317-320, 361-363, 369-372, 382-396, 403-412.
West Cameron Area (Leasing Map LA1)	569-570, 589-592, 611-614, 633-638, 645-646, 648-663.
West Delta Area (Leasing Map LA8)	147-148.

- Whole blocks that contain banks that are adjacent to blocks previously included in the Topographic Features Stipulation:

GOM protraction area	Blocks
Garden Banks (Leasing Map NG 15-02)	181.

- Whole and Partial Blocks that were previously subject to the Live Bottom (Pinnacle Trend) Stipulation:

GOM protraction area	Blocks
Main Pass Area, South and East Addition (Leasing Map LA10A).	190, 194, 198, 219-226, 244-266, 276-290.
Viosca Knoll (Leasing Map NH 16-07)	473-476, 521-522, 564-566, 610, 654, 692-698, 734, 778.

- Whole and partial blocks identified as either Wind Energy Area Options (Areas A, B, C, D, E, F, G, H, J, K, L, and N) or final Wind Energy Areas (Areas I and M):

GOM protraction area	Blocks
Brazos Area (Leasing Map TX5)	430, 457-459, 466-468, 572-575, 580-584, 609-614, A22, A28-A29, A3, A30-A35, A42-A43.
Brazos Area, South Addition (Leasing Map TX5B).	A102-A105, A46-A48, A55-A58, A60-A61, A73-A74.
East Cameron Area (Leasing Map LA2)	96-106, 113-124.
Galveston Area (Leasing Map TX6)	237, 258-259, 265-268, 286-291, 293-299, 317-327, 350-356, 386-387, 427-429, 460-462, 464-465, A1-A9, A10-A35, A40-A49, A62-A77, A84-A86, A91-A94, A97-A99, A103-A105, A110-A113.
Galveston Area, South Addition (Leasing Map TX6A).	A114-A119, A138-A139, A140-A148, A169-A174, A203.
High Island Area (Leasing Map TX7)	235-236, 260-261, 263-264, 292, A2-A4, A11-A15, A27-A31, A62-A64, A66-A68, A70-A90, A92-A99, A100-A111, A113-A116, A118-A142, A144-A152, A156-A163, A165-A166.
High Island Area, East Addition (Leasing Map TX7A).	A170-A174, A177-A182, A187-A193, A195-A199, A202-A209, A211-A213, A216-217, A220-A228, A233-A241, A250-A251.
High Island Area, South Addition (Leasing Map TX7B).	A404-A405, A408-A413, A420-A425, A428-A431, A434-A439, A454-A457, A480-A481.
Matagorda Island Area (Leasing Map TX4)	639-642, 646-649, 673-678, A1, A3, A4.
Mustang Island Area (Leasing Map TX3)	803-804, 810-812, 826-828, 832-834, 847-849, 853-854.
South Padre Island Area, East Addition (Leasing Map TX1A).	1078, 1097-1098, 1117-1119, A35-A36, A46-A52, A59-A64.

GOM protraction area	Blocks
West Cameron Area (Leasing Map LA1)	188–190, 195–196, 205–213, 224–230, 241–245, 256.
West Cameron Area, West Addition (Leasing Map LA1A).	302–303, 314–318, 328–334, 343–352, 359–360, 362–364, 372–379, 393–396, 398–400.

• Whole and Partial BOEM-designated Significant Sediment Resource Area Blocks:

GOM protraction area	Blocks
Bay Marchand Area (Leasing Map LA6C)	2–5.
Breton Sound Area (Leasing Map LA10B)	24, 25, 39, 41–44, 53–56.
Chandeleur Area (Leasing Map LA11)	1, 4, 5, 8, 16, 28, 30–34.
Eugene Island Area (Leasing Map LA4)	10, 18–35, 37–96, 111, 112.
Galveston Area (Leasing Map TX6)	265, 290, 291, 293, 294, 295, 322.
Galveston Area, South Addition (Leasing Map TX6A).	1A, 2A, 3A, 4A, 5A.
Grand Isle Area (Leasing Map LA7)	15, 25.
High Island Area (Leasing Map TX7)	19–21, 35–39, 45–49, 60–65, 69–76, 83–91, 111–119, 131–137, 158–164, 171–175, 196–205, 230–234, 261–264, 292, A6–A10, A16–A22, A37–A42, A60–A65.
High Island Area, East Addition (Leasing Map TX7A).	6, 10, 38–42, 45, 46, 60–65, 74–76, 83, 84, 85.
Mobile (Leasing Map NH 16–04)	765–767, 778, 779, 809–824, 826–830, 853–874, 897–918, 942, 946, 947, 954–962, 991, 999–1006.
Main Pass Area (Leasing Map LA10)	6, 39–44, 58–60, 86–90, 92–120, 125–129, 139.
Main Pass, South and East Addition (Leasing Map LA10A).	161, 162, 180, 181.
South Pelto Area (Leasing Map LA6B)	1–20, 23–25.
Sabine Pass Area (LA) (Leasing Map LA12)	8–16.
South Marsh Island Area, North Addition (Leasing Map LA3D).	207–237, 241–249, 259–261, 267, 268.
Ship Shoal Area (Leasing Map LA5)	24–26, 37, 38, 63–75, 84–100, 107–114, 119, 120.
South Timbalier Area (Leasing Map LA6)	9–11, 16–18, 34, 51, 52, 54, 55, 66, 67, 72.
Sabine Pass Area (TX) (Leasing Map TX8)	9, 17, 18, 40, 44.
Viosca Knoll (Leasing Map NH 16–07)	23, 34–38, 67, 78–82, 111, 155.
Vermilion Area (Leasing Map LA3)	11, 30, 49, 51–54, 68–77, 86–96, 108–111.
West Cameron Area (Leasing Map LA1)	20–22, 41–45, 56–60, 78–83, 90–95, 113–118, 128–134, 146–150, 153–157, 160, 161, 162, 168–172, 181.
West Cameron Area, West Addition (Leasing Map LA1A).	154–157, 160–162, 287.
West Delta Area (Leasing Map LA8)	20–31, 32, 43–50, 56–61.

• Whole and Partial Blocks between the 100 m and 400 m isobaths across the northern Gulf of Mexico on the OCS, eastward from the Mexican border with Texas and westward from the eastern edge of the Central Planning Area.

GOM protraction areas	Blocks
Main Pass Area (Leasing Map LA10A)	249–260, 280–291, 306–308, 315, 316.
West Cameron Area South Addition (Leasing Map LA1B).	620, 621, 624–663.
East Cameron Area South Addition (Leasing Map LA2A).	344, 345, 353–381.
Vermilion Area South Addition (Leasing Map LA3B).	367, 368, 373. 378–413.
South Marsh Island Area, South Addition (Leasing Map LA3C).	177–206.
Eugene Island Area, South Addition (Leasing Map LA4A).	346–349, 361–397.
Ship Shoal Area, South Addition (Leasing Map LA5A).	320–368.
South Timbalier Area, South Addition (Leasing Map LA6A).	258, 259, 280–294, 300–320.
Grand Isle Area (Leasing Map LA7)	80–83.
Grand Isle Area, South Addition (Leasing Map LA7A).	86–88, 90–92, 97, 103–106, 110–121.
West Delta Area, South Addition (Leasing Map LA8A).	126–130, 137–154.
South Pass Area (Leasing Map LA9)	33, 47–55, 61.
South Pass Area, south and East Addition (Leasing Map LA9A).	62–65, 67–76, 79–96.

GOM protraction areas	Blocks
Corpus Christi (Leasing Map NG14-03)	350, 351, 392-395, 435-439, 478-483, 521-527, 565-571, 608-615, 651-657, 694-700, 738-743, 781-786, 825-830, 868-873, 912-917, 956-960, 1000-1004.
Port Isabel (Leasing Map NG14-06)	30-34, 74-77, 118-121, 162-165, 207-210, 251-254, 295-298, 340-342, 384-387, 429-431, 473-475, 517-519, 562-563, 606-608, 650-652, 694-696, 738-740, 782, 783, 826-828, 869-872, 914-916, 958-960.
East Break (Leasing Map NG15-01)	61-65, 73-75, 102-129, 144-173, 185-202, 204-217, 223-234, 239-245, 247-252, 254-261, 265-274, 284, 285, 287-296, 298-305, 309-313, 315, 316, 332, 333, 335, 336, 338-340, 342, 343, 347, 348, 353-356, 397, 398, 441, 442, 485, 486.
Garden Banks (Leasing Map NG15-02)	21-31, 33-35, 60-85, 95-98, 102-129, 133-136, 138-173, 177-217, 221-244, 247-252, 261, 265-287, 295-300, 309-328, 330, 339 340, 342, 343, 358-372, 404-413, 453, 454.
Green Canyon (Leasing Map NG15-03)	3-27, 45-69, 89-105, 110, 133-149, 177-183.
Ewing Bank (Leasing Map NH15-12)	304-306, 347-350, 393, 394, 447, 448, 481, 482, 525, 526, 570, 614, 658, 701, 702, 743-746, 781-791, 824-834, 867-877, 903-921, 932, 933, 937, 940, 944, 961, 975-1000.
Viosca Knoll (Leasing Map NH16-07)	654, 692-698, 734-742, 772-785, 813-825, 856-864, 898-907, 940-947, 983-990.
Mississippi Canyon (Leasing Map NH16-10)	20-27, 63-70, 103, 104, 107-110, 147-153, 190-196, 234-238, 265-269, 277-281, 309-313, 316-325, 353-369, 363A, 397, 398, 400-412, 441, 442, 449-455, 485-487, 529-532, 573-576, 617-619, 661-663, 705-707, 749, 750, 793, 794.
South Padre Island Area, East Addition (Leasing Map TX1A).	A1-A3, A11-A15, A27-29A, A41, A42, A55, A56, A78, A79, A89, A90.
North Padre Island Area, East Addition (Leasing Map TX2A).	A1-A4, A15-A22, A33-A38, A48-A55, A64-A68, A77-A81, A89-A93, A102-A104.
Mustang Island Area (Leasing Map TX3)	A27, A38.
Mustang Island Area, East Addition (Leasing Map TX3A).	A39-A42, A73-A80, A98-A111, A121-A133, A139-A149, A153-A162, A164-A175.
Brazos Area, South Addition (Leasing Map TX5B).	A117-A121.
Galveston Area, South Addition (Leasing Map TX6A).	A219-A228, A234-A253, A561-A566.
High Island Area, South Addition (Leasing Map TX7B).	A561-A566, A573-A596.
High Island Area, East Addition, South Extension (Leasing Map TX7C).	A365-A403.

The final list of blocks available for bid is posted on BOEM's website at <https://www.boem.gov/Sale-261/> under the Final NOS tab.

II. Statutes and Regulations

The IRA directs BOEM to hold GOM Lease Sale 261 by September 30, 2023. Each lease is issued pursuant to OCSLA, 43 U.S.C. 1331 *et seq.*, as amended, and is subject to OCSLA implementing regulations promulgated pursuant thereto in 30 CFR part 556, and other applicable statutes and regulations in existence upon the effective date of the lease, as well as those applicable statutes enacted and regulations promulgated thereafter, except to the extent that the after-enacted statutes and

regulations explicitly conflict with an express provision of the lease. Each lease is subject to amendments to statutes and regulations, including but not limited to OCSLA, that do not explicitly conflict with an express provision of the lease. The lessee expressly bears the risk that such new or amended statutes and regulations (*i.e.*, those that do not explicitly conflict with an express provision of the lease) may increase or decrease the lessee's obligations under the lease. BOEM reserves the right to reject any and all bids received, regardless of the amount offered (see 30 CFR 556.516).

III. Lease Terms and Economic Conditions

OCS Lease Form

BOEM will use Form BOEM-2005 (February 2017) to convey leases resulting from this sale. This lease form can be viewed on BOEM's website at <http://www.boem.gov/BOEM-2005>. The lease form will be amended to include specific terms, conditions, and stipulations applicable to the individual lease. The final terms, conditions, and stipulations applicable to this sale are below.

Primary Terms

Primary terms are summarized in the following table:

Water depth (meters)	Primary term
0 to <400	The primary term is 5 years; the lessee may earn an additional 3 years (<i>i.e.</i> , for an 8-year extended primary term) if a well is spudded targeting hydrocarbons below 25,000 feet True Vertical Depth Subsea (TVDSS) during the first 5 years of the lease.
400 to <800	The primary term is 5 years; the lessee will earn an additional 3 years (<i>i.e.</i> , for an 8-year extended primary term) if a well is spudded during the first 5 years of the lease.
800+	10 years.

(1) The primary term for a lease in water depths less than 400 meters issued as a result of this sale is 5 years. If the lessee spuds a well targeting hydrocarbons below 25,000 feet TVDSS

within the first 5 years of the lease, then the lessee may earn an additional 3 years, resulting in an 8-year primary term. The lessee will earn the 8-year primary term when the well is drilled to

a target below 25,000 feet TVDSS; or the lessee may earn the 8-year primary term in cases where the well targets, but does not reach, a depth below 25,000 feet TVDSS due to mechanical or safety

reasons that are beyond the lessee's control, and that are supported by sufficient evidence from the lessee. To earn the 8-year primary term, the lessee is required to submit a letter to the BOEM GOM Regional Supervisor, Office of Leasing and Plans, as soon as practicable, but no more than 30 days after completion of the drilling operation, providing the well number, spud date, information demonstrating a target below 25,000 feet TVDSS and whether that target was reached, and if applicable, any safety or mechanical reasons encountered that prevented the well from reaching a depth below 25,000 feet TVDSS. In the letter, the lessee must request confirmation from BOEM that the lessee earned the 8-year primary term. The BOEM GOM Regional Supervisor for Leasing and Plans will confirm in writing, within 30 days of receiving the lessee's letter, whether the lessee has earned the extended primary term and accordingly update BOEM's records. The extended primary term is not effective unless and until the lessee receives confirmation from BOEM. A

lessee that has earned the 8-year primary term by spudding a well with a hydrocarbon target below 25,000 feet TVDSS during the standard 5-year primary term of the lease will not be granted a suspension for that same period under the regulations at 30 CFR 250.175 because the lease is not at risk of expiring.

(2) The primary term for a lease in water depths ranging from 400 to less than 800 meters issued as a result of this sale is 5 years. If the lessee spuds a well within the 5-year primary term of the lease, the lessee may earn an additional 3 years, resulting in an 8-year primary term. To earn the 8-year primary term, the lessee is required to submit a letter to the BOEM GOM Regional Supervisor, Office of Leasing and Plans, as soon as practicable, but no more than 30 days after spudding a well, providing the well number and spud date, and requesting confirmation from BOEM that the lessee earned the 8-year extended primary term. Within 30 days of receipt of the request, the BOEM GOM Regional Supervisor for Leasing

and Plans will provide written confirmation of whether the lessee has earned the extended primary term and accordingly update BOEM's records. The extended primary term is not effective unless and until the lessee receives confirmation from BOEM.

(3) The primary term for a lease in water depths 800 meters or deeper issued as a result of this sale is 10 years.

Minimum Bonus Bid Amounts

BOEM will not accept a bonus bid unless it provides for a cash bonus in an amount equal to or exceeding the specified minimum bid, as described below.

- \$25 per acre or fraction thereof for blocks in water depths less than 400 meters; and
- \$100 per acre or fraction thereof for blocks in water depths 400 meters or deeper.

Rental Rates

Annual rental rates, per acre or fraction thereof, are summarized in the following table:

Water depth (meters)	Years 1–5	Year 6	Year 7	Year 8+
0 to <200	\$10	\$20	\$30	\$40
200 to <400	16	32	48	64
400+	16	22	22	22

Escalating Rental Rates for Leases With an 8-Year Primary Term in Water Depths Less Than 400 Meters

Any lessee with a lease in less than 400 meters water depth who earns an 8-year primary term will pay an escalating rental rate as shown above. The rental rates after the fifth year for blocks in less than 400 meters water depth will become fixed and no longer escalate if another well is spudded targeting hydrocarbons below 25,000 feet TVDSS after the fifth year of the lease, and BOEM concurs that such a well has been spudded. In this case, the rental rate will become fixed at the rental rate in effect during the lease year in which the additional well was spudded.

Royalty Rate

- 18¾ percent for all leases.

Minimum Royalty Rate

- \$10 per acre or fraction thereof per year for blocks in water depths less than 200 meters; and
- \$16 per acre or fraction thereof per year for blocks in water depths 200 meters or deeper.

Royalty Suspension Provisions

The Department may issue leases with Royalty Suspension Volumes (RSVs)

and other forms of royalty relief under 30 CFR part 560, which BOEM administers. The specific details relating to eligibility and implementation of RSVs and other royalty relief programs are found at 30 CFR part 203, which the Bureau of Safety and Environmental Enforcement administers. In this sale, the only royalty relief program being offered involves RSVs for the drilling of ultra-deep wells in water depths of less than 400 meters, as described in the following section.

Royalty Suspension Volumes on Gas Production From Ultra-Deep Wells

Pursuant to 30 CFR part 203, certain leases issued as a result of this sale may be eligible for RSV incentives on gas produced from ultra-deep wells. Under this program, wells on leases in less than 400 meters water depth and completed to a drilling depth of 20,000 feet TVDSS or deeper receive an RSV of 35 billion cubic feet on the production of natural gas. This RSV incentive is subject to applicable price thresholds set forth in the regulations at 30 CFR part 203. These regulations implement the requirements of the Energy Policy Act of 2005 (Pub. L. 109–58, 119 Stat. 594 (2005)).

IV. Lease Stipulations

One or more of the stipulations below may be applied to leases issued as a result of this sale. The applicable blocks for each stipulation are identified on the map “Final Notice of Sale, Gulf of Mexico OCS Oil and Gas Lease Sale 261, September 2023, Stipulations and Deferred Blocks” included in the Final NOS package. The full text of the following stipulations is contained in the “Lease Stipulations” section of the Final NOS package. BOEM has posted the final list of blocks available for bid and the applicable stipulations that apply to those blocks on its website at <https://www.boem.gov/Sale-261/> under the Final NOS tab.

- (1) Military Areas
- (2) Evacuation
- (3) Coordination
- (4) Protected Species
- (5) United Nations Convention on the Law of the Sea Royalty Payment
- (6) Agreement between the United States of America and the United Mexican States Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico
- (7) Restrictions due to Rights-of-Use and Easement for Floating Production Facilities

(8) Royalties on All Produced Gas

V. Information to Lessees

Information to Lessees (ITLs) provide detailed information on certain issues pertaining to specific oil and gas lease sales. The full text of the ITLs for this sale is contained in the "Information to Lessees" section of the Final NOS package and covers the following topics.

- (1) Navigation Safety
- (2) Ordnance Disposal Areas
- (3) Existing and Proposed Artificial Reefs/Rigs-to-Reefs
- (4) Lightering Zones
- (5) Indicated Hydrocarbons List
- (6) Military Areas
- (7) Bureau of Safety and Environmental Enforcement Inspection and Enforcement of Certain U.S. Coast Guard Regulations
- (8) Significant Outer Continental Shelf Sediment Resource Areas
- (9) Notice of Arrival on the Outer Continental Shelf
- (10) Bidder/Lessee Notice of Obligations Related to Criminal/Civil Charges and Offenses, Suspension, or Debarment; Disqualification Due to a Conviction under the Clean Air Act or the Clean Water Act
- (11) Protected Species
- (12) Expansion of the Flower Garden Banks National Marine Sanctuary
- (13) Communication Towers
- (14) Deepwater Port Applications (DWP) for Offshore Oil and Liquefied Natural Gas Facilities
- (15) Ocean Dredged Material Disposal Sites
- (16) Rights-of-Use and Easement
- (17) Industrial Waste Disposal Areas
- (18) Gulf Islands National Seashore
- (19) Air Quality Permit/Plan Approvals
- (20) Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States
- (21) Inflation Reduction Act of 2022

VI. Maps

The maps pertaining to this lease sale can be viewed on BOEM's website at <https://www.boem.gov/Sale-261/>. The following maps also are included in the Final NOS package:

Sale Area Map

The sale area is shown on the map entitled, "Final Notice of Sale, Gulf of Mexico OCS Oil and Gas Lease Sale 261, September 2023, Final Sale Area."

Lease Terms and Economic Conditions Map

The lease terms and economic conditions associated with leases of certain blocks are shown on the map entitled, "Final Notice of Sale, Gulf of

Mexico Oil and Gas Lease Sale 261, September 2023, Lease Terms and Economic Conditions."

Stipulations and Deferred Blocks Map

The lease stipulations and the blocks to which they apply are shown on the map entitled, "Final Notice of Sale, Gulf of Mexico OCS Oil and Gas Lease Sale 261, September 2023, Stipulations and Deferred Blocks."

VII. Bidding Instructions

Bids may be submitted BY MAIL ONLY through any parcel delivery service (e.g., FedEx, UPS, USPS, DHL) at the address below in the "Mailed Bids" section. Bidders should be aware that BOEM has eliminated in-person bidding for GOM Lease Sale 261. Instructions on how to submit a bid, secure payment of the advance bonus bid deposit (if applicable), and the information to be included with the bid are as follows:

Bid Form

For each block bid upon, a separate sealed bid must be submitted in a sealed envelope (as described below) and include the following items:

- Total amount of the bid in whole dollars only;
- Sale number;
- Sale date;
- Each bidder's exact name;
- Each bidder's proportionate interest, stated as a percentage, using a maximum of five decimal places (e.g., 33.33333 percent);
- Typed name and title, and signature of each bidder's authorized officer. Electronic signatures are acceptable. The typed name, title, and signature must agree exactly with the name and title on file in the BOEM Gulf of Mexico OCS Region Adjudication Section;
- Each bidder's BOEM qualification number;
- Map name and number or OPD name and number;
- Block number; and
- Statement acknowledging that the bidder(s) understands that this bid legally binds the bidder(s) to comply with all applicable regulations, including the requirement to post a deposit in the amount of one-fifth of the bonus bid amount for any tract bid upon and make payment of the balance of the bonus bid and first year's rental upon BOEM's acceptance of high bids.

The information required for each bid is specified in the document "Bid Form" that is available in the Final NOS package, which can be found at <https://www.boem.gov/Sale-261/>. A blank bid form is provided in the Final NOS package for convenience and can be copied and completed with the necessary information described above.

The information required for each bid is specified in the document "Bid Form" that is available in the Final NOS package, which can be found at <https://www.boem.gov/Sale-261/>. A blank bid form is provided in the Final NOS package for convenience and can be copied and completed with the necessary information described above.

Bid Envelope

Each bid must be submitted in a separate sealed envelope labeled as follows:

- "Sealed Bid for GOM Lease Sale 261, not to be opened until 9 a.m. Wednesday, September 27, 2023";
 - Map name and number or OPD name and number;
 - Block number for block bid upon;
 - Acreage, if the bid is for a block that is split between the Central and Eastern Planning Areas; and
 - The exact name and qualification number of the submitting bidder only.
- The Final NOS package includes a sample bid envelope for reference.

Mailed Bids

Please address the envelope containing the sealed bid envelope(s) as follows: Attention: Leasing and Financial Responsibility Section, BOEM New Orleans Office, 1201 Elmwood Park Boulevard MS-266A, New Orleans, Louisiana 70123-2394. Contains Sealed Bids for GOM Lease Sale 261. Please Deliver to Mr. Greg Purvis, 2nd Floor, Immediately.

Please Note: Bidders are advised to inform BOEM by email at BOEMGOMRLeaseSales@boem.gov immediately after placing bid(s) in the mail. This provides advance notice to BOEM regarding pending bids prior to the bid submission deadline. In the email, please state the tracking number of the bid package, the number of bids being submitted, and the email address of the person who should receive the bid receipt for signature. If BOEM receives bids later than the bid submission deadline, the BOEM GOM Regional Director (RD) will return those bids unopened to bidders. Please see Section XI, "Delay of Sale," regarding BOEM's discretion to extend the Bid Submission Deadline in the case of an unexpected event (e.g., flooding) and how bidders can obtain more information on such extensions.

Advance Bonus Bid Deposit Guarantee

Bidders that are not currently an OCS oil and gas lease record title holder or designated operator, or those that have ever defaulted on a one-fifth bonus bid deposit, must guarantee (secure) the payment of the one-fifth bonus bid deposit, by Electronic Funds Transfer (EFT) or otherwise, prior to bid submission using one of the following four methods:

- Provide a third-party guarantee;
- Amend a development stage area-wide bond via bond rider;
- Provide a letter of credit; or
- Provide a lump sum payment in advance via EFT.

Please provide, at the time of bid submittal, a confirmation or tracking number for the payment, the name of the company submitting the payment as it appears on the payment, and the date the payment was submitted so that BOEM can confirm payment with the Office of Natural Resources Revenue (ONRR). Bidders should submit payments to their financial institution at least 5 business days prior to bid submittal to ensure that the Office of Foreign Assets Control and the U.S. Department of the Treasury (U.S. Treasury) have time to screen and process payments and that payments are posted to ONRR prior to placing the bid. ONRR cannot confirm payment until the monies have been moved into settlement status by the U.S. Treasury. Bids will not be accepted if BOEM cannot confirm payment with ONRR before 10:00 a.m. on Tuesday, September 26, 2023.

If providing a third-party guarantee, amending a development stage area-wide bond via bond rider, or providing a letter of credit to secure your one-fifth bonus bid deposit, bidders are urged to file these documents with BOEM well in advance of submitting the bid. This allows processing time and ensures bidders have time to take any necessary curative actions prior to bid submission. For more information on EFT procedures, see Section X, "The Lease Sale."

Affirmative Action

Prior to bidding, each bidder should file the Equal Opportunity Affirmative Action Representation Form BOEM-2032 (February 2020, available on BOEM's website at <http://www.boem.gov/BOEM-2032/>) and Equal Opportunity Compliance Report Certification Form BOEM-2033 (February 2020, available on BOEM's website at <http://www.boem.gov/BOEM-2033/>) with the BOEM GOM Adjudication Section. This certification is required by 41 CFR part 60 and Executive Order (E.O.) 11246, issued September 24, 1965, as amended by E.O. 11375, issued October 13, 1967, and by E.O. 13672, issued July 21, 2014. Both forms must be on file for the bidder(s) in the GOM Adjudication Section prior to the execution of any lease contract.

Geophysical Data and Information Statement (GDIS)

The GDIS is composed of three parts: (1) A "Statement" page that includes the company representatives' information and separate lists of blocks bid on that used proprietary data and those blocks bid upon that did not use proprietary data;

(2) A "Table" listing the required data about each proprietary survey used (see below); and

(3) "Maps" that contain the live trace maps for each proprietary survey that is identified in the GDIS statement and table.

Every bidder submitting a bid on a block in GOM Lease Sale 261 or participating as a joint bidder in such a bid must submit at the time of bid submission all three parts of the GDIS. A bidder must submit the GDIS *even if a joint bidder or bidders on a specific block also have submitted a GDIS*. Please specify on the outside of the GDIS envelope if the information provided is for a joint bid, and if so, include the block number and primary bidder (company submitting the bid). Any speculative data that has been reprocessed externally or "in-house" is considered proprietary due to the proprietary processing and is no longer considered to be speculative.

The bidder and joint bidder must submit the GDIS in a separate and sealed envelope and must identify all proprietary data; reprocessed speculative data, and/or any Controlled Source Electromagnetic surveys, Amplitude Versus Offset (AVO) data, gravity data, and/or magnetic data; or other information used as part of the decision to bid or participate in a bid on the block. The bidder and joint bidder must also include a live trace map (e.g., .pdf and ArcGIS shapefile) for each proprietary survey identified in the GDIS illustrating the actual areal extent of the proprietary geophysical data in the survey (see the "Example of Preferred Format" that is included in the Final NOS package for additional information). The shape file must not include cultural resources information; only the live trace map of the survey itself.

The GDIS statement must include the name, phone number, and full address for a contact person and an alternate who are both knowledgeable about the geophysical information and data listed and who are available for 30 days after the sale date. The GDIS statement must also include a list of all blocks bid upon, including those blocks where no proprietary or reprocessed geophysical data and/or proprietary information was used, as a basis for the bidder's decision to bid or to participate as a joint bidder in the bid. All GDIS statements must be included *with* any submitted bids in a separate envelope identified as GDIS. All bidders must submit the GDIS statement, even if no proprietary geophysical data or information was used in its bid preparation for the block.

An example of the preferred format of the table is included in the Final NOS package, and a blank digital version of the preferred table can be accessed on the GOM Lease Sale 261 website at <http://www.boem.gov/Sale-261/>. The GDIS table should have columns that clearly state the following:

- The sale number;
- The bidder company's name;
- The joint bidder's company's name (if applicable);
- The company that will provide the proprietary geophysical survey data to BOEM;
- The block area and block number bid upon;
- The owner of the original data set (e.g., TGS, PGS, WGC, CGG, etc.);
- The industry's original name of the survey (e.g., E Octopus);
- The BOEM permit number for the survey;
- Whether the data set is a fast-track version (intermediate product that is not final);
- Whether the data is speculative or proprietary;
- The data type (e.g., 2-D, 3-D, or 4-D; pre-stack or post-stack; time or depth);
- The migration algorithm (e.g., Kirchhoff migration, wave equation migration, reverse migration, reverse time migration) of the data and areal extent of bidder survey (*i.e.*, number of line miles for 2-D or number of blocks for 3-D);
- The live proprietary survey coverage (2-D miles 3-D blocks);
- The computer storage size, to the nearest gigabyte, of each seismic data and velocity volume used to evaluate the lease block;
- Who reprocessed the data;
- The date on which the final reprocessing was completed (month and year);
- If the data was previously sent to BOEM, list the sale number and date of the sale for which it was used;
- Whether proprietary or speculative AVO/AVA (PROP/SPEC) was used;
- The date on which AVO or AVA was sent to BOEM, if sent prior to the sale;
- Whether AVO/AVA is time or depth (PSTM or PSDM);
- Which angled stacks were used (e.g., NEAR, MID, FAR, ULTRAFAR);
- Whether the company used Gathers to evaluate the block in question; and
- Whether the company used Vector Offset Output (VOO) or Vector Image Partitions (VIP) to evaluate the block in question.

BOEM will use the computer storage size information to estimate the reproduction costs for each data set, if

applicable. BOEM will determine the availability of reimbursement of production costs consistent with 30 CFR 551.13.

BOEM reserves the right to inquire about alternate data sets, to perform quality checks, and to compare the listed and alternative data sets to determine which data set most closely meets the needs of the fair market value determination process. See the "Example of Preferred Format" that is included in the Final NOS package.

The GDIS maps are live trace maps (e.g., .pdf and ArcGIS shapefiles) that bidders should submit for each proprietary survey identified in the GDIS table. The maps should illustrate the actual areal extent of the proprietary geophysical data in the survey (see the "Example of Preferred Format" that is included in the Final NOS package for additional information). As previously stated, the shapefile must not include cultural resources information, only the live trace map of the survey itself.

Pursuant to 30 CFR 551.12 and 556.501, as a condition of the sale, the BOEM GOM Regional Director requests that all bidders and joint bidders submit the proprietary data identified on their GDIS within 30 days after the lease sale (unless notified after the lease sale that BOEM has withdrawn the request). This request only pertains to proprietary data that is not commercially available. Commercially available data should not be submitted to BOEM unless specifically requested by BOEM. No reimbursement will be provided for unsolicited data sent to BOEM. The BOEM GOM RD will notify bidders and joint bidders of any withdrawal of the request, for all or some of the proprietary data identified on the GDIS, within 15 calendar days of the lease sale. Where the BOEM GOM RD has notified bidders and joint bidders that the request for such proprietary data has been withdrawn, reimbursement will not be provided. Pursuant to 30 CFR part 551 and 30 CFR 556.501, as a condition of this sale, all bidders that are required to submit data must ensure that the data are received by BOEM no later than the 30th day following the lease sale, or the next business day if the submission deadline falls on a weekend or Federal holiday. Please do not submit proprietary geophysical survey data in the GDIS envelope.

The proprietary geophysical survey data must be submitted to BOEM at the following address within 30 days of the sale as stated above: Bureau of Ocean Energy Management, Resource Studies, GM 881A, 1201 Elmwood Park Blvd., New Orleans, Louisiana 70123-2304.

The GDIS must be submitted along with your bid envelope to: Leasing and Financial Responsibility Section, BOEM New Orleans Office, 1201 Elmwood Park Boulevard, MS-266A, New Orleans, Louisiana 70123-2394. Contains Sealed Bids for GOM Lease Sale 261. Please Deliver to Mr. Greg Purvis 2nd Floor, Immediately.

BOEM recommends that bidders mark the GDIS submission's external envelope as "Deliver Immediately to DASPU." BOEM also recommends that bidders submit the GDIS in an internal envelope, or otherwise marked, with the following designation: "Geophysical Data and Information Statement for Oil and Gas Lease Sale 261", Company Name, GOM Company Qualification Number, and "Proprietary Data."

In the event a person supplies any type of data to BOEM, that person must meet the following requirements to qualify for reimbursement:

(1) Must be registered with the System for Award Management (SAM), formerly known as the Central Contractor Registration (CCR). CCR usernames will not work in SAM. A new SAM user account is needed to register or update an entity's records. The website for registering is <https://usfcr.com/register-renew/>.

(2) Must be enrolled in the U.S. Treasury's Invoice Processing Platform (IPP) for electronic invoicing; to enroll go to <https://www.ipp.gov/>. Access then will be granted to use the IPP for submitting requests for payment. When submitting a request for payment, the assigned Purchase Order Number must be included.

(3) Must have a current On-line Representations and Certifications Application at <https://usfcr.com/>.

Please Note: Digital copies and duplicate hardcopies should be submitted for the GDIS Statement, Table and Maps. The GDIS Statement should be sent as a digital PDF. The GDIS Information Table must be submitted digitally as an Excel spreadsheet. The Proprietary Maps should be sent as PDF files and the live trace outline of each proprietary survey should also be submitted as a shapefile. Please flatten all layered PDF files, since layered PDFs can have many objects. Layered PDFs can cause problems opening or printing the file correctly. Bidders may submit the digital files on a CD, DVD, or any USB external drive (formatted for Windows). If bidders have any questions, please contact Ms. Dee Smith at (504) 736-2706 or Ms. Teree Campbell at (504) 736-3231.

Bidders should refer to the "Acceptance, Rejection, or Return of Bids" heading under Section X, "The

Lease Sale," regarding a bidder's failure to comply with the requirements of the Final NOS, including any failure to submit information required in the Final NOS package.

Telephone Numbers/Addresses of Bidders

BOEM requests that bidders provide this information in the suggested format prior to or at the time of bid submission. The suggested format is included in the Final NOS package. The form must not be enclosed inside the sealed bid envelope.

Additional Documentation

BOEM may require bidders to submit other documents in accordance with 30 CFR 556.107, 556.401, 556.501, and 556.513.

VIII. Bidding Rules and Restrictions

Restricted Joint Bidders

On May 4, 2023, BOEM published the most recent List of Restricted Joint Bidders in the **Federal Register** at 88 FR 28610. Potential bidders are advised to refer to the **Federal Register** prior to bidding for the most current list in place at the time of the lease sale. Please refer to the joint bidding provisions at 30 CFR 556.511-556.515.

Authorized Signatures

All signatories executing documents on behalf of the bidder(s) must execute the same in conformance with the BOEM qualification records. Bidders are advised that BOEM considers the signed bid to be a legally binding obligation on the part of the bidder(s) to comply with all applicable regulations, including that requiring payment of one-fifth of the bonus bid on all high bids. A statement to this effect is included on each bid form (see the document "Bid Form" that is included in the Final NOS package).

Unlawful Combination or Intimidation

BOEM warns bidders against violation of 18 U.S.C. 1860, which prohibits unlawful combination or intimidation of bidders.

Bid Withdrawal

Bids may be withdrawn only by written request delivered to BOEM prior to the bid submission deadline via any parcel delivery service. Withdrawals will not be accepted in person or via email. The withdrawal request must be on company letterhead and must contain the bidder's name, its BOEM qualification number, the map name/number, and the block number(s) of the bid(s) to be withdrawn. The withdrawal request must be executed by one or more of the representatives named in

the BOEM qualification records. The name and title of the authorized signatory must be typed under the signature block on the withdrawal request. The BOEM GOM RD, or the RD's designee, will indicate approval by signing and dating the withdrawal request.

Bid Rounding

Minimum bonus bid calculations, including rounding, for all blocks are shown in the document "List of Blocks Available for Leasing" that is included in the Final NOS package. The bonus bid amount must be stated in whole dollars. If the acreage of a block contains a decimal figure, then prior to calculating the minimum bonus bid, BOEM will round up to the next whole acre. The appropriate minimum rate per acre will be applied to the whole (rounded up) acreage. The bonus bid amount must be greater than or equal to the minimum bonus bid, as calculated and stated in the Final NOS package.

IX. Forms

The Final NOS package includes instructions, samples, and/or the preferred format for the items listed below. BOEM strongly encourages bidders to use the recommended formats. If bidders use another format, they are responsible for including all the information specified for each item in the Final NOS package.

- (1) Bid Form
- (2) Sample Completed Bid
- (3) Sample Bid Envelope
- (4) Sample Bid Mailing Envelope
- (5) Telephone Numbers/Addresses of Bidders Form
- (6) GDIS Form
- (7) GDIS Envelope Form

X. The Lease Sale

Bid Opening and Reading

Sealed bids received in response to the Final NOS will be opened at the place, date, and hour specified under the **DATES** and **ADDRESSES** sections of the Final NOS. The venue will not be open to the public. Instead, the bid opening will be available for the public to view on BOEM's website at <http://www.boem.gov> via live streaming. The opening of the bids is for the sole purpose of publicly announcing and recording the bids received; no bids will be accepted or rejected at that time.

Bonus Bid Deposit for Apparent High Bids

Each bidder submitting an apparent high bid must submit a bonus bid deposit to ONRR equal to one-fifth of the bonus bid amount for each such bid.

A copy of the notification of the high bidder's one-fifth bonus bid amount can be obtained on the BOEM website at <https://www.boem.gov/Sale-261/> under the heading "Notification of EFT 1/5 Bonus Liability" after 1:00 p.m. on the day of the sale. All payments must be electronically deposited into an interest-bearing account in the U.S. Treasury by 1:00 p.m. Eastern Time the day following the bid reading (no exceptions). Account information is provided in the "Instructions for Making Electronic Funds Transfer Bonus Payments" found on the BOEM website identified above.

Bidders must submit payment to their financial institution as soon as possible on the day of bid reading and no later than 7:00 p.m. Eastern Time on the day of bid reading. This will help ensure that deposits have time to process through the U.S. Treasury and post to ONRR. ONRR cannot confirm payment until the monies have been moved into settlement status by the U.S. Treasury.

BOEM requires bidders to use EFT procedures for payment of one-fifth bonus bid deposits for GOM Lease Sale 261, following the detailed instructions contained on the ONRR Payment Information web page at <https://www.onrr.gov/paying>. Acceptance of a deposit does not constitute, and will not be construed as, acceptance of any bid on behalf of the United States.

Withdrawal of Blocks

The United States reserves the right to withdraw any block from this lease sale prior to issuance of a written acceptance of a bid for the block.

Acceptance, Rejection, or Return of Bids

The United States reserves the right to reject any and all bids, regardless of the amount offered. Furthermore, no bid will be accepted, and no lease for any block will be awarded to any bidder, unless:

(1) The bidder has complied with all applicable regulations and requirements of the Final NOS, including those set forth in the documents contained in the Final NOS package;

(2) The bid is the highest valid bid; and

(3) The amount of the bid has been determined to be adequate by the authorized officer.

Any bid submitted that does not conform to the requirements of the Final NOS, OCSLA, or other applicable statutes or regulations will be rejected and returned to the bidder. The U.S. Department of Justice and the Federal Trade Commission will review the results of the lease sale for any antitrust

issues prior to the acceptance of bids and issuance of leases.

Bid Adequacy Review Procedures for GOM Lease Sale 261

To ensure that the U.S. Government receives fair market value for the conveyance of leases from this sale, BOEM will evaluate high bids in accordance with the bid adequacy procedures that are effective on the date of the sale. The bid adequacy procedures are available on BOEM's website at <http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Regional-Leasing/Gulf-of-Mexico-Region/Bid-Adequacy-Procedures.aspx>.

Lease Award

Leases issued as a result of GOM Lease Sale 261 are expressly limited to oil and gas exploration and development. As noted in Section 19 of the lease form, all rights in the leased area not expressly granted to the Lessee by the Act, the regulations, or this lease are hereby reserved to the Lessor.

BOEM requires each bidder that is awarded a lease to complete the following:

(1) Execute all copies of the lease (Form BOEM-2005 [February 2017], as amended);

(2) Pay by EFT the balance of the bonus bid amount and the first year's rental for each lease issued in accordance with the requirements of 30 CFR 1218.155 and 556.520(a); and

(3) Satisfy the bonding requirements of 30 CFR part 556, subpart I, as amended. ONRR requests that bidders use only one transaction for payment of the balance of the bonus bid amount and the first year's rental. Once ONRR receives such payment, the bidder awarded the lease may not request a refund of the balance of the bonus bid amount or first year's rental payment.

XI. Delay of Sale

The BOEM GOM RD has the discretion to change any date, time, and/or location specified in the Final NOS package if the RD deems that an emergent event could interfere with a fair and orderly lease sale. Such events could include, but are not limited to, natural disasters (e.g., earthquakes, hurricanes, floods), wars, riots, acts of terrorism, fires, strikes, civil disorder, or other events of a similar nature. In case of such events, bidders should call (504) 736-0557 or access the BOEM website

at <https://www.boem.gov/> for information regarding any changes.

Elizabeth A. Klein,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2023–18342 Filed 8–24–23; 8:45 am]

BILLING CODE 4340–98–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0045]

Gulf of Mexico, Outer Continental Shelf, Oil and Gas Lease Sale 261

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of availability of a record of decision.

SUMMARY: BOEM announces the availability of the Record of Decision (ROD) for Gulf of Mexico (GOM) Outer Continental Shelf (OCS) Oil and Gas Lease Sale 261 (GOM Lease Sale 261). This ROD identifies the selected alternative for GOM Lease Sale 261, which is analyzed in the *Gulf of Mexico OCS Oil and Gas Lease Sales 259 and 261: Final Supplemental Environmental Impact Statement* (GOM Lease Sales 259 and 261 Supplemental EIS).

ADDRESSES: The ROD and associated information are available on BOEM's website at <https://www.boem.gov/oil-gas-energy/leasing/lease-sale-261>.

FOR FURTHER INFORMATION CONTACT: Helen Rucker, Supervisor, Environmental Assessment Section Unit 1, Office of Environment, BOEM New Orleans Office, by telephone at 504–736–2421, or by email at helen.rucker@boem.gov.

SUPPLEMENTARY INFORMATION: BOEM must hold GOM Lease Sale 261 on or before September 30, 2023, pursuant to section 50264(e) of the Inflation Reduction Act of 2022 (IRA, Pub. L. 117–169), which was signed into law on August 16, 2022. However, the IRA does not affect BOEM's discretion regarding other aspects of its normal leasing process, including decisions regarding the scope of the lease sale and the terms of the resulting leases. GOM Lease Sale 261 will provide qualified bidders the opportunity to bid on unleased blocks in the Gulf of Mexico OCS in order to explore for, develop, and produce oil and natural gas. BOEM evaluated five alternatives in the GOM Lease Sales 259 and 261 Supplemental EIS, which BOEM completed as part of its normal leasing process to inform the decision-maker on possible lease sale impacts,

mitigations, and other action alternatives.

The ROD for Lease Sale 261 is the second ROD that relies on the analysis in the GOM Lease Sales 259 and 261 Supplemental EIS. BOEM reviewed new and relevant information since the GOM Lease Sales 259 and 261 Supplemental EIS was issued and verified that the GOM Lease Sales 259 and 261 Supplemental EIS adequately addresses the potential environmental effects of the proposed lease sale. There are no new circumstances, information, or changes in the proposed lease sale or its potential impacts that require supplementation of the GOM Lease Sales 259 and 261 Supplemental EIS.

After careful consideration, the U.S. Department of the Interior (Interior) decided to offer for lease a subset of the OCS blocks analyzed as Alternative D in the GOM Lease Sales 259 and 261 Supplemental EIS.

Therefore, BOEM will hold GOM Lease Sale 261 as a GOM regionwide lease sale encompassing all three planning areas, *i.e.*, the Western Planning Area, Central Planning Area, and a small portion of the Eastern Planning Area, with the following exclusions: (1) whole and portions of blocks made unavailable for leasing by Presidential withdrawal in the September 8, 2020, *Memorandum on the Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition*; (2) blocks that are adjacent to or beyond the United States Exclusive Economic Zone in the area known as the northern portion of the Eastern Gap; (3) whole and partial blocks within the boundary of the Flower Garden Banks National Marine Sanctuary as of the July 14, 2008, *Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition*; (4) whole and partial blocks that were previously subject to the Topographic Features Stipulation; (5) whole and partial blocks that were previously subject to the Live Bottom (Pinnacle Trend) Stipulation; (6) whole and partial blocks that were previously subject to the Blocks South of Baldwin County, Alabama, Stipulation; (7) whole blocks that contain banks that are adjacent to blocks previously included in the Topographic Features Stipulation (currently Garden Banks 181); (8) whole and partial blocks identified as either Wind Energy Area Options (Areas A, B, C, D, E, F, G, H, J, K, L, and N) or final Wind Energy

Areas (Areas I and M);¹ (9) depth-restricted, segregated block portions (Block 299, Main Pass Area, South and East Addition); (10) whole and partial BOEM-designated Significant Sediment Resource Area blocks; and (11) whole and partial blocks between the 100-meter and 400-meter isobaths across the northern GOM on the OCS, eastward from the Mexican border with Texas and westward from the eastern edge of the Central Planning Area.

The excluded blocks are identified by their block number in the Final Notice of Sale for GOM Lease Sale 261. The lease sale area encompasses approximately 12,395 OCS blocks covering approximately 67.3 million acres. The unleased OCS blocks that BOEM will offer for lease are listed in the document entitled “Lease Sale Area,” which is included in the Final Notice of Sale package for GOM Lease Sale 261 available on BOEM's website. See **ADDRESSES** caption above.

As part of the decision to hold GOM Lease Sale 261, BOEM adopted all practicable means to avoid or minimize environmental harm at the lease sale stage. In addition, any subsequent post-lease activities (*e.g.*, exploration and development plans), which may be expected as a result of GOM Lease Sale 261, will undergo additional environmental review and may include additional project-specific mitigation measures applied as conditions of individual plan approvals. The various mitigation measures adopted for the lease sale, and those that may be applied during post-lease reviews, are summarized below.

Lease Stipulations—Because the OCS blocks that otherwise were previously subject to the Topographic Features Stipulation; Live Bottom (Pinnacle Trend) Stipulation; and Blocks South of Baldwin County, Alabama, Stipulation have all been removed from leasing under the chosen alternative, these stipulations will not be applied to any leases issued as a result of GOM Lease Sale 261. Eight lease stipulations have been adopted as lease terms where applicable, and they will be enforceable as part of the leases issued. The GOM Lease Sale 259 and 261 Supplemental EIS describes these lease stipulations, which are included in the Final Notice of Sale Package. These lease stipulations include the following: Military Areas; Evacuation; Coordination; Protected Species; United Nations Convention on the Law of the Sea Royalty Payment; Agreement between the United States of

¹ <https://www.boem.gov/sites/default/files/documents/Draft%20Area%20ID%20Memo%20GOM%20508.pdf>.

America and the United Mexican States Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico; Restrictions Due to Rights-of-Use and Easements for Floating Production Facilities; and Royalties on All Produced Gas. The Final Notice of Sale package includes a document describing these stipulations in detail. See ADDRESSES caption above.

Post-Lease Measures—Appendix B of the *Gulf of Mexico OCS Oil and Gas Lease Sales: 2017–2022; Gulf of Mexico Lease Sales 249, 250, 251, 252, 253, 254, 256, 257, 259, and 261—Final Multisale Environmental Impact Statement* provides a list and description of standard post-lease conditions of approval that BOEM or the Bureau of Safety and Environmental Enforcement may require as a result of their plan and permit reviews for oil and gas activities in the Gulf of Mexico OCS region.

The decision to hold GOM Lease Sale 261 meets the purpose of and need for the proposed action, as identified in the GOM Lease Sales 259 and 261 Supplemental EIS, and provides for orderly resource development with protection of human, marine, and coastal environments while also ensuring that the public receives a fair market value for these resources and that free-market competition is maintained.

Authority: 42 U.S.C. 4321 *et seq.* (National Environmental Policy Act) and 40 CFR parts 1505 and 1506.

Elizabeth A. Klein,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2023–18345 Filed 8–24–23; 8:45 am]

BILLING CODE 4340–98–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)

On August 21, 2023, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of New Jersey in the lawsuit entitled *United States of America v. TCI Pacific Communications, LLC*, Civil Action No. 2:23–cv–06076. The United States seeks reimbursement of response costs under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) in connection with the Barth Smelting Corporation Site located in the City of Newark, Essex County,

New Jersey. Under the proposed consent decree, the Settling Defendant (TCI Pacific Communications, LLC) agrees to pay the United States \$950,000 to resolve the United States’ claim for past response costs arising from a removal action by the Environmental Protection Agency to address lead-contaminated soil at the Site.

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Environmental Enforcement Section, and should refer to *United States of America v. TCI Pacific Communications, LLC*, Civil Action No. 2:23–cv–06076, D.J. Ref. No. 90–11–3–12493. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	pubcomment-ees.enrd@usdoj.gov .
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$4.25 (25 cents per page reproduction cost), for the consent decree with appendix payable to the United States Treasury.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–18295 Filed 8–24–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1814]

Meeting of the Coordinating Council on Juvenile Justice and Delinquency Prevention

AGENCY: Coordinating Council on Juvenile Justice and Delinquency Prevention.

ACTION: Notice of meeting.

SUMMARY: The Coordinating Council on Juvenile Justice and Delinquency Prevention announces its next meeting.

DATES: Tuesday September 19, 2023 at 9:00 a.m.–2:30 p.m. CT.

ADDRESSES: The meeting will take place at the DoubleTree Hotel & Suites Houston Galleria located at 5353 Westheimer Road, Houston, TX 77056.

FOR FURTHER INFORMATION CONTACT: Visit the website for the Coordinating Council at www.juvenilecouncil.gov or contact Maegen Barnes, Project Manager/Federal Contractor, by telephone (732) 948–8862, email at Maegen.Currie@usdoj.gov; or Julie Herr, Designated Federal Official (DFO), OJJDP, by telephone at (202) 598–6885, email at Julie.Herr@usdoj.gov. Please note that the above phone numbers are not toll free.

SUPPLEMENTARY INFORMATION: The Coordinating Council on Juvenile Justice and Delinquency Prevention (“Council”), established by statute in the Juvenile and Delinquency Prevention Act of 1974 section 206(a) (34 U.S.C. 11116(a)), will meet to carry out its advisory functions. Information regarding this meeting will be available on the Council’s web page at www.juvenilecouncil.gov. In light of space constraints, this meeting will be open to the public via online video conference only. Prior registration is required (see below). In addition, meeting documents will be viewable via this website including meeting announcements, agendas, minutes and reports.

Although designated agency representatives may attend in lieu of members, the Council’s formal membership consists of the following secretaries and/or agency officials; Attorney General (Chair), Administrator of the Office of Juvenile Justice and Delinquency Prevention (Vice Chair), Secretary of Health and Human Services, Assistant Secretary for Mental Health and Substance Use, Secretary of the Interior, Secretary of Labor, Secretary of Education, Secretary of Housing and Urban Development,

Director of the Office of National Drug Control Policy, Chief Executive Officer of AmeriCorps and the Assistant Secretary of Homeland Security for the U.S. Immigration and Customs Enforcement. Ten additional members are appointed by the President of the United States, the Speaker of the U.S. House of Representatives, the U.S. Senate Majority Leader and the Chairman of the Committee on Indian Affairs of the Senate. Further agencies that take part in Council activities include the Departments of Agriculture and Defense.

Council meeting agendas are available on www.juvenilecouncil.gov. Agendas will generally include: (a) Opening remarks and introductions; (b) Presentations and discussion of agency work; and (c) Council member announcements.

Members of the public who wish to virtually attend, must register in advance of the meeting at the meeting registration site, by no later than Tuesday September 12th, 2023. Should issues arise with online registration, or to register by email, the public should contact Maegen Barnes, Senior Program Manager/Federal Contractor (see above for contact information). If submitting registrations by email, attendees should include all of the following: Name, Title, Organization/Affiliation, Full Address, Phone Number, and Email. Registration for this is also found online at www.juvenilecouncil.gov.

Interested parties may submit written comments and questions in advance to Maegen Barnes, Senior Program Manager/Federal Contractor (contact information above). All comments and questions should be submitted no later than 5:00 p.m. EST on Tuesday September 12th, 2023.

The Council will limit public statements if they are found to be duplicative. Written questions submitted by public attendees may also be considered by the Council, time permitting.

Julie Herr,

Designated Federal Official, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2023-18348 Filed 8-24-23; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Agency Information Collection Activities; Request for Public Comment

AGENCY: Employee Benefits Security Administration (EBSA), Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (the Department), in accordance with the Paperwork Reduction Act, provides the general public and Federal agencies with an opportunity to comment on proposed 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. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed extension of the information collection requests (ICRs) contained in the documents described below. A copy of the ICRs may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at [reginfo.gov](http://www.reginfo.gov) (<http://www.reginfo.gov/public/do/PRAMain>).

DATES: Written comments must be submitted to the office shown in the **ADDRESSES** section on or before October 24, 2023.

ADDRESSES: James Butikofer, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210, or ebbsa.opr@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Current Actions

This notice requests public comment on the Department's request for extension of the Office of Management and Budget's (OMB) approval of ICRs contained in the rules and prohibited transaction exemptions described below. The Department is not proposing any changes to the existing ICRs at this time. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a valid OMB control number. A summary of the ICRs and the burden estimates follows:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Suspension of Pension Benefits Pursuant to Regulations 29 CFR 2530.203-3.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210-0048.

Affected Public: Businesses or other for-profits.

Respondents: 39,457.

Responses: 171,221.

Estimated Total Burden Hours: 132,639.

Estimated Total Burden Cost (Operating and Maintenance): \$48,524.

Description: Section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) governs the circumstances under which pension plans may suspend pension benefit payments to retirees who return to work or to participants who continue to work beyond normal retirement age. This section sets forth the circumstances and conditions under which such benefit payments may be suspended. In order for a plan to suspend benefits pursuant to the regulation, it must notify the affected retiree or participant during the first calendar month or payroll period in which the plan withholds payment that benefits are suspended. Requests for such reviews may be considered in accordance with the claims procedure adopted by the plan pursuant to section 503 of the Act and applicable regulations. The notice must include the specific reasons for such suspension, a general description of the plan provisions authorizing the suspension, a copy of the relevant plan provisions, and a statement indicating where the applicable regulations may be found, *i.e.*, 29 CFR 2530.203-3. In addition, the suspension notification must inform the retiree or participant of the plan's procedure for affording a review of the suspension of benefits.

The Department has received approval from OMB for this ICR under OMB Control No. 1210-0048. The current approval is scheduled to expire on January 31, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption 1981-8, Class Exemption Covering Certain Short-Term Investment.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210-0061.

Affected Public: Not-for-profit institutions, Businesses, or other for-profits.

Respondents: 95,170.

Responses: 413,320.

Estimated Total Burden Hours: 103,330.

Estimated Total Burden Cost (Operating and Maintenance): \$114,109.

Description: PTE 81–8 permits the investment of plan assets that involve the purchase or other acquisition, holding, sale, exchange, or redemption by or on behalf of an employee benefits plan in certain types of short-term investments. PTE 81–8 covers five types of short-term investments: banker's acceptances, commercial paper, repurchase agreements, certificates of deposit, and bank securities. Without the exemption, certain aspects of these transactions might be prohibited by ERISA section 406. In order to grant an exemption under ERISA section 408 and Code section 4975(c)(2), the Department must determine that the exemption is: administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plan.

The Department requires minimal information collection pertaining to the affected transactions and two basic disclosure requirements. Both disclosure requirements affect only the portion of the exemption dealing with repurchase agreements. The first requirement calls for the repurchase agreements between the seller and the plan to be in writing. The second requirement obliges the seller of such repurchase agreements to furnish the plan with the most recent available audited statement of its financial condition as well as its most recent available unaudited statement at the time of the sale and as the statements are issued. The seller must also represent, either in the repurchase agreement or prior to each repurchase agreement transaction, that as of the time the transaction is negotiated, there has been no material adverse change in the seller's financial condition since the date the last financial statement was furnished that has not been disclosed to the plan fiduciary with whom the written agreement is made.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0061. The current approval is scheduled to expire on January 31, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption 1996–62, Class Exemption to Permit Certain Authorized Transactions Between Plans and Parties in Interest.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0098.

Affected Public: Not-for-profit institutions, Businesses, or other for-profits.

Respondents: 7.

Responses: 3,515.

Estimated Total Burden Hours: 88.

Estimated Total Burden Cost (Operating and Maintenance): \$30,156.

Description: PTE 96–62 provides accelerated approval of an exemption permitting a plan to engage in a transaction which might otherwise be prohibited following a demonstration to the Department that the transaction is substantially similar to either transactions described in at least two prior individual exemptions granted by the Department and that provided relief from the same restriction(s) within the 60-month period ending on the date of the filing of the written submission; or one individual exemption that was granted by the Department, and provided relief from the same restriction(s), within 120-month period ending on the date of filing of the written submission and at least one transaction that has received final authorization pursuant to PTE 96–62 within a 60-month period ending on the date of the filing of the written submission. In addition, there must be little, if any, risk of abuse or loss to a plan's participants and beneficiaries as a result of the transaction. An applicant for an exemption must submit the necessary documentation as described in the class exemption to the Department for the Department to make an informed determination regarding an application for accelerated approval. Following tentative authorization, the applicant must provide written notice to interested persons in a manner that is reasonably calculated to result in the receipt of such notice by interested persons, to ensure that participants and beneficiaries are informed of the application for an exemption and the date of the expiration of the comment period and have an opportunity to comment.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0098. The current approval is scheduled to expire on January 31, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption 98–54, Class Exemption Relating to Certain Employee Benefit Plan Foreign Exchange Transactions Executed Pursuant to Standing Instructions.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0111.

Affected Public: Businesses or other for-profits.

Respondents: 35.

Responses: 420,000.

Estimated Total Burden Hours: 4,200.

Estimated Total Burden Cost (Operating and Maintenance): \$0.

Description: PTE 98–54 permits employee benefit plans to engage in foreign exchange transactions with banks or broker-dealers which are trustees, custodians, fiduciaries, or other parties in interest with respect to such plans pursuant to a standing instruction. The exemption's conditions contain the following information collection requirements: (1) the bank or broker-dealer maintains at all times written policies and procedures regarding the handling of foreign exchange transactions for plans with respect to which the bank or broker-dealer is a trustee, custodian, fiduciary or other party in interest or disqualified person which assure that the person acting for the bank or broker-dealer knows that they are dealing with a plan, a partial copy of which prior to the execution of certain transactions is provided to the plan's independent fiduciary; (2) the covered transaction is performed under a written authorization executed in advance by the fiduciary of the plan whose assets are involved in the transaction, which plan fiduciary is independent of the bank or broker-dealer engaging in the covered transaction or any foreign affiliate thereof; (3) the bank or broker-dealer engaging in the covered transaction furnishes to the independent fiduciary a written confirmation statement with respect to each covered transaction not more than five business days after execution of the transactions; and (4) recordkeeping requirements.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0111. The current approval is scheduled to expire on January 31, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees Prohibited Transaction Exemption.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0163.

Affected Public: Individuals or Households.

Respondents: 11,782.

Responses: 1,755,959.

Estimated Total Burden Hours: 401,251.

Estimated Total Burden Cost (Operating and Maintenance): \$92,063.

Description: PTE 2020–02 permits investment advice fiduciaries (*i.e.*, registered IAs, BDs, banks, and insurance companies) to receive compensation and engage in principal transactions that would otherwise violate the prohibited transaction provisions of ERISA and the Code. The prohibited transaction provisions of ERISA and the Code generally prohibit fiduciaries with respect to employee benefit plans (Plans) and individual retirement accounts and annuities (IRAs) from engaging in self-dealing and receiving compensation from third parties in connection with transactions involving the Plans and IRAs, and from purchasing and selling investments with the Plans and IRAs when the fiduciaries are acting on behalf of their own accounts (principal transactions).

To qualify for the exemption, investment advice fiduciaries are required to comply with the following information collection requirements: (1) make disclosures to inform retirement investors of their fiduciary status, services offered, and material conflicts of interest; (2) establish, maintain, and enforce written policies and procedures designed to ensure that they and their investment professionals comply with the Impartial Conduct Standards; (3) document the specific reasons for any rollover recommendation and show that the rollover is in the best interest of the retirement investor and provide the documentation to the retirement investor; (4) conduct an annual retrospective review that is reasonably designed to prevent violations of the PTE's Impartial Conduct Standards and the institution's own policies and procedures and provide a written report that is certified by a senior executive officer; and (5) maintain records so that parties relying on an exemption can demonstrate, and the Department can verify, compliance with the conditions of the exemption. Investment advice fiduciaries may choose to self-correct certain violations if, among other things, the financial institution notifies the Department of Labor and the person(s) responsible for conducting the retrospective review.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0163. The current approval is scheduled to expire on February 29, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Delinquent Filer Voluntary Compliance Program.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0089.

Affected Public: Not-for-profit institutions, Businesses or other for-profits.

Respondents: 10,350.

Responses: 10,350.

Estimated Total Burden Hours: 518.

Estimated Total Burden Cost (Operating and Maintenance): \$778,718.

Description: Under Title I of ERISA, the administrator of each welfare plan and each pension plan, unless otherwise exempt, is required to file an annual report with the Secretary containing the information set forth in section 103 of ERISA. The statutory annual reporting requirements under Titles I and IV of ERISA, as well as the Internal Revenue Code (the Code), are satisfied generally by filing the appropriate annual return/report (the Form 5500).

On April 27, 1995, the Department implemented the Delinquent Filer Voluntary Compliance Program (the DFVC Program) in an effort to encourage annual reporting compliance. Under the DFVC Program, administrators otherwise subject to the assessment of higher civil penalties are permitted to pay reduced civil penalties for voluntarily complying with the annual reporting requirements under Title I of ERISA.

The only information collection requirement included in the DFVC Program is the requirement of providing data necessary to identify the plan along with the penalty payment. This data is the only means by which each penalty payment is associated with the relevant plan. With respect to most pension plans and welfare plans, the requirement is satisfied by sending, along with the penalty payment, a copy of the delinquent annual report (without attachments or schedules) which is filed with the Department at a different address under the EFAST system. In the event that the plan administrator files the delinquent annual report using a 1998 or prior plan year form, a paper copy of only the first page of the Form 5500 or Form 5500–C, as applicable, should be submitted along with the penalty payment.

Certain pension plans for highly compensated employees, commonly called “top hat” plans, and apprenticeship plans may file a one-time statement in lieu of annual reports. With respect to such plans, information collection requirements of the DFVC Program are satisfied by sending a completed first page of an annual report form along with the penalty payment. The one-time statements are required to

be sent to a different address within the Department. The DFVC Program is designed to allow the processing of all penalty payments at a single location within the Department.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0089. The current approval is scheduled to expire on March 31, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Request for Assistance from the Department of Labor, Employee Benefits Security Administration.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0146.

Affected Public: Individuals or Households.

Respondents: 5,582.

Responses: 5,582.

Estimated Total Burden Hours: 2,791.

Estimated Total Burden Cost (Operating and Maintenance): \$0.

Description: The Department of Labor's Employee Benefits Security Administration (EBSA) maintains a program designed to provide education and technical assistance to participants and beneficiaries as well as to employers, plan sponsors, and service providers related to their health and retirement plan benefits. EBSA assists participants in understanding their rights, responsibilities, and benefits under employee benefit law and intervenes informally on their behalf with the plan sponsor in order to assist them in obtaining the health and retirement benefits to which they may have been inappropriately denied, which can avert the necessity for a formal investigation or a civil action. EBSA maintains a toll-free telephone number through which inquirers can reach Benefits Advisors in ten Regional Offices. EBSA has also made a request for assistance form available on its website for those wishing to obtain assistance in this manner. Contact with EBSA is entirely voluntary.

The collection of information is an intake form for assistance requests from the public. This information includes the plan type, broad categories of problem type, contact information for responsible parties, and a mechanism for the inquirer to attach relevant documents. Summary data from the existing intake form has also been used, in accordance with section 513 of ERISA, to respond to requests for information regarding employee benefit plans from members of Congress and governmental oversight entities, and to inform the policy formulation process.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0146. The current approval is scheduled to expire on March 31, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Alternative Method of Compliance for Certain Simplified Employee Pensions.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0034.

Affected Public: Businesses or other for-profits.

Respondents: 35,560.

Responses: 67,930.

Estimated Total Burden Hours: 21,227.

Estimated Total Burden Cost (Operating and Maintenance): \$3,223.

Description: Section 110 of ERISA relieves sponsors of certain Simplified Employee Pensions (SEPs) from ERISA's Title I reporting and disclosure requirements by prescribing an alternative method of compliance. These SEPs are, for purposes of this information collection, referred to as "non-model SEPs" because they exclude those SEPs which are created through use of Internal Revenue Service (IRS) Form 5305–SEP, and those SEPs in which the employer influences the employees as to their choice of IRAs to which employer contributions will be made, and that also prohibit withdrawals by participants.

This information collection requirement generally requires timely written disclosure to employees eligible to participate in non-model SEPs, including specific information concerning: participation requirements; allocation formulas for employer contributions; designated contact persons for further information; and, for employer recommended IRAs, specific terms of the IRAs such as rates of return and any restrictions on withdrawals. Moreover, general information is required that provides a clear explanation of: the operation of the non-model SEP; participation requirements and any withdrawal restrictions; and the tax treatment of the SEP-related IRA. Furthermore, statements must be provided that inform participants of: any other IRAs under the non-model SEP other than that to which employer contributions are made; any options regarding rollovers and contributions to other IRAs; descriptions of IRS disclosure requirements to participants and information regarding social security integration (if applicable); and timely notification of any amendments to the terms of the non-model SEP.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0034. The current approval is scheduled to expire on April 30, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0060.

Affected Public: Businesses or other for-profits.

Respondents: 20.

Responses: 4,899.

Estimated Total Burden Hours: 632.

Estimated Total Burden Cost (Operating and Maintenance): \$551,422.

Description: ERISA sections 406 and 407 and Code section 4975(e) prohibit various transactions between a plan and certain related parties and certain transactions by a plan fiduciary unless a statutory or administrative exemption applies to the transaction. The Department has authority under Reorganization Plan No. 4, pursuant to section 408 of ERISA and section 4975(c)(2) of the Code to grant either individual or class exemptions. In order to grant an exemption under ERISA section 408 and Code section 4975(c)(2), the Department must determine that the exemption is: administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries.

In order to make such a determination, the Department requires full disclosure of information regarding all aspects of the proposed transaction, and the parties and the assets involved. Sections 2570.34 and 2570.35 of the exemption procedure regulation describe the information that must be supplied by the applicant, such as: identifying information (name, type of plan, EIN number, etc.); an estimate of the number of plan participants; a detailed description of the exemption transaction and the parties for which an exemption is requested; a statement regarding which section of ERISA is thought to be violated and whether transaction(s) involved have already been entered into; a statement of whether the transaction is customary in the industry; a statement of the hardship or economic loss, if any, which would result if the exemption were denied; a statement explaining why the proposed exemption would be administratively feasible, in the interests of the plan and protective of the rights of plan participants and beneficiaries; and

several other statements. In addition, the applicant must certify that the information supplied is accurate and complete.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0060. The current approval is scheduled to expire on April 30, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Investment Advice Participants and Beneficiaries.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0134.

Affected Public: Businesses or other for-profits.

Respondents: 11,396.

Responses: 23,033,030.

Estimated Total Burden Hours: 2,423,391.

Estimated Total Burden Cost (Operating and Maintenance): \$318,912,816.

Description: Under ERISA, providing "investment advice" is a fiduciary act. A fiduciary who advises participants about plan investment opportunities that pay the adviser fees or commissions may be subject to liability under the Employee Retirement Income Security Act of 1974 (ERISA) prohibited transaction rules. The Pension Protection Act of 2006 (Pub. L. 109–280) amended the ERISA and the Internal Revenue Code (Code) to include a statutory exemption for providing investment advice to participants and beneficiaries in self-directed defined contribution individual account ERISA-covered plans (Plans) and beneficiaries of individual retirement accounts, individual retirement annuities, Archer MSAs, health savings accounts and Coverdell education savings accounts (collectively IRAs) described in the Code. The statutory exemption provides relief from the prohibited transaction provisions of ERISA, and the parallel provisions of the Code.

The information collections that are conditions of the regulation include, third-party disclosures, recordkeeping, and audit requirements. With one exception, the regulation does not require any reporting or filing with the Federal government, but the designated records must be made available upon request. The exception is the requirement that the fiduciary adviser is required under certain circumstances to forward the audit report which is also a required disclosure under the regulation to the Department.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0134. The

current approval is scheduled to expire on April 30, 2024.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Furnishing Documents to the Secretary of Labor on Request Under Employee Retirement Income Security Act Section 104(a)(6).

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210–0112.

Affected Public: Not-for-profit institutions, Businesses or other for-profits.

Respondents: 893.

Responses: 893.

Estimated Total Burden Hours: 41.

Estimated Total Burden Cost (Operating and Maintenance): \$721.

Description: Prior to the enactment of the Taxpayer Relief Act of 1997 (Pub. L. 105–34, August 5, 1997) (TRA '97), section 104(a) of the Employee Retirement Security Act of 1974 (ERISA) required administrators of employee benefit plans automatically to file the plan's summary plan description (SPD) and any summaries of material modification (SMMs) with the Secretary of the Department of Labor (the Department). TRA '97 eliminated the requirement that these documents be filed automatically with the Department, but added ERISA section 104(a)(6), requiring a plan administrator to furnish documents related to an employee benefit plan to the Department upon request. The requirement that administrators furnish the Department requested plan documents other than SPDs and SMMs was part of section 104(a) prior to enactment of TRA '97; that requirement was moved by TRA '97 to section 104(a)(6) and consolidated with the new furnishing requirement pertaining to SPDs and SMMs.

Pursuant to the regulation, the Department requests documents under section 104(a)(6) when a participant or beneficiary has previously requested the documents directly from the plan administrator and the administrator has failed or refused to provide them. The Department therefore uses the requested information to respond to participants' requests to the Department for documents that the participants were unable to obtain from their plan administrators.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0112. The current approval is scheduled to expire on June 30, 2024.

II. Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the collections 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., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the information collection; they will also become a matter of public record.

Signed at Washington, DC, this 18th day of August 2023.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2023–18276 Filed 8–24–23; 8:45 am]

BILLING CODE P

OFFICE OF MANAGEMENT AND BUDGET

Statistical Policy Directive No. 3: Compilation, Release, and Evaluation of Principal Federal Economic Indicators—Proposal To Change Timing of Public Comments by Employees of the Executive Branch

AGENCY: Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

ACTION: Notice of solicitation of comments.

SUMMARY: The Office of Management and Budget (OMB) issues a request for public comments on a proposal to modify one provision within *Statistical Policy Directive No. 3: Compilation, Release, and Evaluation of Principal Federal Economic Indicators* (Directive No. 3). The procedures in Directive No. 3, published in 1985, were designed to ensure equitable, policy-neutral, and timely release and dissemination of Principal Federal Economic Indicators

(PFEIs). The goals of Directive No. 3 remain sound; this Notice proposes updates to procedures consistent with these goals to reflect advances in communication technologies and methods. In particular, OMB proposes to modify the provision, “employees of the Executive Branch shall not comment publicly on the data until at least one hour after the official release time,” by replacing “one hour” with “thirty minutes.” This proposed change would reduce the delay after official release time before commentary from employees of the Executive Branch. Additional discussion of the request for public comment may be found in the **SUPPLEMENTARY INFORMATION** section below.

DATES: To ensure consideration of comments on this notice, they must be received no later than October 24, 2023. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to send comments electronically (see **ADDRESSES**, below).

ADDRESSES: Submit comments through www.regulations.gov—a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Enter “OMB–2023–0016” (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received by the date specified above will be included as part of the official record.

Privacy Notice: Information submitted in response to this RFI will be maintained in the OMB Public Input System of Records, OMB/INPUT/01 88 FR 20913. OMB generally makes comments received from members of the public available for public viewing on the Federal Rulemaking Portal at www.regulations.gov. As such, commenters should not include information that they do not wish to make publicly available, including information of a confidential nature, such as sensitive personal information or proprietary information. Please note that if you submit your email address, it will be automatically captured and included as part of the comment that is placed in the public docket; however, www.regulations.gov does include the option of commenting anonymously. For more detail about how OMB may maintain and disclose submitted information, please review the System of Records Notice at 88 FR 20913.

Electronic Availability: This notice is available on the internet on the OMB

website at <https://www.whitehouse.gov/omb/>. **Federal Register** notices are also available electronically at <https://www.federalregister.gov/>.

Instructions: Response to this Notice is voluntary. Respondents may provide input on any aspects of this solicitation. OMB will not respond to individual submissions.

FOR FURTHER INFORMATION CONTACT: For information about this request for comments, contact Kerrie Leslie, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, telephone (202) 395–1093, email Statistical_Directives@omb.eop.gov with the subject “More Info: Directive No. 3.”

SUPPLEMENTARY INFORMATION:

Background: The Office of Management and Budget (OMB) issues a request for comments on a proposal to change one provision within *Statistical Policy Directive No. 3: Compilation, Release, and Evaluation of Principal Federal Economic Indicators* (50 FR 38932, Sep. 25, 1985) (Directive No. 3), issued under the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 1104(d)) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3504(e)) (the PRA).¹ The stated purposes of Directive No. 3 are to preserve the time value of the economic indicators, strike a balance between timeliness and accuracy, provide for periodic evaluation of each indicator, prevent early access to information that may affect financial and commodity markets, and preserve the distinction between the policy-neutral release of data by statistical agencies and their interpretation by policy officials. Directive No. 3 remains a robust, comprehensive source of guidance for Federal statistical agencies and recognized statistical units producing Principal Federal Economic Indicators (PFEIs). The government and private sector widely watch and heavily rely upon these statistical series as indicators of the current condition and direction of the economy.

The procedures in Directive No. 3, published in 1985, were designed to ensure equitable, policy-neutral, and timely release and dissemination of Principal Federal Economic Indicators (“PFEIs”). The goals of Directive No. 3 remain sound, and this Notice does not seek to change them. Specifically, in furtherance of these goals, we are proposing to retain the requirement that some period of time needs to elapse

between the policy-neutral release of the data and the public interpretation of such data by policy officials in the Executive Branch. More background and history on the policies of Directive No. 3 can be found in the April 2019 **Federal Register** Notice (84 FR 14682, Apr. 11, 2019) (April 2019 FRN), available at www.federalregister.gov/documents/2019/04/11/2019-07172/statistical-policy-directive-no-3-compilation-release-and-evaluation-of-principal-federal-economic.

Previous proposal. In April 2019, OMB published in the **Federal Register** a request for comments on a proposal to reduce the duration of the prohibition of commentary by employees of the Executive Branch following the PFEI release from one hour to something shorter, including the consideration of the option of having no delay at all (84 FR 14682, Apr. 11, 2019). OMB received sixteen in-scope comments in response to that Notice.² All in-scope commenters strongly supported either a retention of the one-hour delay, or a delay of some duration, after official release time before employees of the Executive Branch could comment on the PFEI releases, with no commenters in support of removing the delay entirely.

Updated proposal. OMB agrees with the previous comments on this issue submitted in 2019, and understands that maintaining some delay as part of Directive No. 3 continues to be important to maintain the bright line between the release of data and any commentary on such data by Executive Branch officials. OMB is seeking public comment on the updated proposal that would modify the delay from one hour to thirty minutes. OMB is considering this updated proposal because, while the delay is important to ensuring a clear bright line between the data release and the Executive Branch’s policy interpretation, OMB also understands that since 1985 there have been many changes in the way we communicate within and across society, as well as in how the relevant agencies disseminate information. For example, in addition to more traditional means of dissemination (e.g., newspaper or radio), agencies now disseminate and society interacts with data releases through the internet, including through websites, social media platforms, and other applications. These newer dissemination platforms in particular offer nearly instantaneous access to any information supplied by the agencies

producing the PFEI data, including the data releases. These platforms can also offer direct attribution of the data to the agencies that produce it; these agencies are required to meet data quality standards and are trusted to implement those requirements. These advances in the timing and attribution of dissemination can contribute to the ability of society to fully digest the data releases sooner than when such dissemination methods were not available.

In addition, society generally communicates and interacts differently now than in 1985. In particular, various platforms exist now that allow society to interact seconds after a new data release comes out. This means that for these PFEI data releases, non-governmental actors are engaging in dialogue almost immediately following the official release time and can be offering perspectives on the meaning of the data. Under the current Directive No. 3, this dialogue is missing any Executive Branch interpretation until at least one hour after the data’s official release time. Under this proposal to reduce the delay to thirty minutes, Executive Branch officials could enter the dialogue thirty minutes earlier. OMB is considering the proposed change because we believe it is likely to lead to a more robust discussion without compromising the underlying principles of Directive No. 3, including the benefits of having some time delay.

OMB is not considering any other alternatives in this proposal; this means that OMB is neither considering removing the delay entirely, nor is it considering any other changes to any other policies in Directive No. 3. OMB proposes changing the italicized text in the excerpt from Directive No. 3 below, which is part of the last paragraph of Section 5 of Directive No. 3³:

5. Release Procedure. * * * Except for the authorized distribution described in this section, agencies shall ensure that no information or data estimates are released before the official release time.

The agency will provide prerelease information to the President, through the Chairman of the Council of Economic Advisers, as soon as it is available. The agency may grant others prerelease access only under the following conditions:

(a) The agency head must establish whatever security arrangements are necessary and impose whatever conditions on the granting of access are necessary to ensure that there is no unauthorized dissemination or use.

¹ The full text of Directive No. 3 is available at www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/statpolicy/dir_3_fr_09251985.pdf.

² Public comments received in response to the April 2019 FRN are available at www.regulations.gov/document/OMB-2019-0001-0001/comment.

³ The full text of Directive No. 3 is available at www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/statpolicy/dir_3_fr_09251985.pdf.

(b) The agency head shall ensure that any person granted access has been fully informed of and agreed to these conditions.

(c) Any prerelease of information under an embargo shall not precede the official release time by more than 30 minutes.

(d) In all cases, prerelease access shall precede the official release time only to the extent necessary for an orderly review of the data.

All employees of the Executive Branch who receive prerelease distribution of information and data estimates as authorized above are responsible for assuring that there is no release prior to the official release time. Except for members of the staff of the agency issuing the principal economic indicator who have been designated by the agency head to provide technical explanations of the data, employees of the Executive Branch shall not comment publicly on the data until *at least one hour after the official release time*.

Under OMB's proposal, the italicized text would be changed to "*at least thirty minutes after the official release time*."

Any changes to the text from Section 5 would neither affect nor replace any of the other standards and guidelines articulated in Directive No. 3.

Request for comments. OMB seeks comments from all interested parties, including data users, businesses, organizations, and the media. Specifically, OMB seeks comments from the public about the proposal to change the delay from one hour to thirty minutes, including whether such a change could still meet the goals of Directive No. 3 to ensure equitable, policy-neutral, and timely release and dissemination of PFEIs. OMB also seeks input on whether to maintain the one-hour delay.

Richard L. Revesz,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 2023-18313 Filed 8-23-23; 11:15 am]

BILLING CODE 3110-01-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 23-090]

Agency Information Collection Activities; Proposals, Submissions, and Approvals

DATES: Comments are due by September 25, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757-864-7998, or b.edwards-bodmer@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection enabled NASA to pre-test methods to collect information from individuals to determine community response to the new, quieter sonic booms, prior to the start of flight testing the X-plane. No public exposure to any form of sonic boom occurred during the pre-testing phase.

The pre-test was conducted by telephone interview. NASA wanted to evaluate telephone surveys to assess prompt public response associated with experiencing low amplitude sonic booms over multiple, geographically dispersed communities. Responses were voluntary.

The new X-plane is designed to produce low amplitude sonic booms. Ultimately, flight testing of the X-plane is intended to (1) demonstrate and validate the technology necessary for civil supersonic flights that create low amplitude sonic booms, and (2) assess community response to the new, quieter, sonic booms.

II. Methods of Collection

Telephone.

III. Data

Title: Pilot Testing of Telephone Interviewing Approaches to Assess Community Response to New, Quieter Boom Experiences.

OMB Number: 2700-0166.

Type of Review: Reinstatement.

Affected Public: Individuals.

Estimated Annual Number of Activities: 5,000.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 5,000.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 250.

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.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

William Edwards-Bodmer,

NASA PRA Clearance Officer.

[FR Doc. 2023-18269 Filed 8-24-23; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

60-Day Notice for the "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery"

AGENCY: National Endowment for the Arts.

ACTION: Notice of proposed collection; comment request.

SUMMARY: The National Endowment for the Arts (NEA), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. 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. Currently, the NEA is soliciting comments concerning the proposed information collection for Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery. A copy of the current information collection request can be obtained by contacting the office listed below in the address section of this notice.

DATES: Written comments must be submitted to the office listed in the address section below within 60 days from the date of this publication in the **Federal Register**.

ADDRESSES: Email comments to Sunil Iyengar, National Endowment for the Arts, at research@arts.gov.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 3135–0130.

Abstract: The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;

- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;

- Information gathered is used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;

- Information gathered is not used for the purpose of substantially informing influential policy decisions; and

- Information gathered yields qualitative information; the collections are not designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals and Households; Businesses and Organizations; State, Local or Tribal Government.

Estimated Number of Respondents: 7,950.

Average Expected Annual Number of Activities: 4.

Average Number of Respondents per Activity: 883.

Annual Responses: 2,650.

Frequency of Response: Once per request.

Average minutes per response: 16.

Average Expected Annual Burden hours: 726.5.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; 2. The accuracy of the Agency's estimate of the burden of the collection of information; 3. Ways to enhance the quality, utility, and clarity of the information to be collected; 4. Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and 5. Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: August 14, 2023.

Bonita Smith,

Director, Office of Administrative Services & Contracts, National Endowment for the Arts.

[FR Doc. 2023–18274 Filed 8–24–23; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit modification request.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of requests to modify permits issued to conduct activities regulated under the Antarctic Conservation Act of 1978. This is the required notice of a requested permit modification.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by September 25, 2023. Permit applications may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314.

FOR FURTHER INFORMATION CONTACT:

Andrew Titmus, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703-292-4479; or ACApermits@nsf.gov.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95-541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

Description of Permit Modification Requested: The Foundation issued a permit (ACA 2022-013) to Lisa Bolton, Scenic USA on November 12, 2021. The issued permit allows the applicant to conduct waste management activities associated with operating remotely piloted aircraft systems (RPAS) and helicopters. The permit holder may operate small battery operated RPAS to capture aerial footage for commercial, educational, and safety uses. The permit holder may also operate two helicopters for sightseeing in the Antarctic Peninsula region.

Now the applicant proposes a modification to the permit to increase the number of helicopters to four helicopters, two on each ship, and to allow those helicopters to make landings for sightseeing purposes. The name of the permit holder is also proposed to be changed to Jason Fleisher, Scenic USA.

Location: Antarctic Peninsula region.

Dates: September 15, 2023 to March 31, 2026.

Kimiko S. Bowens-Knox,

Program Analyst, Office of Polar Programs.

[FR Doc. 2023-17498 Filed 8-24-23; 8:45 am]

BILLING CODE 7555-01-P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Innovation and Technology Ecosystems; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Proposal Review Panel for Innovation and Technology Ecosystems (#84685)—

North Dakota State University Fargo Site Visit.

Date and Time: September 19, 2023; 3:00 p.m.–9:00 p.m.

September 20, 2023; 8:30 a.m.–7:45 p.m.

September 21, 2023; 8:00 a.m.–2:00 p.m.

Place: Jasper Hotel, 215 Broadway N, Fargo, ND 58102.

Tour Location: Hefty Seed Company, 153rd Ave. SE, Wheatland, ND 58079.

Agronomy Seed Farm, 15449 37th St. SE, Casselton, ND 58102.

Type of Meeting: Part-Open.

Contact Person: Daniel Goetzel, Program Director, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; Telephone (703) 292-5304.

Purpose of Meeting: NSF site visit to provide advice and recommendations concerning the progress and future activities of the projects that are one year into two-year awards.

Agenda

September 19, 2023

3:00 p.m.–4:15 p.m. Executive Sessions (Closed)

4:15 p.m.–7:00 p.m. Tour of Hefty Seed Company and Agronomy Seed Farm (Open)

7:00 p.m.–9:00 p.m. Executive Sessions (Closed)

September 20, 2023

8:30 a.m.–7:45 p.m. Executive Sessions (Closed)

September 21, 2023

8:00 a.m.–2:00 p.m. Executive Sessions (Closed)

Reason for Closing: Topics to be discussed and evaluated during closed portions of the site review will include information of a proprietary or confidential nature, including technical information; and information on personnel. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: August 21, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023-18277 Filed 8-24-23; 8:45 am]

BILLING CODE 7555-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2023-0135]

Environmental Assessment and Finding of No Significant Impact of Independent Spent Fuel Storage Facilities Decommissioning Funding Plans

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is publishing this notice regarding the issuance of a final environmental assessment (EA) and a finding of no significant impact (FONSI) for its review and approval of the updated decommissioning funding plans (DFPs) submitted by independent spent fuel storage installation (ISFSI) licensees for the ISFSIs listed in the “Discussion” section of this document.

DATES: The EA and FONSI referenced in this document are available on August 25, 2023.

ADDRESSES: Please refer to Docket ID NRC-2023-0135 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2023-0135. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301-415-0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, 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, at 301-415-4737, or by email to PDR.Resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

- *NRC’s PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an

appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Tilda Liu, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 404-997-4730, email: Tilda.Liu@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the approval of the updated DFPs submitted by ISFSI licensees. The NRC staff has prepared a final EA and FONSI determination for each of the updated ISFSI DFPs in accordance with the NRC regulations in part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), “Environmental Protection Regulations for Domestic

Licensing and Related Regulatory Functions,” which implement the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).

The NRC requires its licensees to plan for the eventual decommissioning of their licensed facilities prior to license termination. On June 17, 2011, the NRC published a final rule in the **Federal Register** amending its decommissioning planning regulations (76 FR 35512). The final rule amended the NRC regulation, 10 CFR 72.30, which concerns financial assurance and decommissioning for ISFSIs. This regulation requires each holder of, or applicant for, a license under 10 CFR part 72 to submit a DFP for the NRC’s review and approval. The purpose of the DFP is to demonstrate the licensee’s financial assurance, *i.e.*, that funds will be available to decommission the ISFSI. The NRC staff will later publish its financial analyses

of the DFP submittals which will be available for public inspection in ADAMS.

II. Discussion

The table in this notice includes the plant name, docket number, licensee, and ADAMS accession number for the final EA and FONSI determination for each of the individual ISFSIs. The table also includes the ADAMS accession numbers for other relevant documents, including the updated DFP submittals. For further details with respect to these actions, see the NRC staff’s final EA and FONSI determinations which are available for public inspection in ADAMS and at <https://www.regulations.gov> under Docket ID NRC-2023-0135. For additional direction on accessing information related to this document, see the **ADDRESSES** section of this document.

FINDING OF NO SIGNIFICANT IMPACT

Facility	Fermi, Unit 2 (Fermi 2)
Docket No	72-71.
Licensee	DTE Electric Company (DTE).
Proposed Action	The NRC’s review and approval of DTE’s updated decommissioning funding plans (DFPs) submitted in accordance with 10 CFR 72.30(c).
Environmental Impact of Proposed Action.	The NRC staff has determined that the proposed action, the review and approval of DTE’s updated DFPs, submitted in accordance with 10 CFR 72.30(c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the independent spent fuel storage installation (ISFSI), or result in the creation of solid waste. Moreover, the approval of the updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impact.	The proposed action does not require changes to the ISFSI’s licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC’s review and approval of DTE’s updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Fermi 2. Therefore, the NRC staff determined that approval of the updated DFPs for the Fermi 2 ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The NRC staff further finds that preparation of an environmental impact statement is not required.
Available Documents	Federal Register notice. Final Rule “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments,” dated March 12, 1984 (49 FR 9381). Federal Register notice. Final Rule “Decommissioning Planning,” dated June 17, 2011 (76 FR 35512). Federal Register notice. Environmental Assessments and Findings of no Significant Impact of Independent Spent Fuel Storage Facilities Decommissioning Funding Plans, dated April 5, 2021 (86 FR 17644). U.S. Nuclear Regulatory Commission. 2003/08/31-NUREG-1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, Final Report.” August 2003 (ADAMS Accession No. ML032540811). U.S. Nuclear Regulatory Commission. “Environmental Assessment for Final Rule: Decommissioning Planning” (10 CFR Parts 20, 30, 40, 50, 70, and 72; RIN 3150-AI55). February 2009 (ADAMS Accession No. ML090500648). U.S. Nuclear Regulatory Commission. ESA Section 7 No Effect Determination for ISFSI DFP Reviews (Note to File), dated May 15, 2017 (ADAMS Accession No. ML17135A062). U.S. Nuclear Regulatory Commission. “Final Environmental Assessment and Finding of No Significant Impact for DTE Electric Company’s Initial Decommissioning Funding Plan Submitted in Accordance with 10 CFR 72.30(b) for Fermi-2 Independent Spent Fuel Storage Installation,” dated March 29, 2021 (ADAMS Accession No. ML21056A139). U.S. Nuclear Regulatory Commission. “Analysis of DTE Electric Company’s Initial Decommissioning Funding Plan for the Fermi-2 Independent Spent Fuel Storage Installation,” dated April 7, 2021 (ADAMS Accession No. ML21068A071). U.S. Nuclear Regulatory Commission. “Review of the Draft Environmental Assessment and Finding of No Significant Impact for Fermi 2 Independent Spent Fuel Storage Installation Updated Decommissioning Funding Plans,” dated June 8, 2023 (ADAMS Accession No. ML23132A319). DTE Electric Company. Fermi 2 ISFSI Decommissioning Funding Plan, dated July 2, 2014 (ADAMS Accession No. ML14183B584).

FINDING OF NO SIGNIFICANT IMPACT—Continued

Facility	Fermi, Unit 2 (Fermi 2)
	DTE Electric Company. Fermi 2 ISFSI Decommissioning Funding Plan Update, dated March 30, 2017 (ADAMS Accession No. ML17089A789). DTE Electric Company. Fermi 2 ISFSI Decommissioning Funding Plan Update, dated March 30, 2020 (ADAMS Accession No. ML20090H578). DTE Electric Company. Fermi 2 ISFSI Decommissioning Funding Plan Update, dated March 30, 2023 (ADAMS Accession No. ML23089A081).
Facility	San Onofre Nuclear Generating Station (San Onofre)
Docket No	72–41.
Licensee	Southern California Edison (SCE).
Proposed Action	The NRC's review and approval of SCE's updated decommissioning funding plans (DFPs) submitted in accordance with 10 CFR 72.30(c).
Environmental Impact of Proposed Action.	The NRC staff has determined that the proposed action, the review and approval of SCE's updated DFPS, submitted in accordance with 10 CFR 72.30(c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the independent spent fuel storage installation (ISFSI), or result in the creation of solid waste. Moreover, the approval of the updated DFPS will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impact	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of SCE's updated DFPS. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of San Onofre. Therefore, the NRC staff determined that approval of the updated DFPS for the San Onofre ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a Finding of No Significant Impact is appropriate. The NRC staff further finds that preparation of an environmental impact statement is not required.
Available Documents	Federal Register notice. Final Rule “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments,” dated March 12, 1984 (49 FR 9381). Federal Register notice. Final Rule “Decommissioning Planning,” dated June 17, 2011 (76 FR 35512). Federal Register notice. Environmental Assessments and Findings of no Significant Impact of Independent Spent Fuel Storage Facilities Decommissioning Funding Plans, dated April 14, 2021 (86 FR 19644). U.S. Nuclear Regulatory Commission. 2003/08/31–NUREG–1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, Final Report.” August 2003 (ADAMS Accession No. ML032540811). U.S. Nuclear Regulatory Commission. “Environmental Assessment re: Final Rule: Decommissioning Planning” (10 CFR Parts 20, 30, 40, 50, 70, and 72; RIN 3150–AI55). February 2009 (ADAMS Accession No. ML090500648). U.S. Nuclear Regulatory Commission. ESA Section 7 No Effect Determination for ISFSI DFP Reviews (Note to File), dated May 15, 2017 (ADAMS Accession No. ML17135A062). U.S. Nuclear Regulatory Commission. “Final Environmental Assessment and Finding of No Significant Impact for the Southern California Edison Company's Initial and Updated Decommissioning Funding Plan Submitted in Accordance with 10 CFR 72.30 for San Onofre Independent Spent Fuel Storage Installation,” dated April 7, 2021 (ADAMS Accession No. ML21090A115). U.S. Nuclear Regulatory Commission. “Analysis of Southern California Edison Company's Initial and Updated Decommissioning Funding Plans for the San Onofre Nuclear Generating Station Independent Spent Fuel Storage Installations,” dated April 7, 2021 (ADAMS Accession No. ML21061A231). U.S. Nuclear Regulatory Commission. “Review of the Draft Environmental Assessment and Finding of No Significant Impact Related to San Onofre Independent Spent Fuel Storage Installation Updated Decommissioning Funding Plans,” dated June 14, 2023 (ADAMS Accession No. ML23129A180). ISFSI Decommissioning Funding Plans (10 CFR 72.30), dated December 14, 2012 (ADAMS Accession No. ML130420384). ISFSI Decommissioning Funding Plans (10 CFR 72.30), dated December 14, 2015 (ADAMS Accession No. ML15349A942). Response to Request for Additional Information—Southern California Edison's Decommissioning Funding Plan Update for San Onofre Nuclear Generating Station Independent Spent Fuel Storage Installation, dated April 11, 2018 (ADAMS Accession No. ML18106A042). Decommissioning Funding Status Report, San Onofre Nuclear Generating Station Units 1, 2 and 3 and ISFSI, dated March 28, 2017 (ADAMS Accession No. ML17090A152). Decommissioning Funding Status Report 2019, San Onofre Nuclear Generating Station Units 1, 2, and 3 and Independent Spent Fuel Storage Installation, dated March 17, 2020 (ADAMS Accession No. ML20079J032). Decommissioning Funding Status Report 2020, San Onofre Nuclear Generating Station Units 1, 2, and 3 and Independent Spent Fuel Storage Installation, dated March 24, 2021 (ADAMS Accession No. ML21091A037).

Facility	San Onofre Nuclear Generating Station (San Onofre)
	Decommissioning Funding Status Report 2021, San Onofre Nuclear Generating Station Units 1, 2, and 3 and Independent Spent Fuel Storage Installation, dated March 23, 2022 (ADAMS Accession No. ML22084A055). Decommissioning Funding Status Report 2021 [sic], San Onofre Nuclear Generating Station Units 1, 2, and 3 and Independent Spent Fuel Storage Installation, dated March 29, 2023 (ADAMS Accession No. ML23094A127).

Dated: August 22, 2023.

For the Nuclear Regulatory Commission.

Yaira K. Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023-18331 Filed 8-24-23; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act, notice is hereby given that a virtual meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, September 21, 2023. There will be no in-person gathering for this meeting.

DATES: The virtual meeting will be held on September 21, 2023, beginning at 10:00 a.m. (ET).

ADDRESSES: The meeting will convene virtually.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, 202-606-2858, or email pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: 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 Office of Personnel Management.

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 2020 are posted

at <http://www.opm.gov/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 Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 7H31, 1900 E Street NW, Washington, DC 20415, (202) 606-2858.

This meeting is open to the public, with an audio option for listening. This notice sets forth the agenda for the meeting and the participation guidelines.

Meeting Agenda: The tentative agenda for this meeting includes the following Federal Wage System items:

- The definition of Monroe County, PA.
- The definition of San Joaquin County, CA.
- The definition of the Salinas-Monterey, CA, wage area.
- The definition of the Puerto Rico wage area.

Public Participation: The September 21, 2023, meeting of the Federal Prevailing Rate Advisory Committee is open to the public through advance registration. Public participation is available for the meeting. All individuals who plan to attend the virtual public meeting to listen must register by sending an email to pay-leave-policy@opm.gov with the subject line "September 21, 2023" no later than Tuesday, September 19, 2023.

The following information must be provided when registering:

- Name.
- Agency and duty station.
- Email address.
- Your topic of interest.

Members of the press, in addition to registering for this event, must also RSVP to media@opm.gov by September 19, 2023.

A confirmation email will be sent upon receipt of the registration. Audio teleconference information for participation will be sent to registrants the morning of the virtual meeting.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2023-18358 Filed 8-24-23; 8:45 am]

BILLING CODE 6325-49-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023-234 and CP2023-237]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES:

Comments are due: August 28, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal

Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s)*: MC2023–234 and CP2023–237; *Filing Title*: USPS Request to Add Priority Mail & USPS Ground Advantage Contract 30 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: August 18, 2023; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative*: Jennaca D. Upperman; *Comments Due*: August 28, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2023–18275 Filed 8–24–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98185; File No. SR–Phlx–2023–37]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Set Fees for the Purchase of Field-Programmable Gate Array Technology as an Optional Delivery Mechanism for PSX TotalView

August 21, 2023.

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 August 11, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, 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 set fees for the purchase of field-programmable gate array (“FPGA”) technology as an optional delivery mechanism for PSX TotalView.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to establish a fee schedule for the purchase of field-programmable gate array (“FPGA”) technology as an optional delivery mechanism for PSX TotalView (“PSX FPGA Service”).³ This follows a recently-filed proposal to offer FPGA technology as an optional delivery mechanism for PSX TotalView.⁴

FPGA

FPGA is a hardware-based delivery mechanism that utilizes an integrated circuit that is programmed to reduce “jitter”—a technical term of art referring to the deviation in amplitude, phase timing or width of a signal pulse in a digital signal—that will allow data to be processed in a more predictable, or “deterministic,” fashion. Reducing jitter can be useful for certain customers due to the variability in the timing of market data packets transmitted by an exchange over the course of the trading day. Orders, and therefore market data packets, typically accumulate in larger numbers at the beginning and end of the trading day, as well as during the peaks of activity that occur at random intervals during the day. These bursts of activity may alter the time interval between the delivery of data packets because software processes information at variable rates depending on load to the system. Processing times may increase at higher loads, and decrease during periods of lesser activity. FPGA technology processes data packets at a constant time interval, without regard to the number of packets processed. Higher levels of determinism mean less variable queuing, which improves the predictability of data transfer,

³ This Proposal was initially filed by the Exchange on May 23, 2023. See Securities Exchange Act Release No. 97628 (May 31, 2023), 88 FR 37116 (June 6, 2023) (SR-Phlx–2023–21). On July 7, 2023, that filing was withdrawn and replaced to provide supplemental information. See Securities Exchange Act Release No. 97947 (July 19, 2023), 88 FR 47932 (July 25, 2023) (SR-Phlx–2023–30). On August 9, 2023, the second filing was withdrawn and replaced with SR-Phlx–2023–35 to provide additional information without changing the Proposal in substance. On August 11, 2023, SR-Phlx–2023–35 was replaced with the instant filing to correct a typographical error.

⁴ See SR-Phlx–2023–18 (“A proposal to offer field-programmable gate array (‘FPGA’) technology as an optional delivery mechanism for PSX TotalView.”), available at <https://listingcenter.nasdaq.com/assets/rulebook/Phlx/filings/SR-Phlx-2023-18.pdf>. A proposal to establish a fee schedule for the use of FPGA technology for the BX exchange is being filed concurrently with this proposal.

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

particularly during times of peak market activity.

The benefits of determinism depend on the use case of the customer, as well as the customer's specific system architecture.

Higher determinism does not necessarily mean lower latency. The concepts of determinism and latency are related, but distinct. Determinism refers to predictability in the rate of data transmission; latency refers to the time required to process data or transport it from one location to another. Low latency is not necessarily deterministic, and higher determinism does not necessarily mean low latency. As such, use of FPGA technology will increase determinism, but does not guarantee lower latency at all times.⁵

Among customers that seek a higher degree of determinism, the benefits of FPGA technology vary, as FPGA technology is one possible solution, among a catalog of possible solutions, for increasing the consistency and predictability of message throughput over the course of the trading day. Some customers are able to adequately control jitter without using FPGA technology; other customers address jitter using specialized software, coding or other design solutions in conjunction with FPGA; still others use FPGA alone. The specific choice depends on a complex analysis of the customer's information technology systems in the context of their particular use cases.

FPGA is a broadly-available, commonly-used type of programmable circuit that can be modified to suit different use cases. It is used in a wide spectrum of industries, including the consumer electronics, automotive, and aerospace, as well as in a variety of industrial applications. It is not unique to the financial services industry,⁶ or to the Exchange.

FPGA technology has been offered by the Nasdaq Stock Exchange for over a decade, and the Nasdaq Options Market

for nearly as long,⁷ and has been cited by the SEC as an example of a technology useful in the distribution of market data products.⁸

The Exchange proposes to offer the PSX FPGA Service in conjunction with the Exchange's depth of book feed, PSX TotalView. PSX TotalView is a real-time market data product that provides full order depth using a series of order messages to track the life of customer orders in the PSX market, as well as trade data for PSX executions and administrative messages such as Trading Action messages, Symbol Directory, and Event Control messages.⁹

Customers that choose to purchase PSX TotalView without the PSX FPGA Service will receive the same data as customers that elect to purchase PSX TotalView with the PSX FPGA Service.

Proposed Fees

Phlx proposes internal distribution fees of \$3,500 per month and external distribution fees of \$350 for the PSX FPGA Service; customers that elect to use the PSX FPGA Service for both internal and external distribution will pay both fees.¹⁰ These fees are in addition to Market Data Distributor Fees¹¹ and fees for PSX TotalView.¹² Customers that elect to receive PSX TotalView without using the PSX FPGA Service will pay no fee in addition to the underlying fees listed above.

The proposed fees for the PSX FPGA Service are substantially lower than fees for the Nasdaq FPGA Service, which are

set at \$25,000 per Distributor for internal only distribution, \$2,500 for external only, and \$27,500 for internal and external distribution.¹³ The difference is based, in part, on a comparison of peak activity at the two exchanges. As noted above, high levels of determinism are particularly valuable during periods of peak activity.

Although there is considerable variation in the number of messages at various peaks, as well as the duration of peak activity, the proposed fees are roughly comparable to the differences in average peak activity for Phlx equity products relative to the Nasdaq exchange. Exchange staff have also discussed the proposed fees with customers, and believe, based on those discussions and their own business judgment, that the proposed fees fairly reflect the value of the PSX FPGA Service. A number of customers provisionally agree with this assessment, and have indicated that they are interested in testing it.

No other exchange currently offers FPGA technology as a separate service in conjunction with the delivery of a proprietary data feed, and therefore there are no other fees for comparison.

If Phlx is incorrect in its determination that the proposed fees reflect the underlying value of the PSX FPGA Service, customers will not purchase the product. The PSX FPGA Service is not necessary for a customer to ingest and process depth of book information, and those customers that seek a higher degree of determinism have a number of options at their disposal to reduce jitter without using the PSX FPGA Service.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,¹⁴ in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,¹⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposal is reasonable and unlikely to burden the market because the purchase of the PSX FPGA Service is optional for all categories of customers. No customer and no category of customers (such as, for example,

⁷ See Securities Exchange Act Release No. 67297 (June 28, 2012), 77 FR 39752 (July 5, 2012) (SR-Nasdaq-2012-063) (introducing FPGA technology); see also Nasdaq Data News 2012-13, available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=dn2012-13> (introducing TotalView FPGA service as of August 1, 2012); Securities Exchange Act Release No. 74745 (April 16, 2015), 80 FR 22588 (April 22, 2015) (SR-Nasdaq-2015-035) (establishing FPGA for the Nasdaq Options Market); The Nasdaq Stock Market LLC Rules, Equity 7, Section 126(c) (Hardware-Based Delivery of Nasdaq Depth data).

⁸ See Securities Exchange Act Release No. 90610, 86 FR 18596, 18647 (April 9, 2021) (File No. S7-03-20) (listing field programmable gate array services as an example of a technological innovation that could be employed by competing consolidators as part of the Market Data Infrastructure rule).

⁹ See Nasdaq Phlx LLC Rules, Equity 7 (Pricing Schedule), Section 3 (Nasdaq PSX Fees), PSX TotalView; see also Securities Exchange Act Release No. 62876 (September 9, 2010), 75 FR 56624 (September 16, 2010) (SR-Phlx-2010-120) (introducing PSX TotalView as a product).

¹⁰ The difference in amount for external and external distribution reflects Nasdaq's experience that the Exchange's FPGA hardware is best employed at the point of ingestion, as the utility of FPGA technology falls as the data moves farther from the source.

¹¹ See Nasdaq Phlx LLC Rules, Equity 7, Section 3, Market Data Distributor Fees.

¹² See *id.*, PSX TotalView.

⁵ Because software can be impacted by workload, FPGA technology in general can provide lower latency during periods of peak activity. The same FPGA technology that will support the PSX FPGA Service is also broadly commercially available for purchase from third-party sellers unrelated to the Exchange.

⁶ See, e.g., Contrive Datum Insights, "Field-Programmable Gate Array (FPGA) Market is expected to reach around USD 22.10 Billion by 2030, Grow at a CAGR of 15.12% during Forecast Period 2023 to 2030," (February 21, 2023), available at <https://www.globenewswire.com/en/news-release/2023/02/21/2612772/0/en/Field-Programmable-Gate-Array-FPGA-Market-Is-Expected-To-Reach-around-USD-22-10-Billion-by-2030-Grow-at-a-CAGR-Of-15-12-during-Forecast-Period-2023-To-2030-Data-By-Contrive-Datum-1.html> (describing the general size and state of the FPGA market in 2023).

¹³ See The Nasdaq Stock Market LLC Rules, Equity 7 (Pricing Schedule), Section 126(c) (Hardware-based delivery of Nasdaq depth data).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4) and (5).

vendors, proprietary trading firms, banks, hedge funds, market makers, or high frequency trading firms) are required to purchase the PSX FPGA Service for either legal or technological reasons—even a customer that seeks to reduce jitter.¹⁶

The Nasdaq exchange has over ten years of experience in selling the Nasdaq FPGA Service. That experience has shown that the vast majority of Nasdaq depth customers do not find value in the Nasdaq FPGA Service. The Exchange expects customers that do not find value in the Nasdaq FPGA Service to make a similar decision with respect to the PSX FPGA Service, and continue to ingest PSX TotalView as they do now.

For those customers that may seek to increase determinism, the purchase of FPGA technology from the PSX exchange will be only one of several options available. FPGA technology is not unique to the Exchange or even the financial services industry. Third-party data vendors offer FPGA technology services. Customers may also install their own FPGA hardware for internal use. All of these are viable options; the benefits of any particular option will depend on the particular customer's systems and use cases.

Customers may also choose not to address jitter using FPGA technology at all. As noted above, FPGA technology processes the data at a consistently predictable rate relative to software. This predictability in the rate of processing may not be advantageous or optimal for all systems receiving the exchange data feed.

The design of data processing architecture is complex. The ingestion of data from an exchange is just one step in the life-cycle of trading. Customers must also generate and submit orders, evaluate trades, and then generate new orders while interacting with multiple exchanges. All of these steps are part of a single trading system. Changing any one step in the process—by, for example, purchasing the PSX FPGA Service when other exchanges may not offer FPGA—often results in the need for changes to other aspects of the process. As such, the decision to buy the PSX FPGA Service will be based on whether the service is compatible with the customer's trading system as a whole, not just on whether it may facilitate the processing of data from a single exchange. The appropriateness of any particular solution will depend on the customer's system architecture, and

the specific use cases for the market data consumed.

To illustrate the choice faced by exchange customers, consider the decisions made by the two consolidated data processors, the UTP and CTA Plans, two different systems that use dissimilar means to achieve an optimal solution. Both perform the same task—combining quotes and trades from all US exchanges into a consolidated data feed with relatively low jitter. Yet only one processor—the CTA Plan—uses FPGA hardware, while the other—the UTP Plan—does not.

This is because the UTP Plan's design, coding and hardware achieve the desired level of determinism without FPGA technology. The CTA Plan, by contrast, elected to incorporate FPGA technology into its system design. Notwithstanding these different design decisions, both plans achieve broadly similar levels of performance. FPGA technology is therefore not essential to addressing jitter, but rather is one option among many to address the issue.

Market data customers face an array of choices to optimize determinism, much like the UTP and CTA Plans. For example, a customer may purchase and deploy its own FPGA hardware, without purchasing the proposed FPGA technology service from the Exchange, *after* receiving data from the Exchange. Another customer may find use of the PSX FPGA Service, which lowers the level of jitter prior to the customer's receipt of the data, to be a better fit for its system architecture. The solution chosen will vary based on the needs and design choices of the customer.

The experience of the Nasdaq exchange in offering the Nasdaq FPGA Service shows that customers sensitive to jitter often avail themselves of substitutes for FPGA technology, a decision that can change over time. Over the past decade, a total of 21 current or potential users of the Nasdaq FPGA Service—all of which sought a higher degree of determinism—substituted the Nasdaq FPGA Service with an alternative solution. Six of these customers were in the process of developing and testing the Nasdaq FPGA Service but ultimately decided not to purchase it before completing this process. The remaining 15 customers purchased the Nasdaq FPGA Service, only to cancel it after using it. Because all of these customers continued to utilize the underlying data, these cancellations demonstrate that the PSX FPGA Service, like the Nasdaq FPGA Service, will be an optional service, even for those customers that seek to reduce jitter.

Moreover, as noted above, no other exchange currently offers FPGA technology in conjunction with their proprietary data feeds as a separate service, notwithstanding the fact that it is a widely available technology, providing further evidence that customers have multiple options at their disposal to address jitter.

In the experience of the Nasdaq exchange, the Nasdaq FPGA Service is purchased by vendors, proprietary trading firms, banks, high-frequency trading firms, hedge funds, and market makers. The Nasdaq exchange is aware of no systematic differences within any of these categories among market participants that choose to use or not to use the Nasdaq FPGA Service.

Few customers of Nasdaq TotalView purchase the Nasdaq FPGA Service. This is because the bulk of customers consume Nasdaq TotalView for display (*i.e.*, human) usage. FPGA technology impacts performance at a speed that a human cannot process, and there is no need for FPGA technology for such usage.

Of the customers that receive Nasdaq TotalView from Nasdaq (either through a direct feed or an extranet connection) and are in a position to utilize the Nasdaq FPGA Service, only about 15 percent purchase it.

Most strikingly, only approximately 3% of market makers at Nasdaq purchase the Nasdaq FPGA Service.¹⁷ This may seem a surprising result, given that market makers, by definition, trade throughout the day and during periods of peak activity, but, as noted above, customers have several options: purchase FPGA services from a third-party vendor, implement FPGA technology on their own, or configure their systems to process data during peaks without the use of FPGA. The fact that only about 3% of market makers at the Nasdaq exchange purchase the Nasdaq FPGA Service demonstrates that most customers make use of alternative solutions. As such, the determining factor in whether to purchase the Nasdaq FPGA Service is not the category of customer, but rather the compatibility of that service with the customer's specific systems architecture and technical requirements, which can

¹⁶ Not all customers of depth of book information process at sufficiently high speeds for jitter to become a concern. Neither FPGA hardware nor its substitutes are required to ingest depth of book information.

¹⁷ The 3% figure represents the percentage of designated market makers by market participant identifier ("MPID") that currently purchase the Nasdaq FPGA Service relative to all MPIDs on the Nasdaq Market Center. The MPID is a unique four-letter mnemonic assigned to each Participant in the Nasdaq Market Center. A Participant may have one or more than one MPID. See The Nasdaq Stock Market LLC Rules, Equity 1, Section 1(a)(11).

and do change over time as systems are modified, replaced or updated.

For all of these reasons, customers can discontinue the use of the PSX FPGA Service at any time, or decide not to purchase it, for any reason, including the level of fees.

Customers that choose not to purchase the PSX FPGA Service are not impacted by the proposal.

The PSX FPGA Service will be available to all customers on a non-discriminatory basis, and therefore the proposed fees are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

This Proposal, a response to customer demand, is a product of a competitive marketplace. To date, lower levels of peak activity at the Phlx equity exchange relative to the Nasdaq exchange have been associated with low levels of customer interest in this product. Recently, however, Phlx has heard from customers interested in using FPGA technology for PSX TotalView. To address this customer demand, and to drive liquidity to the Phlx equity exchange by making it a more attractive trading venue, Phlx has decided to offer this product.

Approval of this Proposal will further promote competition by providing market participants additional choices in the transmission of PSX TotalView.

Nothing in the Proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the Proposal does not impose any burden on the ability of other exchanges to compete. As noted above, FPGA technology is generally available and any exchange has the ability to offer it if it so chooses.

Nothing in the Proposal burdens intra-market competition (the competition among consumers of exchange data) because the PSX FPGA Service will be available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase the PSX FPGA Service can do so on a non-discriminatory basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act.¹⁸

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2023-37 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-2023-37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2023-37 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-18307 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98181; File No. SR-CboeBZX-2023-059]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 11.22 ("Data Products") To Eliminate the ETF Implied Liquidity Feed

August 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 8, 2023, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") 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. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ The Commission is publishing this notice to

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

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

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") proposes to amend Exchange Rule 11.22 ("Data Products") to eliminate one of the Exchange's data offerings. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.22 ("Data Products") to eliminate the data product listed under subparagraph (n), the "ETF Implied Liquidity" data feed,⁵ which the Exchange intends to decommission on August 8, 2023.

By way of background, the ETF Implied Liquidity feed is an optional data feed that provides the Exchange's proprietary calculation of the implied liquidity and the aggregate best bid and offer ("BBO") of all displayed orders on the Exchange and its affiliated exchanges⁶ for all standard, non-leveraged U.S. equity Exchange Traded

Funds ("ETFs") traded on the System.⁷ An ETF's implied liquidity disseminated via the feed consists of the ETF's implied BBO (including the implied size) calculated via a proprietary methodology based on the national best bid and offer ("NBBO"), the number of shares of securities underlying one creation unit of the ETF, and the estimated cash included in one creation unit of the ETF. The Exchange disseminates the aggregate BBO through the ETF Implied Liquidity feed no earlier than it provides its BBO to the processors under the CTA Plan or the Nasdaq/UTP Plan.

Currently there are no market participants that are taking the ETF Implied Liquidity feed. As such, the Exchange no longer wishes to maintain or offer this product and therefore proposes to decommission the ETF Implied Liquidity feed and delete the corresponding reference to the product from its rulebook.⁸

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁹ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹⁰ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in 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. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹¹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposal to decommission the ETF Implied Liquidity feed is

appropriate given the non-usage of the product among market participants. Further, the ETF Implied Liquidity feed is optional, and its use is not a prerequisite for trading on the Exchange. The Exchange also notes that it is not required to maintain or offer any one proprietary market data product, including the ETF Implied Liquidity feed. The Exchange also believes that the proposed rule change is fair and equitable and is not designed to permit unfair discrimination as it applies uniformly to all Members (*i.e.*, the product will no longer be available for any Member). Eliminating reference to this feed in the Exchange's rulebook will promote clarity in the rules as to what data products may or may not be available.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The ETF Implied Liquidity feed is an optional data feed offered by the Exchange, it is not a prerequisite to trading on the Exchange, and the Exchange is not required to offer or maintain such feed.

The Exchange believes that the proposed deletion does impose any intramarket competition as it applies to all Members (*i.e.* the product will no longer be available to any Member). The Exchange believes that the proposed rule change also does not impose any undue burden on intermarket competition. The ETF Implied Liquidity feed is an optional data product offered by the Exchange and market participants are not required to subscribe to it and the Exchange is not required to offer it. Moreover, the proposed change is not being submitted for competitive reasons, but rather to eliminate a data product that is not being actively used by market participants today.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

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

⁵ The ETF Implied Liquidity Feed was adopted in 2017. See Securities Exchange Act Release No. 80580 (May 3, 2017), 82 FR 21585 (May 9, 2017) (SR-BatsBZX-2017-25) and Securities Exchange Act Release No. 80772 (May 25, 2017), 82 FR 25389 (June 1, 2017) (SR-BatsBZX-2017-036).

⁶ The Exchange's affiliates are Cboe EDGA Exchange, Inc., ("EDGA"), Cboe EDGX Exchange, Inc., ("EDGX"), and Cboe BYX Exchange, Inc., ("BYX") ("collectively, the "Bats Exchanges").

⁷ The securities underlying each of the U.S. equity ETFs included in the proposed feed must be considered NMS Securities as defined under Rule 600(b)(46) of Regulation NMS. 17 CFR 242.600(b)(46).

⁸ The Exchange intends to also submit a corresponding rule filing to eliminate reference to this feed and corresponding fees in the Exchange's fee schedule. See SR-CboeBZX-2023-060.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ *Id.*

operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6)¹³ thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)¹⁴ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁵ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange requested the waiver because it intended to decommission the ETF Implied Liquidity feed effective August 8, 2023, and eliminate such references from the Exchange's rulebook to alleviate potential confusion as to what data products the Exchange currently offers. Because the proposed rule change does not raise any novel legal or regulatory issues, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹⁶

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.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 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, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-059 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-CboeBZX-2023-059. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-059 and should be submitted on or before September 15, 2023.

¹⁷ 17 CFR 200.30-3(a)(12), (59).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-18303 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98184; File No. SR-MRX-2023-14]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 15 (Simple Order Risk Protections) To Adopt an Active Quote Protection

August 21, 2023.

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 August 11, 2023, Nasdaq MRX, LLC ("MRX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 3, Section 15 (Risk Protections) to adopt an active quote protection.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 the proposed rule change is to adopt an active risk counter functionality called active quote protection ("Active Quote Protection") in Options 3, Section 15. The Exchange intends to begin implementation prior to December 20, 2024, and will provide prior notice of the implementation date to Members in an Options Trader Alert.

The Exchange proposes to offer an optional active risk counter functionality called Active Quote Protection, which will be available to Market Makers as an alternative to existing passive risk counter functionality described in Options 3, Section 15(a)(3)(B) (*i.e.*, "Automated Quotation Adjustments").³ The proposed Active Quote Protection functionality will be similar to existing active risk counter functionality on another options exchange, which currently allows exchange users to actively decrement the risk counter by a specified amount at any time, rather than waiting until a risk limit is reached or the user otherwise sends a specific instruction to the exchange to completely reset the counting program.⁴

Today, the Exchange requires Market Makers to configure risk exposure thresholds based on various metrics for each options class, including percentage of executed quotes ("Percentage Threshold"), total number of executed contracts ("Volume Threshold"), absolute value of the difference between long and short positions ("Delta Threshold"), and absolute value of the difference between contracts bought and contracts sold ("Vega Threshold") (collectively, "Thresholds").⁵ As set

forth in Options 3, Section 15(a)(3)(B)(i), the System tracks each Threshold with a corresponding risk counter over a Market Maker-specified rolling time period not to exceed 30 seconds. Furthermore, Section 15(a)(3)(B)(i) and (ii) describes that when a risk counter exceeds the corresponding Threshold during the specified time period, the System would automatically remove the Market Maker's quotes in all series of the applicable options class (each, a "Purge Event"). As a result of a Purge Event, the corresponding risk counter and Threshold would reset upon such removal. The Exchange also notes that pursuant to Section 15(a)(3)(B)(iii) today, the Thresholds and risk counters can be completely reset if the Market Maker specifically requests the System to remove quotes in all series of an options class. This risk protection is passive in that the risk counters wait to reset until the expiry of a specified time period, a Purge Event, or when the Market Maker otherwise sends a specific instruction to the Exchange to remove quotes to completely reset the counters.

The Exchange now proposes to introduce a new risk protection called Active Quote Protection that would enable Market Makers to actively manage their executed contract limit ("Contract Limit") by sending an electronic instruction to the Exchange to decrement their executed contract limit counter ("Limit Counter") by a specified amount at any time, rather than waiting until the expiry of a defined time period, when the risk limit is exceeded (like a Purge Event), or when the Market Maker otherwise sends a specific instruction to purge quotes to completely reset the risk counter. The Contract Limit, as set by the Market Maker, would apply for the duration of the trading day. Once the Market Maker's Limit Counter exceeds the Contract Limit set by the Market Maker, the System would automatically remove quotes in all series of the applicable options class submitted through the Exchange's Specialized Quote Feed protocol,⁶ identical to how the quote removal mechanism works for a Purge Event today.⁷ Today, Purge Events are triggered under the existing Automated Quotation Adjustments on the first execution that exceeds the applicable

Threshold. Once an execution occurs, the System checks all Thresholds to see if they have been exceeded. If exceeded, the Market Maker's quote would be purged pursuant to Options 3, Section 15(a)(3)(B)(iii). In order to remain consistent with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS, any marketable orders or quotes that are executable against a Market Maker's quotes that are received⁸ prior to the time the applicable Threshold is triggered will be automatically executed up to the size of the Market Maker's quote, regardless of whether the execution would cause the Market Maker to exceed their pre-set Percentage Threshold, Volume Threshold, Delta Threshold, or Vega Threshold.⁹

Under Active Quote Protection, the System would similarly handle the Market Maker's quote in that the quote could be filled one execution over the Contract Limit before the Market Maker's remaining quotes are cancelled by the System in order to be consistent with the firm quote obligations under Rule 602 of Regulation NMS. Specifically, the Exchange notes that any marketable orders or quotes that are executable against a Market Maker's quotes that are received¹⁰ prior to the time the Contract Limit is triggered will be automatically executed up to the size of the Market Maker's quote, regardless of whether the execution would cause the Market Maker to exceed the Contract Limit.¹¹

Additionally, under Active Quote Protection, Market Makers will be able to submit a request (i) to decrement their Limit Counter by a specified number of contracts, or (ii) to fully decrement their Limit Counter to zero.¹² Market Makers that elect to use the proposed Active Quote Protection on a

⁸ The time of receipt for an order or quote is the time such message is processed by the Exchange's order book.

⁹ See current Options 3, Section 15(a)(3)(B)(ii)(b). The Exchange will renumber this as Section 15(a)(3)(B)(iii)(b) and clarify this provision in the manner described later in this filing.

¹⁰ See *supra* note 8.

¹¹ For both the current Automated Quotation Adjustments and proposed Active Quote Protection, the System will execute marketable interest up to the size of the Market Maker's quote, but cannot guarantee interest will be fully executed, as is the case with any execution in the Exchange's order book. There is always the possibility that the Market Maker's quote size (and/or Market Maker's quote plus other interest on the order book) may not be sufficient volume to fill the incoming interest.

¹² As discussed later in this filing, in order to re-enter the System after their quotes are purged pursuant to the Active Quote Protection, Market Makers will need to submit the same request to fully decrement their Limit Counter to zero.

³ As described below, the Exchange will specifically define this passive risk counter functionality as "Rapid Fire" within this Rule.

⁴ See MEMX LLC ("MEMX") Rule 21.16(b) (Active Risk Counter). See also Securities Exchange Act Release No. 95445 (August 8, 2022), 87 FR 49894 (August 12, 2022) (SR-MEMX-2022-10). Similar to the proposed Active Quote Protection, the active risk counter on MEMX is voluntary and offers a way for users to proactively manage their risk. The MEMX risk protection, however, allows the user to actively manage all the risk limits specified in MEMX's rule (*e.g.*, executed contracts, notional value, etc.) whereas the Exchange's proposal would allow Market Makers to actively manage executed contracts only, as discussed later in this filing. In addition, the Exchange's proposal will only apply to quotes whereas MEMX's functionality applies to both orders and quotes.

⁵ The Thresholds are described in detail in Options 3, Section 15(a)(3)(B)(i)(a)-(d). If a Market

Maker does not provide a parameter for each Threshold, the Exchange will apply default parameters announced to Members.

⁶ Specialized Quote Feed or "SQF" is an interface that only Market Makers may use to submit quotes to the Exchange. See Supplementary Material .03(c) to Options 3, Section 7.

⁷ See Options 3, Section 15(a)(3)(B)(ii) (renumbered as Section 15(a)(3)(B)(iii) under this proposal, as noted below).

badge¹³ will not be able to use the existing Threshold risk protections described above on the same badge (*i.e.*, the active and passive risk counter functionality would be mutually exclusive per badge) given that it would be unnecessarily complex to implement from a technology standpoint. Market Makers may be associated with multiple badges today, so if they want to use both risk protections for their activity on the Exchange, they will be able to set either the active or passive risk counter functionality on each one.

To effectuate the foregoing changes, the Exchange proposes to set forth the new risk protection in subparagraph (B)(ii) of Options 3, Section 15(a)(3), as follows:¹⁴

In lieu of Rapid Fire, a Market Maker may provide an executed contract limit ("Contract Limit") that, if exceeded, the System will automatically remove the Market Maker's quotes in all series of an options class submitted through SQF. The System will apply the Contract Limit for the duration of the trading day. For each class of options, the System will maintain an active limit counter that will track the current number of contracts executed through the Market Maker's quotes ("Limit Counter"). If the Limit Counter exceeds the Contract Limit established by the Market Maker, the System will automatically remove the Market Maker's quotes as described in Section 15(a)(3)(B)(iii). Market Makers may submit a request (i) to decrement their Limit Counter by a specified number of contracts, or (ii) to fully decrement their Limit Counter to zero, including to re-enter the System as described in Section 15(a)(3)(B)(v). For Market Makers that elect to utilize the Contract Limit, the Percentage Threshold, Volume Threshold, Delta Threshold, and Vega Threshold will not be available for use on the Market Maker's badge.

As described above, once the Limit Counter exceeds the Contract Limit set by the Market Maker under the proposed Active Quote Protection, the System would automatically remove quotes in the same manner as currently specified for a Purge Event in proposed subparagraph (B)(iii) of Options 3, Section 15(a)(3). Accordingly, the Exchange proposes to add Active Quote Protection's Contract Limit throughout this Rule. Specifically, proposed

subparagraph (B)(iii) will provide that the System will automatically remove quotes in all series of an options class when the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or Contract Limit has been exceeded. The System will send a Purge Notification Message to the Market Maker for all affected series when the above thresholds have been exceeded. Proposed subparagraph (B)(iii)(a) will provide that the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, and Contract Limit are considered independently of each other.

Further, as discussed above, any marketable orders or quotes that are executable against a Market Maker's quotes that are received¹⁵ prior to the time the applicable Threshold or Contract Limit is triggered will be automatically executed up to the size of the Market Maker's quote, even if such execution would cause the Market Maker to exceed any of their pre-set risk limits with respect to any of the foregoing risk parameters. The Exchange notes that the current related Rule in sub-paragraph (B)(ii)(b)(3) only mentions that quotes will execute up to the Market Maker's size, and is silent on marketable orders. In addition, the current Rule does not specify the time of receipt of such marketable interest that is executable against the size of the Market Maker's quote. As such, the Exchange proposes to add this specificity in proposed sub-paragraph (B)(iii)(b)(3) to better describe how the System operates today for Automated Quotation Adjustments and how the System will operate for proposed Active Quote Protection. In particular, subparagraph (B)(iii)(b)(3) will provide:

The System will execute any marketable orders or quotes that are executable against a Market Maker's quote and received prior to the time the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or Contract Limit is triggered up to the size of the Market Maker's quote, even if such execution results in executions in excess of the Market Maker's applicable Threshold or Contract Limit with respect to any parameter.

In addition, when the System removes quotes as a result of exceeding the Contract Limit under Active Quote Protection, the Exchange proposes to require the Market Maker to submit a request to re-enter the System. This request will be the same type of message as the request described in proposed subparagraph (B)(ii) where the Market Maker must request to fully decrement their Limit Counter back to zero in order to re-enter the System. This requirement will be added in proposed subparagraph

(B)(v) of Options 3, Section 15(a)(3), and will be similar to how the existing quote purge mechanism works for the Thresholds today, except the Market Maker needs to send a separate message (*i.e.*, a re-entry indicator) to re-enter the System when their quotes are purged as a result of exceeding any of the existing Thresholds.

Similar to how default parameters are currently applied for each of the existing Thresholds described above, the Exchange proposes to apply a default parameter for the Active Quote Protection Contract Limit (which would be announced to Members) if the Market Maker opting to use Active Quote Protection does not provide a Contract Limit at the outset.¹⁶ Accordingly, proposed subparagraph (B)(vi) will provide that if a Market Maker does not provide a parameter for each of the automated quotation removal protections described in (B)(i)(a)–(d) and (B)(ii) above, the Exchange will apply default parameters, which are announced to Members.

The Exchange also proposes that the new Active Quote Protection would leverage the existing market-wide speed bump ("MWSB") functionality currently set forth in Options 3, Section 15(a)(3)(B)(vi) (renumbered as Section 15(a)(3)(B)(vii) under this proposal). Today, MWSB is a risk protection offered alongside the current Automated Quotation Adjustments and triggers when, during a time period established by the Market Maker, the total number of Purge Events exceeds a market-wide parameter provided to the Exchange by the Market Maker. When MWSB is triggered, the Exchange automatically purges the Market Maker's quotes in all classes, and the Market Maker must request re-entry to the System by contacting the Exchange's Operations Department. Today, MWSB is meant to provide Market Makers with protection from the risk of multiple executions across multiple series of an option or across multiple options. This risk protection recognizes that risk to Market Makers is not limited to a single series in an option or even to all series in an option; Market Makers that quote in multiple series of multiple options have significant exposure, requiring them to offset or hedge their overall positions. Market Makers are required to continuously quote in assigned options, and quoting across many series in an option or multiple options creates the possibility of executions that can create large, unintended principal positions that could expose Market Makers to

¹³ A "badge" shall mean an account number, which may contain letters and/or numbers, assigned to Market Makers. A Market Maker account may be associated with multiple badges. See Options 1, Section 1(a)(5).

¹⁴ As a result, the Exchange will also renumber existing subparagraphs (B)(ii)–(vi) as proposed subparagraphs (B)(iii)–(vii).

¹⁵ See *supra* note 8.

¹⁶ The Exchange will initially set the default Contract Limit at 100 contracts.

unnecessary risk. MWSB is therefore intended to assist Market Makers in managing their market risk by tracking the number of Purge Events relative to the market-wide parameter set by the Market Maker. The Exchange believes that tracking the number of Active Quote Protection Purge Events for a Market Maker against its MWSB market-wide parameter would be similarly useful for managing market risk.

To that end, the Exchange proposes to update MWSB to add purge events under Active Quote Protection to the MWSB counter such that Active Quote Protection purge events and Purge Events under the current Automated Quotation Adjustments will be aggregated together as counting toward the specified market-wide parameter. Accordingly, the Exchange proposes to add references to the Active Quote Protection rule (*i.e.*, proposed subparagraph (B)(ii) of Options 3, Section 15(a)(3)) throughout the MWSB rule in proposed subparagraph (B)(vii), specifically:

In addition to the automated quotation removal protections described in (B)(i)(a)–(d) and (B)(ii) above, a Market Maker must provide a market wide parameter by which the Exchange will automatically remove a Market Maker's quotes in all classes when, during a time period established by the Market Maker, the total number of quote removal events specified in (B)(i)(a)–(d) and (B)(ii) exceeds the market wide parameter provided to the Exchange by the Market Maker. Market Makers must request the Exchange enable re-entry by contacting the Exchange's Operations Department.

The following example illustrates the proposed behavior of the Active Quote Protection risk protection:

Market Maker AAPL

Contract Limit: 100.

- Market Maker trades a transaction for 10 contracts in AAPL; Limit Counter goes from 0 to 10.

- Market Maker sends a request to decrement its Limit Counter in AAPL for 10 contracts; Limit Counter goes from 10 to 0.

- Market Maker trades a transaction for 20 contracts in AAPL; Limit Counter goes from 0 to 20.

- Market Maker trades a transaction for 50 contracts in AAPL; Limit Counter goes from 20 to 70.

- Market Maker sends a request to decrement its Limit Counter in AAPL for 20 contracts; Limit Counter goes from 70 to 50.

- Market Maker trades a transaction for 60 contracts in AAPL; Limit Counter goes from 50 to 110 and all Market Maker quotes in AAPL are automatically purged after the execution because the

Limit Counter exceeded the Market Maker's Contract Limit of 100 executed contracts.

- At this point, the Market Maker must send a request to fully decrement its Limit Counter in AAPL back to zero in order to begin quoting again.

The following example illustrates how MWSB will work with the proposed Active Quote Protection functionality:

- Assume Market Maker in AAPL and SPY has Automated Quotation Adjustments set for AAPL and Active QP set for SPY.

- Market Maker sets its MWSB market-wide parameter so that it is triggered at 25 purge events within a 20 second time period.

- On a given trading day, if an Active Quote Protection Purge Event is triggered 15 times in SPY and an Automated Quotation Adjustment Purge Event is triggered 10 times in AAPL, all within 20 seconds, then the Exchange will automatically remove all of the Market Maker's quotes AAPL and SPY.

Technical Amendments

The Exchange proposes a few technical, non-substantive amendments in Options 3, Section 15(a)(3)(B). With the addition of the new Active Quote Protection rule in proposed subparagraph (B)(ii), the Exchange proposes to renumber existing subparagraphs (B)(ii)–(vi) as proposed subparagraphs (B)(iii)–(vii) and make related changes to update existing cross-cites within Section 15(a)(3)(B). The Exchange also proposes to title subparagraph (B)(i) as “Rapid Fire” and subparagraph (B)(vii) as “Market-Wide Speed Bump” to more clearly identify which rules apply to which risk protections.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,¹⁷ in general, and furthers the objectives of section 6(b)(5) of the Act,¹⁸ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed Active Quote Protection risk protection is consistent with the Act because it will enhance the risk protection tools available to Market Makers by introducing a new method of establishing and monitoring for risk

parameters that will be offered as an alternative to existing Rapid Fire risk parameters, thereby supporting a Market Maker's ability to manage their risk on the Exchange, and also providing them with flexibility to use additional tools to manage risk. As noted above, while the passive (Rapid Fire) and active (Active QP) risk counter functionality will be mutually exclusive on each badge, Market Makers will still be able to use both to cover their activity on the Exchange by getting multiple badges and setting each risk counter by badge. The Exchange believes that offering more risk management tools to Market Makers would mitigate their exposure to excessive risk. The Exchange further believes that having the new Active Quote Protection functionality leverage the existing MWSB functionality will similarly support a Market Maker's ability to manage their risk on the Exchange by including Active Quote Protection purge events to the MWSB counter. As noted above, the risk to Market Makers is not limited to a single series in an option or even multiple series in an option as Market Makers that quote in multiple series of multiple options have significant exposure, requiring them to offset or hedge their overall positions. Market Makers are required to continuously quote in assigned options, and quoting across many series in an option or multiple options creates the possibility of executions that can create large, unintended principal positions that could expose Market Makers to unnecessary risk. Today, MWSB is designed to assist Market Makers in managing their market risk by tracking the number of Purge Events relative to the market-wide parameter set by the Market Maker. The Exchange therefore believes that tracking the number of Active Quote Protection purge events for a Market Maker against its MWSB market-wide parameter would be similarly useful for managing market risk so that they can provide deep and liquid markets to the benefit of all investors. Ultimately, the Exchange believes that providing Market Makers with additional tools in the manner described above to manage their risk parameters serves to perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest because Market Makers will be better able to manage risks with these tools.

With regard to the impact of this proposal on system capacity, the Exchange notes that it has analyzed its capacity and represents that it and the

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

Options Price Reporting Authority have the necessary systems capacity to handle any potential additional traffic associated with the proposed rule change. The Exchange believes that its members will not have a capacity issue as a result of this proposal.

The Exchange further represents that its proposal will continue to operate consistently with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS. Specifically, any marketable interest that is executable against a Market Maker's quotes that are received¹⁹ by the Exchange prior to the time this functionality is triggered will be automatically executed at the price up to the Market Maker's size, regardless of whether such execution results in executions in excess of the Market Maker's pre-set Contract Limit.²⁰ As discussed above, this is also in line with how current Rapid Fire operates today. The Exchange believes that the proposed changes in proposed subparagraph (B)(iii)(b) to specify that this Rule will apply to marketable orders and quotes (currently silent on marketable orders), and to specify the time of receipt of such marketable interest that is executable against the size of the Market Maker's quote, will promote clarity in how the System currently operates for Rapid Fire and will operate for Active Quote Protection.

As noted above, the proposed Active Quote Protection functionality is similar to existing active risk counter functionality on another options exchange, which currently allows users to actively decrement the risk counter by a specified amount at any time, rather than waiting until a risk limit is reached or the user otherwise sends a specific instruction to the exchange to completely reset the counting program.²¹

Technical Amendments

The Exchange believes that the technical amendments in Options 3, Section 15(a)(3)(B) described above are consistent with the Act because they will promote clarity in the rules and make the Rulebook easier to navigate for market participants by updating rule numbering and existing cross-cites as described above. Furthermore, the Exchange also believes that adding the defined terms for Rapid Fire and MWSB in the rule text will promote clarity so that Members can more easily locate the relevant functionalities in the Rulebook.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed Active Quote Protection functionality will impose any undue burden on intra-market competition as it is aimed at mitigating exposure to excessive risk when trading on the Exchange. While the Exchange will offer the proposed functionality to Market Makers only, the proposed risk protection is intended to provide Market Makers with an additional tool to manage their risk parameters in a manner they deem appropriate. As such, the Exchange believes that the proposed functionality may facilitate Market Makers' provision of liquidity on the Exchange, thereby benefitting all market participants through additional execution opportunities at potentially improved prices.

The Exchange also believes that its Active Quote Protection proposal does not impose an undue burden on inter-market competition as the proposed risk protection is similar to an existing risk protection on MEMX²² as described above, and any options market could adopt similar rules.

Lastly, the Exchange does not believe that the proposed technical amendments in Options 3, Section 15(a)(3)(B) will impose an undue burden on competition as these are non-substantive changes to promote clarity in the rules and make the Rulebook easier to navigate for 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 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)(iii) of the Act²³ and

subparagraph (f)(6) of Rule 19b-4 thereunder.²⁴

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MRX-2023-14 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-MRX-2023-14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

²⁴ 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.

¹⁹ See *supra* note 8.

²⁰ See proposed subparagraph (B)(iii)(b) of Options 3, Section 15(a)(3).

²¹ See *supra* note 4.

²² See *supra* note 4.

²³ 15 U.S.C. 78s(b)(3)(A)(iii).

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MRX-2023-14 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-18306 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98183; File No. SR-CboeBZX-2023-060]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Eliminate Reference to the ETF Implied Liquidity Feed and Corresponding Fees

August 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 8, 2023, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) 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 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

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX” or “BZX Equities”) proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform (“BZX Equities”) to eliminate reference to the ETF Implied Liquidity Feed and corresponding fees, effective August 8, 2023.

The Exchange proposes to amend the Market Data section of its fee schedule to eliminate reference to, and corresponding fees for, a market data product called the ETF Implied Liquidity Feed.³ The ETF Implied Liquidity feed is an optional data feed that provides the Exchange’s proprietary calculation of the implied liquidity and the aggregate best bid and offer (“BBO”) of all displayed orders on the Exchange and its affiliated exchanges⁴ for all standard, non-leveraged U.S. equity Exchange Traded Funds (“ETFs”) traded on the System.⁵ An ETF’s implied liquidity disseminated via the feed consists of the ETF’s implied BBO (including the implied size) calculated via a proprietary methodology based on

the national best bid and offer (“NBBO”), the number of shares of securities underlying one creation unit of the ETF, and the estimated cash included in one creation unit of the ETF. The Exchange disseminates the aggregate BBO through the ETF Implied Liquidity feed no earlier than it provides its BBO to the processors under the CTA Plan or the Nasdaq/UTP Plan. The Exchange currently assesses (i) Distribution Fees for both Internal and External Distributors⁶ (ii) Usage Fees for both Professional⁷ and Non-Professional⁸ Users; and a (iii) Data Consolidation fee. Specifically, the Exchange assesses (i) Internal Distributors a monthly fee of \$1,500 and External Distributors a monthly fee of \$5,000; (ii) Professional Users a monthly fee of \$0.25 (if receiving internally) or \$25 (if receiving externally); (iii) Non-Professional Users a monthly fee of \$1.00 (whether receiving internally or externally); and a monthly Data Consolidation Fee of \$500. The Fee Schedule currently provides that Distributors of the Cboe One Feed (as described in Rule 11.22(j)) may also receive upon request access to the ETF Implied Liquidity Feed without incurring an additional Logical Port fee for the ETF Implied Liquidity Feed. It also provides that External Distributors of the Cboe One Feed will also receive

⁶ A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.” An “Internal Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor’s own entity.” An “External Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.”

⁷ A Professional User of an Exchange Market Data product is any User other than a Non-Professional User.

⁸ A “Non-Professional User” of an Exchange Market Data product is a natural person or qualifying trust that uses Data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) registered or qualified in any capacity with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an “investment adviser” as that term is defined in section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States.

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The ETF Implied Liquidity Feed was adopted in 2017. See Securities Exchange Act Release No. 80580 (May 3, 2017), 82 FR 21585 (May 9, 2017) (SR-BatsBZX-2017-25) and Securities Exchange Act Release No. 80772 (May 25, 2017), 82 FR 25389 (June 1, 2017) (SR-BatsBZX-2017-036).

⁴ The Exchange’s affiliates are Cboe EDGA Exchange, Inc., (“EDGA”), Cboe EDGX Exchange, Inc. (“EDGX”), and Cboe BYX Exchange, Inc. (“BYX”) (“collectively, the “Bats Exchanges”).

⁵ The securities underlying each of the U.S. equity ETFs included in the proposed feed must be considered NMS Securities as defined under Rule 600(b)(46) of Regulation NMS. 17 CFR 242.600(b)(46)

upon request access to the ETF Implied Liquidity Feed for external distribution only without incurring an additional Distributor fee or, if an External Distributor, the Data Consolidation fee for the ETF Implied Liquidity Feed.

Currently there are no market participants that are taking the ETF Implied Liquidity feed. As such, the Exchange no longer wishes to maintain or offer this product and therefore proposes to decommission the ETF Implied Liquidity feed and delete the corresponding reference to the product from its Fee Schedule.⁹

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.¹⁰ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹¹ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in 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. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹² requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as section 6(b)(4)¹³ as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

In particular, the Exchange believes that the proposal to decommission the ETF Implied Liquidity feed and remove reference to the feed and corresponding fees in the Fee Schedule is appropriate given the non-usage of the product among market participants. Further, the ETF Implied Liquidity feed is optional, and its use is not a prerequisite for trading on the Exchange. The Exchange

also notes that is not required to maintain or offer any one proprietary market data product, including the ETF Implied Liquidity feed. The Exchange also believes that the proposed rule change is fair and equitable and is not designed to permit unfair discrimination as it applies uniformly to all Members (*i.e.*, the product will no longer be available for any Member). Eliminating reference to this feed in the Exchange's Fee Schedule will promote clarity in the rules as to what data products may or may not be available. The Exchange has also provided notice of such termination.¹⁴

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The ETF Implied Liquidity feed is an optional data feed offered by the Exchange, it is not a prerequisite to trading on the Exchange, and the Exchange is not required to offer or maintain such feed.

The Exchange believes that the proposed deletion does impose any intramarket competition as it applies to all Members (*i.e.* the product will no longer be available to any Member). The Exchange believes that the proposed rule change also does not impose any undue burden on intermarket competition. The ETF Implied Liquidity feed is an optional data product offered by the Exchange and market participants are not required to subscribe to it and the Exchange is not required to offer it. Moreover, the proposed change is not being submitted for competitive reasons, but rather to eliminate a data product that is not being actively used by market participants today.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)

of the Act¹⁵ and paragraph (f) of Rule 19b-4¹⁶ thereunder. 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 will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ChoeBZX-2023-060 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-ChoeBZX-2023-060. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

⁹ The Exchange intends to also submit a corresponding rule filing to eliminate reference to this feed in the Exchange's Rulebook under Exchange Rule 11.22(n). See SR-ChoeBZX-2023-059.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² *Id.*

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ See Exchange Notice C2023073104, "Choe Equities Fee Schedule Updates Effective August 1, 2023" issued on July 31, 2023 available at https://cdn.cboe.com/resources/fee_schedule/2023/Choe-Equities-Exchanges-Fee-Schedule-Updates-Effective-August-1-2023.pdf.

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f).

copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-060 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-18305 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98187; File No. SR-CBOE-2023-040]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Relating to the Select Customer Options Reduction Program, LiveVol Fees, and Routing Fee Codes

August 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 11, 2023, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) 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 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

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at

the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule.³

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share.⁴ Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products in response to fee changes. Accordingly, competitive forces constrain the Exchange’s transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like

other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

Select Customer Options Reduction Program Changes

The Exchange first proposes to amend the Select Customer Options Reduction program (“SCORE”). By way of background, SCORE is a discount program for Retail, Non-FLEX Customer (“C” origin code) volume in the following options classes: SPX (including SPXW), VIX, RUT, MXEA, & MXEF (“Qualifying Classes”). The SCORE program is available to any Trading Permit Holder (“TPH”) Originating Clearing Firm or non-TPH Originating Clearing Firm that sign up for the program.⁵

Under the program, to determine the Discount Tier, an Originating Firm’s Retail volume in the Qualifying Classes will be divided by total Retail volume in the Qualifying Classes executed on the Exchange. The program then provides a discount per retail contract, based on the determined Discount Tier thereunder. The program sets forth four discount tiers, with applicable discounts ranging from \$0.00 to \$0.14 per retail contract. Under the current program, and as set forth in Footnote 48 to the Fees Schedule, “Retail” volume is defined as Customer order (“C” capacity code) for which the original order size (in the case of a simple order) or largest leg size (in the case of a complex order) is 100 contracts or less. The Exchange proposes amending Footnote 48 to the Fees Schedule, to define “Retail” volume as Customer order (“C” capacity code) for which the original order size (in the case of a simple order) or the largest leg size (in the case of a complex order) is 20 contracts or less.

Additionally, the Exchange proposes to remove outdated language from Footnote 48 related to the SCORE program. Effective February 1, 2023, the Exchange amended the program by eliminating the Qualifying Tiers construct.⁶ As amended, SCORE utilizes only one measure for participation and discount (*i.e.*, the Discount Tiers). As such, the Exchange proposes to remove the outdated language related to the

⁵ For this program, an “Originating Clearing Firm” is defined as either (a) the executing clearing Options Clearing Corporation (“OCC”) number on any transaction which does not also include a Clearing Member Trading Agreement (“CMTA”) OCC clearing number or (b) the CMTA in the case of any transaction which does include a CMTA OCC clearing number.

⁶ See Securities Exchange Act Release No. 96856 (February 9, 2023), 88 FR 9938 (February 15, 2023) (SR-CBOE-2023-011).

³ The Exchange initially filed the proposed fee changes on August 1, 2023 (SR-CBOE-2023-037). On August 2, 2023, the Exchange withdrew that filing and submitted SR-CBOE-2023-039. On August 11, 2023 the Exchange withdrew SR-CBOE-2023-039 and submitted this proposal.

⁴ See Cboe Global Markets U.S. Options Monthly Market Volume Summary (July 26, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

¹⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

determination of an Originating Firm's Qualifying Tier.

Livevol Fee Changes

The Exchange proposes to amend certain fees related to its provision of Open-Close Data. By way of background, the Exchange currently offers End-of-Day ("EOD") and Intraday Open-Close Data (collectively, "Open-Close Data"). EOD Open-Close Data is an end-of-day volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), price, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Open-Close Data is proprietary Cboe Options trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed.

The Exchange also offers Intraday Open-Close Data, which provides similar information to that of Open-Close Data but is produced and updated every 10 minutes during the trading day. Data is captured in "snapshots" taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period.⁷ The Intraday Open-Close Data provides a volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), and transaction type (opening or closing). The customer and professional customer volume are further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Intraday Open-Close Data is also proprietary Cboe Options trade data and does not include trade data from any other exchange.

Cboe LiveVol, LLC ("LiveVol"), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Open-Close Data available for purchase to TPHs and non-TPHs on the LiveVol DataShop website (data.cboe.com). Customers may currently purchase

Open-Close Data on a subscription basis (monthly or annually) or by ad hoc request for a specified month (e.g., request for Intraday Open-Close Data for month of August 2023).

Open-Close Data is subject to direct competition from similar end-of-day and intraday options trading summaries offered by several other options exchanges.⁸ All of these exchanges offer essentially the same end-of-day and intraday options trading summary information.

End-of-Day Open-Close Data

Currently, End-of-Day Open-Close Data is available to purchase and download in three formats. Customers may (1) download data on a per Cboe Security basis, (2) download data for all Cboe Securities (equities, indexes and ETFs), and/or (3) download daily updates for all Cboe Securities (equities, indexes and ETFs). Cboe is proposing to eliminate the End-of-Day Open-Close Data offering to download data on a per Cboe Security basis. The End-of-Day Open-Close Data offerings will remain available on an all Cboe Securities basis.

The Exchange notes that removing the offering to download data on a per Cboe Security basis and offering such data for all Cboe Securities only is consistent with the offering of Open-Close Data at the Exchange's affiliates,⁹ as well as another exchange with a similar data product.¹⁰ The Exchange further notes that the purchase of Open-Close historical data is discretionary and not compulsory.

The Exchange also proposes a technical amendment to its Livevol fees, correcting a spelling error of "Intraday" to "Intraday."

Options Institute Research Grant Program 2023

Through its educational division, the Options Institute, the Exchange has established the Options Institute Research Grant Program 2023 ("Grant Program"). Under the Grant Program, selected grant recipients will conduct a research project in an eligible topic(s), including Derivatives Products and Performance, Market Performance, Operations and Risk Management, and Decision Theory. The Exchange seeks to provide historical data sets to selected

grant recipients for use as part of the research project. As such, the Exchange proposes to amend its Fee Schedule to add Footnote 51, applicable to the Livevol Fees table of the Fee Schedule, stating that fees for Open-Close Data will be waived for grant recipients of the Grant Program.

In order to qualify for the Grant Program, an applicant must be a faculty member or student of a qualifying, accredited educational institution that will use the data solely for their completion of the research project (*i.e.*, academic use). The data must be used solely for the purposes of the research project, and any commercial or profit-seeking usage is excluded. Researchers interested in qualifying for the Grant Program are required to submit an application, which describes the proposed research project. The Options Institute has the discretion to review such applications and select grant recipients.

The Exchange believes that researchers at academic institutions provide a valuable service for the Exchange in studying and promoting the options market. Though academic institutions and researchers have a need for granular options data sets, they do not trade upon the data for which they subscribe. The Exchange believes the waiver of these Open-Close Data fees for any grant recipient under the Grant Program will encourage and promote research directed at increasing understanding and advancement of derivatives usage and financial exchange marketplace structures.

The Exchange notes other exchanges offer academic discounts or credit for similar data feeds.¹¹ The Exchange recognizes the high value of academic research and educational instruction and publications, and believes that the proposed waiver of historical Open-Close Data fees will encourage academic research of the options industry, which will serve to benefit all market

¹¹ See e.g., Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Market Data. See also Securities Exchange Act Release No. 67955 (October 1, 2012) 77 FR 61037 (October 5, 2012) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Reduced Fees for Historical ISE Open/Close Trade Profile Intraday Market Data Offering) (SR-ISE-2012-76); Securities and Exchange Act Release 34-60654 (September 11, 2009) 74 FR 47848 (September 17, 2009) (Notice of Filing of Proposed Rule Change Relating to Historical ISE Open/Close Trade Profile Fees) (SR-ISE-2009-64); Securities Exchange Act Release No. 53770 (May 8, 2006) 71 FR 27762 (May 12, 2006) (Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Establish an Annual Administrative Fee for Market Data Distributors That Are Recipients of Nasdaq Proprietary Data Products) (SR-NASD-2006-030).

⁷ For example, subscribers to the intraday product will receive the first calculation of intraday data by approximately 9:42 a.m. ET, which represents data captured from 9:30 a.m. to 9:40 a.m. Subscribers will receive the next update at 9:52 a.m., representing the data previously provided together with data captured from 9:40 a.m. through 9:50 a.m., and so forth. Each update will represent the aggregate data captured from the current "snapshot" and all previous "snapshots."

⁸ These substitute products are: Nasdaq PHLX Options Trade Outline, Nasdaq Options Trade Outline, ISE Trade Profile, GEMX Trade Profile data; open-close data from C2, BZX, and EDGX; and Open Close Reports from MIA Options, Pearl, and Emerald.

⁹ See e.g., Cboe EDGX U.S. Options Exchange Fee Schedule, Cboe LiveVol, LLC Market Data Fees.

¹⁰ See Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

participants while also opening up a new potential user base among students.

Routing Fee Codes Changes

Finally, the Exchange proposes to modify fees associated with certain routing fee codes. The Fees Schedule currently lists fee codes and their corresponding transaction fee for routed Customer orders to other options exchanges specifically in Exchange Traded Funds (“ETF”) and equity options, and for non-Customer orders routed in Penny and Non-Penny options classes.

The Exchange notes that its current approach to routing fees is to set forth in a simple manner certain sub-categories of fees that approximate the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as a flat \$0.15 assessment that covers costs to the Exchange for routing (i.e., clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, “Routing Costs”). The Exchange then monitors the fees charged as compared to the costs of its routing services and adjusts its routing fees and/or sub-categories to ensure that the Exchange’s fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. The Exchange notes that other options exchanges currently assess routing fees in a similar manner as the Exchange’s current approach to assessing approximate routing fees.¹²

The Exchange assesses fees in connection with orders routed away to various exchanges. Currently, under the Routing Fees table of the Fee Schedule, fee codes RD, RF, RI, TD, TE, TF, TG, TH, and TI are appended to certain Customer orders in ETF and Equity options, as follows:

- fee code RD is appended to Customer orders in ETF/Equity options routed to NYSE American (“AMEX”), BOX Options Exchange (“BOX”), Nasdaq BX Options (“BX”), Cboe EDGX Exchange, Inc. (“EDGX”), ISE Mercury, LLC (“MERC”), MIAX Options Exchange (“MIAX”) or Nasdaq PHLX LLC (“PHLX”) (excluding orders in SPY options), and assesses a charge of \$0.25 per contract;

- fee code RF is appended to Customer orders in ETF/Equity, Penny options routed to NYSE Arca, Inc. (“ARCA”), Cboe BZX Exchange, Inc. (“BZX”), Cboe C2 Exchange, Inc. (“C2”), Nasdaq ISE (“ISE”), ISE Gemini, LLC

(“GMNI”), MIAX Emerald Exchange (“EMLD”), MIAX Pearl Exchange (“PERL”), Nasdaq Options Market LLC (“NOM”), or PHLX (for orders in SPY options only) and assesses a charge of \$0.75 per contract;

- fee code RI is appended to Customer orders in ETF/Equity, Non-Penny options routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL or NOMX, and assesses a charge of \$1.25 per contract.

- fee code TD is appended to Customer orders in ETF options originating on an Exchange-sponsored terminal for greater than or equal to 100 contracts routed to AMEX, BOX, BX, EDGX, MERC, MIAX, or PHLX, and assesses a charge of \$0.18 per contract;

- fee code TE is appended to Customer orders in ETF/Equity options originating on an Exchange-sponsored terminal for less than 100 contracts routed to AMEX, BOX, BX, EDGX, MERC, MIAX, PHLX, and assesses no charge per contract;

- fee code TF is appended to Customer orders in ETF, Penny options originating on an Exchange-sponsored terminal for greater than or equal to 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses a charge of \$0.18 per contract;

- fee code TG is appended to Customer orders in ETF, Non-Penny options originating on an Exchange-sponsored terminal for greater than or equal to 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses \$0.18 per contract;

- fee code TH is appended to Customer orders in ETF/Equity, Penny options originating on an Exchange-sponsored terminal for less than 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses no charge per contract; and

- fee code TI is appended to Customer orders in ETF/Equity, Non-Penny options originating on an Exchange-sponsored terminal for less than 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses no charge per contract.

The Exchange proposes to amend fee codes RD, TD, and TE to exclude applicable Customer orders routed to ISE Mercury, LLC (MERC) and to amend fee codes RF, RI, TF, TG, TH, and TI to add applicable Customer orders routed to MERC. The Exchange further proposes to amend fee codes RF, RI, TF, TG, TH, and TI to add applicable Customer orders routed to MEMX LLC (“MEMX”), in anticipation of the launch of the new options exchange. The charges assessed per contract for each

fee code remain the same under the proposed rule change.

The proposed changes result in an assessment of fees that, following fee changes by an away options exchanges and in anticipation of the launch of another options exchange, is more in line with the Exchange’s current approach to routing fees, that is, in a manner that approximates the cost of routing Customer orders to other away options exchanges, based on the general cost of transaction fees assessed by the sub-category of away options exchanges for such orders (as well as the Exchange’s Routing Costs).¹³ The Exchange notes that routing through the Exchange is optional and that TPHs will continue to be able to choose where to route their Customer orders in ETF and equity options.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.¹⁴ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in 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. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4) of the Act,¹⁷ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

First, the Exchange believes the proposal to amend the SCORE program

¹³ See Securities Exchange Act Release No. 97800 (June 26, 2023), 88 FR 42409 (June 30, 2023) (SR-MRX-2023-11).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ *Id.*

¹⁷ 15 U.S.C. 78f(b)(4).

¹² See e.g., MIAX Options Exchange Fee Schedule, Section 1(c), “Fees for Customer Orders Routed to Another Options Exchange.”

to define “Retail” volume as Customer order (“C” capacity code) for which the original order size (in the case of a simple order) or the largest leg size (in the case of a complex order) is 20 contracts or less (changing from 100) is reasonable as Members are still eligible to receive discounts under the program, albeit at a smaller scale. Moreover, the Exchange is not required to maintain this program nor provide such discounts as are provided under the program. Further, the Exchange believes the program remains equitable and reasonable, as the proposed change to the number of contracts in the “Retail” definition does not substantively change the program, but rather adjusts a considered metric of the program. The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to any TPH Originating Clearing Firm or non-TPH Originating Firm who participates in the program. The Exchange believes SCORE, currently and as amended, continues to provide an incremental incentive for Originating Firms to strive for the highest tier level, which provides increasingly higher discounts. As such, the changes are designed to encourage increased Retail volume in the Qualifying Classes, which provides increased volume and greater trading opportunities for all market participants. Finally, the Exchange believes eliminating outdated language from Footnote 48 related to the SCORE program is reasonable as the Exchange no longer utilizes Qualifying Tiers under the program. The proposed deletions reduce potential confusion and maintain clarity in the Fees Schedule.

The Exchange also believes the proposed changes to amend its End-of-Day Open-Close Data offering to remove the offering to download data on a per Cboe Security basis and to offer such data on an all Cboe Securities basis only are reasonable. In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes the proposed change will continue to broaden the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. Open-Close Data is designed to help investors understand underlying market

trends to improve the quality of investment decisions. Indeed, subscribers to the data will still be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes Open-Close Data continues to provide a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer the same type of data content through end-of-day or intraday reports.¹⁸

The Exchange also operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 16% of the market share.¹⁹ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”²⁰ Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange’s data product as more or less attractive than the competition they can and do switch between similar products. The Exchange notes the proposed change merely aligns the Exchange’s offering of End-of-Day Open-Close Data with the data products of the Exchange’s affiliates,²¹ as well as another exchange with a similar data product, in that such offerings do not include the ability to purchase the End-of-Day Open-Close Data on a per securities basis.²² The Exchange believes that the proposed changes to the Exchange’s End-of-Day Open-Close Data offering are equitable and not

unfairly discriminatory because the change to the offering applies to all current and potential subscribers of the product uniformly, in that no subscriber will be able to purchase the End-of-Day Open-Close Data on a per Cboe Securities basis. Further, End-of-Day the Open-Close Data will continue to be available for purchase to all subscribers on an all Cboe Securities basis.

The Exchange also believes that the waiver of Open-Close data fees for recipients of the Grant Program is reasonable because such data is utilized for a strict, limited purpose under the terms of the Grant Program and selected grant recipients are not able to monetize access to the data as they do not trade on the data set. The Exchange believes the waiver of fees for grant recipients will promote research and studies of the options industry to the benefit of all market participants. The Exchange believes that the proposed waiver is equitable and not unfairly discriminatory because it will apply equally to all selected grant recipients and in exchange, the Exchange will be granted certain usage rights with respect to the recipients’ final research papers. Further, as noted above, other exchanges offer academic discounts or credit for similar data feeds.²³

The Exchange also believes the proposed rule change to amend fee codes RD, RF, RI, TD, TE, TF, TG, TH, and TI to account for MERC’s current assessment of fees for Customer orders and MEMX’s expected assessment of fees for Customer orders is reasonable because it is reasonably designed to assess routing fees in line with the Exchange’s current approach to routing fees. That is, the proposed rule change is intended to include Customer orders in ETF and equity options routed to MERC and MEMX in the most appropriate sub-category of fees that approximates the cost of routing to a group of away options exchanges based on the cost of transaction fees assessed by each venue as well as Routing Costs to the Exchange. As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange notes that routing through the Exchange is optional and that TPHs will continue to be able to choose where to route their Customer orders in ETF and equity options in the same sub-category group of away exchanges as they currently may choose to route. The proposed rule

¹⁸ See *supra* note 8.

¹⁹ See *supra* note 4.

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

²¹ See *supra* note 9.

²² See *supra* note 10.

²³ See *supra* note 11.

change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. The Exchange further notes that other options exchanges currently approximate routing fees in a similar manner as the Exchange's current approach.²⁴ The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all Members' applicable Customer orders in ETF and equity options routed to MERC and MEMX will be automatically and uniformly assessed the applicable routing charges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed changes to the SCORE program will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply to all registered Originating Firms uniformly, in that the updated definition of "Retail" volume will, for purposes of calculating discounts under the program, be applied to all Originating Firms.

Further, the Exchange does not believe that the proposed changes to its offering of End-of-Day Open-Close Data will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the proposed amendments align the Exchange's offering of End-of-Day Open-Close Data with the data products of the Exchange's affiliates,²⁵ as well as another exchange with a similar data product.²⁶ The changes to the offering apply to all current and potential subscribers of the product uniformly, in that no subscriber will be able to purchase the End-of-Day Open-Close Data on a per Cboe Securities basis. Further, End-of-Day the Open-Close Data will continue to be available for purchase to all subscribers on an all Cboe Securities basis.

Additionally, the Exchange does not believe that the proposed waiver of Open-Close data fees for recipients of the Grant Program will impose any burden on intramarket competition that

is not necessary or appropriate in furtherance of the purposes of the Act. All qualifying researchers are eligible to apply to the Grant Program, and the waiver of Open-Close data fees for recipients of the Grant Program will apply equally to all selected grant recipients. In exchange, the Exchange will be granted certain usage rights with respect to the recipients' final research papers. Further, while the waiver applies only to grant recipients, academic institutions' research and publications as a result of access to historical market data benefits all market participants.

Finally, the Exchange does not believe the proposed rule change to amend fee codes RD, RF, RI, TD, TE, TF, TG, TH, and TI will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. All Members' Customer orders routing to MERC and currently yielding fee code RD, TD, or TE will yield fee code RF, RI, RF, TG, TH, or TI (depending on the order) and will automatically and uniformly be assessed the current fees already in place for such routed orders, as applicable. Likewise, all Members' Customer orders routed to MEMX will automatically yield fee code RF, RI, RF, TG, TH, or TI (depending on the order) and uniformly be assessed the corresponding fee. The Exchange notes that other options exchange approximate routing costs in a similar manner as the Exchange's current approach.²⁷

The Exchange also does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 16% of the market share.²⁸ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference

for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."²⁹ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ."³⁰ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Additionally, the Exchange also does not believe that the proposed rule change to waive Open-Close data fees for recipients of the Grant Program will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as other options exchanges offer academic discounts or credit for similar data feeds.³¹ Offering a discount for qualifying academic institutions that purchase the Exchange's historical Open-Close Data may make that data more attractive to such academic institutions and further increase competition with exchanges that offer similar historical data products.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

²⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

³⁰ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

³¹ See *supra* note 11.

²⁴ See *supra* note 12.

²⁵ See *supra* note 9.

²⁶ See *supra* note 10.

²⁷ See *supra* note 12.

²⁸ See *supra* note 4.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act³² and paragraph (f) of Rule 19b-4³³ thereunder. 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 will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CBOE-2023-040 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-CBOE-2023-040. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CBOE-2023-040 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-18308 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98172; File No. SR-NASDAQ-2023-017]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Modify the Package of Complimentary Services Provided to Certain Eligible Switches and Make Other Changes to IM-5900-7 and IM-5900-7A

August 21, 2023.

On June 21, 2023, The Nasdaq Stock Market LLC ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to modify the package of complimentary services provided to certain Eligible Switches, to update the values of complimentary services provided under Listing Rules IM-5900-7 and IM-5900-7A, and to remove certain obsolete provisions. The proposed rule change was published for comment in the **Federal Register** on July 10, 2023.³

Section 19(b)(2) of the Act⁴ provides that, within 45 days of the publication of notice of the filing of a proposed rule

change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 24, 2023. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,⁵ designates October 8, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NASDAQ-2023-017).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-18298 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98176; File No. SR-EMERALD-2023-19]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

August 21, 2023.

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 August 8, 2023, MIAX Emerald, LLC ("MIAX Emerald" 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

³⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 97833 (July 3, 2023), 88 FR 43637.

⁴ 15 U.S.C. 78s(b)(2).

⁵ *Id.*

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³² 15 U.S.C. 78s(b)(3)(A).

³³ 17 CFR 240.19b-4(f).

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 is filing a proposal to amend the MIAX Emerald Options Exchange Fee Schedule ("Fee Schedule") to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxoptions.com/rule-filings>, at MIAX Emerald's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit ("Gb") ultra-low latency ("ULL") fiber connection for Members³ and non-Members; and (2) adopt a tiered-pricing structure for Limited Service MIAX Emerald Express Interface ("MEI") Ports⁴ available to Market Makers.⁵ The Exchange last increased the fees for both 10Gb ULL fiber connections and Limited Service MEI Ports beginning with a series of

filings on October 1, 2020 (with the final filing made on March 24, 2021).⁶ Prior to that fee change, the Exchange provided Limited Service MEI Ports for \$50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. The Exchange then increased the fee by \$50 to a modest \$100 fee per Limited Service MEI Port and increased the fee for 10Gb ULL fiber connections from \$6,000 to \$10,000 per month.

Also, in that fee change, the Exchange adopted fees for providing five different types of ports for the first time. These ports were FIX Ports, MEI Ports, Clearing Trade Drop Ports, FIX Drop Copy Ports, and Purge Ports.⁷ Again, the Exchange absorbed all costs associated with providing these ports since its launch in March 2019. As explained in that filing, expenditures, as well as research and development ("R&D") in numerous areas resulted in a material increase in expense to the Exchange and were the primary drivers for that proposed fee change. In that filing, the Exchange allocated a total of \$9.3 million in expenses to providing 10Gb ULL fiber connectivity, additional Limited Service MEI Ports, FIX Ports, MEI Ports, Clearing Trade Drop Ports, FIX Drop Copy Ports, and Purge Ports.⁸

Since the time of the 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses.⁹ As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of \$11,361,586 for providing 10Gb ULL connectivity and \$1,779,066 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of

the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services.

Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup ongoing costs and increase in expenses set forth below in the Exchange's cost analysis. The Exchange initially filed this proposal on December 30, 2022 as SR-EMERALD-2022-38. On January 9, 2023, the Exchange withdrew SR-EMERALD-2022-38 and resubmitted this proposal as SR-EMERALD-2023-01 (the "Initial Proposal").¹⁰ On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR-EMERALD-2023-05) (the "Second Proposal").¹¹ On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR-EMERALD-2023-12) (the "Third Proposal").¹² On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised proposal (SR-EMERALD-2023-14) (the "Fourth Proposal").¹³ On August 8,

¹⁰ See Securities Exchange Act Release No. 96628 (January 10, 2023), 88 FR 2651 (January 17, 2023) (SR-EMERALD-2023-01).

¹¹ See Securities Exchange Act Release No. 97079 (March 8, 2023), 88 FR 15764 (March 14, 2023) (SR-EMERALD-2023-05).

¹² See Securities Exchange Act Release No. 97422 (May 2, 2023), 88 FR 29750 (May 8, 2023) (SR-EMERALD-2023-12).

¹³ The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a

³ The term "Member" means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed "members" under the Exchange Act. See Exchange Rule 100.

⁴ The MIAX Emerald Express Interface ("MEI") is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. See the Definitions Section of the Fee Schedule.

⁵ The term "Market Makers" refers to Lead Market Makers ("LMMs"), Primary Lead Market Makers ("PLMMs"), and Registered Market Makers ("RMMs") collectively. See the Definitions Section of the Fee Schedule and Exchange Rule 100. For purposes of Limit Service MEI Ports, Market Makers also include firms that engage in other types of liquidity activity, such as seeking to remove resting liquidity from the Exchange's Book.

⁶ See Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR-EMERALD-2021-11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR-EMERALD-2020-12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR-EMERALD-2020-17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR-EMERALD-2021-02); and 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR-EMERALD-2021-07).

⁷ See *id.* for a description of each of these ports.

⁸ *Id.*

⁹ For example, the New York Stock Exchange, Inc.'s ("NYSE") Secure Financial Transaction Infrastructure ("SFTI") network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

2023, the Exchange withdrew the Fourth Proposal and replaced it with this further revised proposal (SR–EMERALD–2023–19).

The Exchange previously included a cost analysis in the Initial, Second, Third and Fourth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX PEARL, LLC (“MIAX Pearl”) (separately among MIAX Pearl Options and MIAX Pearl Equities) and MIAX¹⁴ (together with MIAX Pearl Options and MIAX Pearl Equities, the “affiliated markets”)) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. Although the baseline cost analysis used to justify the proposed fees was made in the Initial, Second, Third, and Fourth Proposals, the fees themselves have not changed since the Initial, Second, Third or Fourth Proposals and the Exchange still proposes fees that are intended to cover the Exchange’s cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia’s *Susquehanna Decision*¹⁵ and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from its prior review process (hereinafter referred to as the “Revised Review Process”). In the *Susquehanna Decision*, the D.C. Circuit Court stated that the Commission could not maintain a practice of “unquestioning reliance” on claims made by a self-regulatory organization (“SRO”) in the course of filing a rule or fee change with the Commission.¹⁶ Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and*

cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. See Securities Exchange Act Release No. 97813 (June 27, 2023), 88 FR 42785 (July 3, 2023) (SR–EMERALD–2023–14).

¹⁴ The term “MIAX” means Miami International Securities Exchange, LLC. See Exchange Rule 100.

¹⁵ See *Susquehanna International Group, LLP v. Securities & Exchange Commission*, 866 F.3d 442 (D.C. Circuit 2017) (the “*Susquehanna Decision*”).

¹⁶ *Id.*

Financial Markets Association finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.¹⁷ On that same day, the Commission issued an order remanding to various exchanges and national market system (“NMS”) plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the “Remand Order”).¹⁸ The Remand Order directed the exchanges to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”¹⁹ The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.²⁰ However, the Commission did extend the deadlines in the Remand Order “so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court’s mandate.”²¹ Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (“BOX”) to establish connectivity fees (the “BOX Order”), which significantly increased the level of information needed for the Commission to believe that an exchange’s filing satisfied its obligations under the Act with respect to changing a fee.²² Despite approving hundreds of

¹⁷ See *Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84432*, 2018 WL 5023228 (October 16, 2018) (the “SIFMA Decision”).

¹⁸ See *Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84433*, 2018 WL 5023230 (Oct. 16, 2018). See 15 U.S.C. 78k–1, 78s; see also Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

¹⁹ *Id.* at page 2.

²⁰ *Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 85802*, 2019 WL 2022819 (May 7, 2019) (the “Order Denying Reconsideration”).

²¹ Order Denying Reconsideration, 2019 WL 2022819, at *13.

²² See Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it “historically applied a ‘market-based’ test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.” *Id.* at page 16. Despite this admission, the Commission disapproved BOX’s proposal to begin charging

access fee filings in the years prior to the BOX Order (described further below) utilizing a “market-based” test, the Commission changed course and disapproved BOX’s proposal to begin charging connectivity at one-fourth the rate of competing exchanges’ pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance “to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.”²³ In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”²⁴ The Staff Guidance also states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”²⁵

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission’s SIFMA Decision in *NASDAQ Stock Market, LLC v. SEC*²⁶ and remanded for further proceedings consistent with its opinion.²⁷ That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ*. The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision “has now been vacated, the basis for the [Remand

\$5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing “market-based” fee filings from years prior).

²³ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (the “Staff Guidance”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *NASDAQ Stock Mkt., LLC v. SEC*, No 18–1324, --- Fed. App’x ---, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court’s mandate was issued on August 6, 2020.

²⁷ *Nasdaq v. SEC*, 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court’s mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act “section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.” *Id.* The court held that “for a fee rule to be challengeable under section 19(d), it must, at a minimum, be targeted at specific individuals or entities.” *Id.* Thus, the court held that “section 19(d) is not an available means to challenge the fees at issue” in the SIFMA Decision. *Id.*

Order] has evaporated.”²⁸ Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ v. SEC* that Exchange Act section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.²⁹ The Commission further invited “the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq v. SEC*.”³⁰ Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg’s request to withdraw their applications for review and dismissed the proceedings.³¹

As a result of the Commission’s loss of the *NASDAQ vs. SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”³² As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff’s fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the “record” or “review” earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission’s related practice of

continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (“non-legacy exchanges”), while favoring larger, incumbent, entrenched, legacy exchanges (“legacy exchanges”).³³ The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings³⁴ to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.³⁵ These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures

³³ Commission Chair Gary Gensler recently reiterated the Commission’s mandate to ensure competition in the equities markets. See “Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots”, by Chair Gary Gensler, dated December 14, 2022 (stating “[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and enhance competition in the securities markets, including the equity markets” (emphasis added)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring “fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets . . .” (emphasis added). *Id.* at note 1. See also Securities Acts Amendments of 1975, available at <https://www.govtrack.us/congress/bills/94/s249>.

³⁴ This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. See *The Nasdaq Stock Market, LLC v. SEC*, Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule filings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

³⁵ See, e.g., Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a “market-based” test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.*, non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.³⁶ By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish “fee parity” with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff’s change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (“Cboe”) reported “access and capacity

²⁸ *Id.* at *2; see also *id.* (“[T]he sole purpose of the challenged remand has disappeared.”).

²⁹ *Sec. Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the “Order Vacating Prior Order and Requesting Additional Briefs”).

³⁰ *Id.*

³¹ *Sec. Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 90087 (October 5, 2020).

³² See *supra* note 27, at page 2.

³⁶ The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

fee” revenue of \$70,893,000 for 2020³⁷ and \$80,383,000 for 2021.³⁸ Cboe C2 Exchange, Inc. (“C2”) reported “access and capacity fee” revenue of \$19,016,000 for 2020³⁹ and \$22,843,000 for 2021.⁴⁰ Cboe BZX Exchange, Inc. (“BZX”) reported “access and capacity fee” revenue of \$38,387,000 for 2020⁴¹ and \$44,800,000 for 2021.⁴² Cboe EDGX Exchange, Inc. (“EDGX”) reported “access and capacity fee” revenue of \$26,126,000 for 2020⁴³ and \$30,687,000 for 2021.⁴⁴ For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported \$178,712,000 in “access and capacity fees” in 2021. NASDAQ Phlx, LLC (“NASDAQ Phlx”) reported “Trade Management Services” revenue of \$20,817,000 for 2019.⁴⁵ The Exchange notes it is unable to compare “access fee” revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the “Trade Management Services” line item was bundled into a much larger line item in PHLX’s Form 1, simply titled “Market services.”⁴⁶

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy

exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,⁴⁷ new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and “is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .”,⁴⁸ this is not the reality experienced by exchanges such as MIAX Emerald. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.⁴⁹ However, despite

providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in section 6(b)(4) of the Act⁵⁰ in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,⁵¹ to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;⁵² or (c)

93776 (December 14, 2021), 86 FR 71983 (December 20, 2021) (SR-EMERALD-2021-42); 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR-EMERALD-2021-31); (SR-EMERALD-2021-30) (withdrawn without being noticed by the Commission); 93166 (September 28, 2021), 86 FR 54760 (October 4, 2021) (SR-EMERALD-2021-29); 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR-EMERALD-2021-25); 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR-EMERALD-2021-23).

⁵⁰ 15 U.S.C. 78f(b)(4).

⁵¹ To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

⁵² In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. See, e.g.,

Continued

³⁷ According to Cboe’s 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. See Cboe 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf>.

³⁸ See Cboe 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf>.

³⁹ See C2 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf>.

⁴⁰ See C2 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf>.

⁴¹ See BZX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf>.

⁴² See BZX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf>.

⁴³ See EDGX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf>.

⁴⁴ See EDGX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf>.

⁴⁵ According to PHLX, “Trade Management Services” includes “a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX’s] published fee schedules.” See PHLX 2020 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf>.

⁴⁶ See PHLX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf>. The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

⁴⁷ See, e.g., *CNBC Debuts New Set on NYSE Floor*, available at <https://www.cnn.com/id/46517876>.

⁴⁸ See *supra* note 23, at note 1.

⁴⁹ See Securities Exchange Act Release Nos. 94889 (May 11, 2022), 87 FR 29928 (May 17, 2022) (SR-EMERALD-2022-19); 94718 (April 14, 2022), 87 FR 23633 (April 20, 2022) (SR-EMERALD-2022-15); 94717 (April 14, 2022), 87 FR 23648 (April 20, 2022) (SR-EMERALD-2022-13); 94260 (February 15, 2022), 87 FR 9695 (February 22, 2022) (SR-EMERALD-2022-05); 94257 (February 15, 2022), 87 FR 9678 (February 22, 2022) (SR-EMERALD-2022-04); 93772 (December 14, 2021), 86 FR 71965 (December 20, 2021) (SR-EMERALD-2021-43);

accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.⁵³

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access

CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsbc.ca/-/media/PWS/Resources/Securities_Law/Policy2/21401_Market_Data_Fee_CSA_Staff_Consultation_Paper.pdf.

⁵³ The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (e.g., healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to "develop a record," and to "explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review," and to ensure a comparable review process with the Exchange's filing.

the Exchange's system networks⁵⁴ via a 10Gb ULL fiber connection.

Specifically, the Exchange proposes to amend Sections 5(a)–(b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from \$10,000 per month to \$13,500 per month ("10Gb ULL Fee").⁵⁵

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Limited Service MEI Ports Background

The Exchange also proposes to amend Section 5(d) of the Fee Schedule to adopt a tiered-pricing structure for Limited Service MEI Ports available to Market Makers. The Exchange allocates two (2) Full Service MEI Ports⁵⁶ and two (2) Limited Service MEI Ports⁵⁷ per

⁵⁴ The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

⁵⁵ Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4(c) of the Exchange's Fee Schedule. See Section 4(c) of the Exchange's fee schedule available at <https://www.miaxglobal.com/markets/us-options/miax-options/fees> (providing that "Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.").

⁵⁶ The term "Full Service MEI Ports" means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

⁵⁷ The term "Limited Service MEI Ports" means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving

matching engine⁵⁸ to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Currently, Market Makers are assessed a \$100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free.

Limited Service MEI Port Fee Changes

The Exchange now proposes to move from a flat monthly fee per Limited Service MEI Port for each matching engine to a tiered-pricing structure for Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of Limited Service MEI Ports each Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second Limited Service MEI Ports for each matching engine free of charge. For Limited Service MEI Ports, the Exchange proposes to adopt the following tiered-pricing structure: (i) the third and fourth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of \$100 to \$200 per port; (ii) the fifth and sixth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of \$100 to \$300 per port; and (iii) the seventh or more Limited Service MEI Ports will increase from the current monthly flat fee of \$100 to \$400 per port.⁵⁹ The

administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

⁵⁸ The term "Matching Engine" means a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. See the Definitions Section of the Fee Schedule.

⁵⁹ As noted in the Fee Schedule, Market Makers will continue to be limited to fourteen Limited Service MEI Ports per Matching Engine. The Exchange also proposes to make a ministerial clarifying change to remove the defined term "Additional Limited Service MEI Ports" as a result of moving to a tiered pricing structure where the first two Limited Service MEI Ports continue to be provided free of charge. The Exchange proposes to make a related change to add the term "Limited

Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System⁶⁰ in accordance with its fair access requirements under section 6(b)(5) of the Act.⁶¹

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on May 2023 trading results, the Exchange handles over approximately 8.6 billion quotes on an average day, and more than 189 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 111 billion quotes (and more than 5 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports generated approximately 40 billion quotes (and approximately 1.8 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 936 million quotes per day; Market Makers who utilized 5–6 Limited Service MEI Ports submitted an

average of 578 million quotes on an average day; and Market Makers who utilized 3–4 Limited Service MEI Ports submitted an average of 176 million quotes on an average day.

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.⁶² Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (e.g., storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers. The Exchange proposes to increase its monthly Limited Service MEI Port fees to recover a portion of the costs associated with directly accessing the Exchange.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with section 6(b) of the Act⁶³ in general, and furthers the objectives of section 6(b)(4) of the Act⁶⁴ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of section 6(b)(5) of the Act⁶⁵ in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order⁶⁶ and the Staff Guidance,⁶⁷ the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

Service MEI Ports" after the word "fourteen" in the Fee Schedule.

⁶⁰ The term "System" means the automated trading system used by the Exchange for the trading of securities. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁶¹ See 15 U.S.C. 78f(b). The Exchange may offer access on terms that are not unfairly discriminatory among its Members, and ensure sufficient capacity and headroom in the System. The Exchange monitors the System's performance and makes adjustments to its System based on market conditions and Member demand.

⁶² 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

⁶³ 15 U.S.C. 78f(b).

⁶⁴ 15 U.S.C. 78f(b)(4).

⁶⁵ 15 U.S.C. 78f(b)(5).

⁶⁶ See *supra* note 22.

⁶⁷ See *supra* note 23.

In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”⁶⁸ The Staff Guidance further states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”⁶⁹ In the Staff Guidance, the Commission Staff further states that, “[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO’s costs, . . . , specific information, including quantitative information, should be provided to support that argument.”⁷⁰

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges’ ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange’s flexibility to, among other

things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange initially adopted a fee of \$50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. At that same time, the Exchange only charged \$6,000 per month for each 10Gb ULL connection. As a new exchange entrant, the Exchange chose to offer connectivity and ports at very low fees to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange’s technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.⁷¹ Later in

2020, as the Exchange’s market share increased,⁷² the Exchange then increased the fee by \$50 to a modest \$100 fee per Limited Service MEI Port and increased the fee for 10Gb ULL fiber connections from \$6,000 to \$10,000 per month.⁷³ The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in

it does not charge any fees for membership, market data products, physical connectivity or application sessions.”). MEMX’s market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) and 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). See also, e.g., Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), available at <https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf> (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).*

⁷² The Exchange experienced a monthly average trading volume of 3.43% for the month of October 2020. *See* the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/>.

⁷³ *See Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR–EMERALD–2020–12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR–EMERALD–2020–17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR–EMERALD–2021–02); and 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR–EMERALD–2021–07).*

⁷¹ *See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, “[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . .”). See also Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that “[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

the execution of order flow from broker dealers'. . . ."⁷⁴

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."⁷⁵

Congress directed the Commission to "rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'"⁷⁶ As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair,

reasonable, and not unreasonably or unfairly discriminatory. "If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior."⁷⁷ Accordingly, "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."⁷⁸ In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a "proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces."⁷⁹

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange

believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs with a reasonable margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings. The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the connectivity or port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Emerald (as proposed) (equity options market share of 3.04% for the month of May 2023) ^a .	10Gb ULL connection Limited Service MEI Ports	\$13,500. 1–2 ports: FREE (not changed in this proposal). 3–4 ports: \$200 each. 5–6 ports: \$300 each. 7 or more ports: \$400 each.
NASDAQ ^b (equity options market share of 6.59% for the month of May 2023) ^c .	10Gb Ultra fiber connection SQF Port	\$15,000 per connection. 1–5 ports: \$1,500 per port. 6–20 ports: \$1,000 per port. 21 or more ports: \$500 per port.
NASDAQ ISE LLC ("ISE") ^d (equity options market share of 6.18% for the month of May 2023) ^e . NYSE American LLC ("NYSE American") ^g (equity options market share of 7.34% for the month of May 2023) ^h .	10Gb Ultra fiber connection SQF Port ^f 10Gb LX LCN connection Order/Quote Entry Port	\$15,000 per connection. \$1,100 per port. \$22,000 per connection. 1–40 Ports: \$450 per port. 41 or more Ports: \$150 per port.
NASDAQ GEMX, LLC ("GEMX") ⁱ (equity options market share of 2.00% for the month of May 2023) ^j .	10Gb Ultra connection SQF Port	\$15,000 per connection. \$1,250 per port.

^a See the "Market Share" section of the Exchange's website, available at <https://www.miaxglobal.com/>.

^b See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

^c See *supra* note a.

^d See ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees and ISE Rules, General 8: Connectivity.

^e See *supra* note a.

^f Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.

^g See NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

^h See *supra* note a.

ⁱ See GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees and GEMX Rules, General 8: Connectivity.

^j See *supra* note a.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market

participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business

opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, the Exchange's affiliate,

⁷⁴ See *NetCoalition*, 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

⁷⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

⁷⁶ See *NetCoalition*, 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) ("[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.").

⁷⁷ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

⁷⁸ *Id.*

⁷⁹ See Staff Guidance, *supra* note 23.

MIAX Pearl Options, experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

It is not a requirement for market participants to become members of all options exchanges; in fact, certain market participants conduct an options business as a member of only one options market.⁸⁰ A very small number of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.⁸¹

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.⁸² The Exchange and its affiliated options markets, MIAX Pearl Options and MIAX, have a total of 46

members. Of those 46 total members, 37 are members of all three affiliated options markets, two are members of only two affiliated options markets, and seven are members of only one affiliated options market. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no "de facto" or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options (which are similar to the changes proposed herein). Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not "lock" a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.⁸³ If the Exchange is not at the national best bid or offer

("NBBO"),⁸⁴ the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.⁸⁵

With respect to the submission of orders, Members may also choose not to purchase any connection from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an exchange. An institutional investor may utilize a broker-dealer, a service bureau,⁸⁶ or request sponsored access⁸⁷ through a member of an exchange in order to submit a trade directly to an options exchange.⁸⁸ A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.*, fees based on the number of firms that connect to the

⁸⁰ BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17). In that proposal, BOX stated that, "... it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX]." Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR-MEMX-2021-19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee "is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange" and that "neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange."

⁸¹ Service Bureaus may obtain ports on behalf of Members.

⁸² *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

⁸³ *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.

⁸⁴ *See* Exchange Rule 100.

⁸⁵ Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

⁸⁶ Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

⁸⁷ Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

⁸⁸ This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

Exchange indirectly via the third-party).⁸⁹ Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.⁹⁰ Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange. This is again evidenced by the fact that one MIAAX Pearl Options Market Maker terminated their MIAAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAAX Pearl Options. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on

one or many connections, depending on their business model.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.*, to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of section 19(b)(1) under the Act,⁹¹ and Rule 19b-4 thereunder,⁹² with respect to the types of information exchanges should provide when filing fee changes, and section 6(b) of the Act,⁹³ which requires, among other things, that exchange fees be reasonable and equitably allocated,⁹⁴ not designed to permit unfair discrimination,⁹⁵ and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁹⁶ This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.⁹⁷ The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at \$11,361,586 (or approximately \$946,799 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at \$1,799,066 (or approximately \$148,255 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members)⁹⁸ going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of \$13,500 per month for each physical 10Gb ULL connection. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for additional Limited Service MEI Ports.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the "Cost Analysis").⁹⁹ The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.*, personnel), and certain general and administrative expenses ("cost drivers").

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior

⁸⁹ See, e.g., Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection ([nasdaqtrader.com](https://www.nasdaqtrader.com)); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR-NASDAQ-2015-002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR-NASDAQ-2017-114).

⁹⁰ The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

⁹¹ 15 U.S.C. 78s(b)(1).

⁹² 17 CFR 240.19b-4.

⁹³ 15 U.S.C. 78f(b).

⁹⁴ 15 U.S.C. 78f(b)(4).

⁹⁵ 15 U.S.C. 78f(b)(5).

⁹⁶ 15 U.S.C. 78f(b)(8).

⁹⁷ See Staff Guidance, *supra* note 23.

⁹⁸ Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

⁹⁹ The Exchange frequently updates its Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

management, department heads, and the Finance Team. Each department head is required to send a “bottom up” budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.*, price time or pro-rata, simple only or simple and complex markets, auction functionality, *etc.*), which may impact message traffic, individual system architectures that impact platform size,¹⁰⁰ storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time.

All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.*, the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange’s parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange’s parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange’s parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their

approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.*, connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (*e.g.*, message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (61.9% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to additional Limited Service MEI Ports (4.6%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (33.5%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange’s operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of

these sources of revenue is based on services that are interdependent. For instance, the Exchange’s system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange’s costs, the Exchange’s methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges’ interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange’s extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange’s general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, “in nature and closeness,” directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is \$1,095,054 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12

¹⁰⁰ For example, the Exchange maintains 12 matching engines, MIAx Pearl Options maintains 12 matching engines, MIAx Pearl Equities maintains 24 matching engines, and MIAx maintains 24 matching engines.

months, then adding both numbers together), as further detailed below.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by

the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (*e.g.*, as set forth

below, the Exchange allocated approximately 28.1% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Allocated annual cost ^k	Allocated monthly cost ^l	% of all
Human Resources	\$3,520,856	\$293,405	28
Connectivity (external fees, cabling, switches, etc.)	71,675	5,973	61.9
Internet Services and External Market Data	373,249	31,104	84.8
Data Center	752,545	62,712	61.9
Hardware and Software Maintenance and Licenses	666,208	55,517	50.9
Depreciation	1,929,118	160,760	63.8
Allocated Shared Expenses	4,047,935	337,328	51.3
Total	11,361,586	946,799	42.8

k. The Annual Cost includes figures rounded to the nearest dollar.

l. The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

The Exchange notes that it and its affiliated markets have 184 employees (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. ("MIH"), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and

department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market's individual Human Resources expense. Then, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange's parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 42.4% of each employee's time from the above group. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (*i.e.*,

only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 20%).

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 42.4% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, relocation, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades, vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment

and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breath of functions those employees perform in support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority ("OPRA"). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be

able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. The internet services cost driver includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (e.g., re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System

Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though, but for the Exchange, the allocation percentages are generally consistent across markets (e.g., MIAx Emerald, MIAx, MIAx Pearl Options and MIAx Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to the Exchange and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) the Exchange itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage it allocated to the internet Services and External Market Data cost driver is greater than its affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small. For instance, despite the difference in cost allocation percentages for the internet Services and External Market Data cost driver across the Exchange and MIAx, the actual dollar amount difference is approximately only \$4,000 per month, a non-significant amount.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity

in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (61.9%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.¹⁰¹ The Exchange notes that this allocation is less than MIAX Pearl Options by a significant amount, but slightly more than MIAX, as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, MIAX Pearl Options is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes

servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees.

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 63.8% of its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is lower than that of MIAX by approximately \$32,000 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading MIAX to have more hardware that software that is subject to depreciation.

Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.¹⁰² These general shared expenses are incurred by the Exchange's parent company, MIH, as a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, *i.e.*, 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to

¹⁰¹ This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl (the options and equities markets), because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl. This expense also differs in dollar amount among the Exchange, MIAX Pearl (options and equities), and MIAX because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

¹⁰² The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

10Gbb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

The Exchange notes that the 51.3% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited Service MEI Ports. This is based on its allocation methodology that weighted costs attributable to each core service.

While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (e.g., Data Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb ULL Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, the total monthly cost for 10Gb ULL connectivity of \$946,799 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (102), to arrive at a cost of approximately \$9,282 per month, per physical 10Gb ULL

connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, i.e., actual number of 10Gb ULL connections.

* * * * *

Costs Related to Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (e.g., as set forth below, the Exchange allocated approximately 5.9% of its overall Human Resources cost to offering Limited Service MEI Ports).

Cost drivers	Allocated annual cost ^m	Allocated monthly cost ⁿ	% of all
Human Resources	\$737,784	\$61,482	5.9
Connectivity (external fees, cabling, switches, etc.)	3,713	309	3.2
Internet Services and External Market Data	14,102	1,175	3.2
Data Center	55,686	4,641	4.6
Hardware and Software Maintenance and Licenses	41,951	3,496	3.2
Depreciation	112,694	9,391	3.7
Allocated Shared Expenses	813,136	67,761	10.3
Total	1,779,066	148,255	6.7

^m See *supra* note k (describing rounding of Annual Costs).

ⁿ See *supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers described by the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance

thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Limited Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (e.g., halted securities).¹⁰³ Thus, since market data from other exchanges is consumed at the Exchange's Limited Service MEI Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 3.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Emerald Market Makers utilized 1,017 Limited Service MEI ports and MIAX Market Makers utilized 1,770 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far

fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 3.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.7% of all depreciation costs to providing Limited Service MEI Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the Exchange notes that the percentages it and its affiliate, MIAX, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 2.6%. However, MIAX's approximate dollar amount is greater than that of MIAX Emerald by approximately \$10,000 per month. This is due to two primary factors. First, MIAX has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware than software that is subject to depreciation. Second,

¹⁰³ The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.*, occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 11% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 10.3% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.*, Data Center, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 10.3% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited

Service MEI ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.¹⁰⁴

* * * * *

Approximate Cost per Limited Service MEI Port per Month

Based on May 2023 data, the total monthly cost allocated to Limited Service MEI Ports of \$148,255 was divided by the total number of Limited Service MEI Ports (including the two free Limited Service MEI Ports per matching engine that each Member receives) the Exchange maintained at the time that proposed pricing was determined (1,017), to arrive at a cost of approximately \$145 per month, per charged Limited Service MEI Port. In the prior filings, the Exchange did not include the expense of maintaining the two free Limited Service MEI Ports per matching engine that each Member receives in this paragraph but did include them in the total expense amounts. The total number of Limited Service MEI Ports that the Exchange does not charge for is 741 and amounts to a total expense of \$107,445 per month to the Exchange.

* * * * *

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange

¹⁰⁴ MIAX allocated a slightly lower amount (9.8%) of this cost as compared to MIAX Emerald (10.3%). This is not a significant difference. However, both allocations resulted in an identical cost amount of \$0.8 million, despite MIAX having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the additional resources and expenditures associated with maintaining its recently enhanced low latency network.

submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.4%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.0% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 19.8% for 10Gb ULL connectivity or 19.9% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 28.1% of its personnel costs to providing 10Gb ULL and 1Gb connectivity and 5.9% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 34% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 66% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer

equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 67.5% of the Exchange's overall depreciation and amortization expense to connectivity services (63.8% attributed to 10Gb ULL physical connections and 3.7% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 32.5%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing. The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs.

Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.*, to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to

connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal \$11,361,586. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately \$16,524,000. The Exchange believes this represents a modest profit of 31% when compared to the cost of providing 10Gb ULL connectivity services which could decrease over time.¹⁰⁵

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal \$1,779,066. Based on current Limited Service MEI Port services usage, the Exchange would generate annual revenue of approximately \$2,809,200. The Exchange believes this would result in an estimated profit margin of 37% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.¹⁰⁶ The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAx Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, the Exchange's Members are currently allocated 1,017 Limited Service MEI Ports compared to only 384 Full Service MEO Ports (Bulk and Single combined) allocated to MIAx Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a supra-competitive profit, when comparing the total expense of the

¹⁰⁵ Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g.,* <https://www.usinflationcalculator.com/inflation/current-inflation-rates/> (last visited August 4, 2023).

¹⁰⁶ *Id.*

Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Limited Service MEI Port services.

The Exchange also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (e.g., the number of matching engines per exchange, *i.e.*, the Exchange maintains only 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.*, start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection (\$13,500 per month for the Exchange vs. \$15,000 per month for Nasdaq).¹⁰⁷ NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees (\$13,500 per month for the Exchange vs. \$22,000 per month for NYSE American).¹⁰⁸ Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.*, more subscribers to 10Gb ULL connectivity

on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange operated at a cumulative net annual loss from the time it launched operations in 2019 through fiscal year 2021.¹⁰⁹ This was due to a number of factors, one of which was choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in

connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC ("IEX") and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should

¹⁰⁷ See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

¹⁰⁸ See NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

¹⁰⁹ Beginning with fiscal year 2022, the Exchange incurred a net gain of approximately \$14 million. See Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, available at <https://www.sec.gov/Archives/edgar/vpr/2300/23007742.pdf>.

apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the

capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.¹¹⁰ Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (e.g., storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Limited Service MEI Ports

The Exchange designed the proposed tiered-pricing structure to link fees to the number of connections a firm purchases due to the strong correlation between number of connections and related cost burdens imposed upon the Exchange from the largest connection (Limited MEI Ports) users. This is explicitly designed to link fees to related costs imposed on the exchange. Market Makers that purchase more connections cause significantly greater costs and expenses to the Exchange, whereas the opposite is also true. With this in mind, the Exchange proposes (a) no fee or lower fees for Market Makers who utilize fewer Limited Service MEI Ports since those Market Makers generally tend to send the fewest number of orders and messages over those connections, imposing substantially lower costs;¹¹¹ and (b) incrementally higher fees for those that purchase additional Limited Service MEI Ports, because those with the greatest number of Limited Service MEI Ports generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange.¹¹²

¹¹⁰ 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

¹¹¹ The Exchange notes that those Members who purchase three or more Limited Service MEI Ports receive their first two Limited Service Ports for free.

¹¹² Note that the firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and based on their business needs, which

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity alternatives because it is specifically designed to ensure that those users that create the highest costs burden on the Exchange pay the highest fees. As is discussed below, the cost burden associated with Market Makers that use the maximum number of Limited Service MEI ports is significantly higher than costs associated with Market Makers that use fewer of these ports.

As noted above, users with the greatest number of Limited Service MEI Ports consume a disproportionate amount of bandwidth and network resources. Specifically, for 10Gb ULL connectivity, Market Makers who take the maximum number of Limited Service MEI Ports account for greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do so primarily because of the trade-through requirements under Regulation NMS or best execution obligations and do not have the same business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports.

The Exchange's high performance network solutions and supporting infrastructure (including employee support) provide increased system throughput and the capacity to handle approximately 18 million quote messages per second. This is important for the efficient operation of the Exchange and to ensure system resiliency in times of stress (abnormally high capacity demand). For example, based on May 2023 trading results, the Exchange handled more than 8.6 billion quotes on an average day, and more than 189 billion quotes in an average month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 111 billion quotes (and more than 5 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports per matching engine generated approximately 40 billion quotes (and approximately 1.8 billion quotes on an average day). Also for May 2023, Market

include a desire to access the market more quickly using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and may require more connections as they compete to access resting liquidity.

Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 936 million quotes per day; Market Makers who utilized 5–6 Limited Service MEI Ports submitted an average of 578 million quotes on an average day; and Market Makers who utilized 3–4 Limited Service MEI Ports submitted an average of 176 million quotes on an average day.

To achieve consistent, premium network performance, the Exchange must build and maintain a network that has the capacity to handle the message rate requirements of its heaviest network consumers during anticipated peak market conditions. The resultant need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. This need also requires the Exchange to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.¹¹³ Thus, as the number of connections per Market Maker increases, other costs incurred by the Exchange also increase, *e.g.*, storage costs, surveillance costs, service expenses.

According to the statistics provided above for May 2023, Market Makers with the maximum amount of Limited Service MEI Ports sent almost twice as many orders as those that utilize the minimal amount of Limited Service MEI Ports. Due to latency consideration, those Market Makers typically send the same order over multiple Limited Service MEI Ports to attempt to execute against the same contra-side order resting on the Book. This results in a disproportionate number of messages being returned to the Market Maker notifying them which order did or did not result in an execution. This results in an increased amount of message traffic generated by Market Makers who utilize the maximum amount of Limited Service MEI Ports. These Market Makers use a disproportionate amount of System capacity and, therefore, put greater strain on the Exchange's network and other resources discussed below. This is due to higher order to trade ratios that results in increased message traffic that is not recouped via a separate Exchange fee based on each message sent by a Market Maker or other similar

fee. The Exchange must purchase and maintain additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.¹¹⁴

The following presents another example of how the cost burden associated with Members that use the maximum number of Limited Service MEI ports is significantly higher than costs associated with Members that use fewer of these ports. Members with the maximum amount of Limited Service MEI Ports frequently add, drop, or rebalance connections mid-month to determine which connections have the least latency (and engage in the same practice with Limited Service MEI Ports). This requires constant System expansion to meet Market Maker demand for additional Limited Service MEI Ports and results in limited available System headroom, *e.g.*, additional hardware to accommodate demand for additional Limited Service MEI Ports. This also results in increased costs and customer service resources for the Exchange to frequently make changes in the data center (or its network) and provide the additional technical and personnel support necessary to satisfy these requests. The Exchange does not charge a separate fee for these services for Limited Service MEI Ports.¹¹⁵ Given the difference in network utilization and technical support provided, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who utilize the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, because the network is largely designed and maintained to specifically handle the message rate, capacity and performance requirements of those Market Makers.

Finally, charging an incrementally higher fee (above the first two that are provided free of charge) to firms that choose to purchase more Limited Service MEI Ports does not provide those firms with any competitive advantage or incentivize firms to purchase additional Limited Service MEI Ports. Certain firms choose to

purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and, if anything, higher fees act as a disincentive for inefficient and excessive use of Exchange bandwidth and capacity. The Exchange notes that firms may continue to choose to only utilize the two free Limited Service MEI Ports to accommodate their own trading/quoting strategies, business models, and for Market Makers, to meet their quoting obligations. The proposed pricing structure is designed to address the above described increased pull on Exchange resources by firms that choose to purchase the maximum number of Limited Service MEI Ports and to incentivize efficient port usage.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange operated at a cumulative net annual loss since its launch in 2019 through 2021¹¹⁶ due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry,

¹¹⁴ See *id.*

¹¹⁵ The Member and non-Member network connectivity testing and certification fee is unrelated to this practice. That fee is for the first time firms are credentialed to begin live-trading on the Exchange or when the firm makes an internal system change requiring it to re-test its system with the Exchange's system. See Fee Schedule, Sections 4(c)–(d).

¹¹⁶ The Exchange has incurred a cumulative loss of \$9 million since its inception in 2019 through 2021. See Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 29, 2022, available at <https://www.sec.gov/Archives/edgar/vpr/2200/22001164.pdf>.

¹¹³ 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl Options.¹¹⁷

¹¹⁷ The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. See

The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Lastly, the Exchange does not believe its proposal to implement incrementally higher fees for those that purchase more Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants because those with the greatest number of Limited Service MEI Ports tend to generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange, resulting in greater demands and additional burdens on Exchange resources (as described above). The firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and choose to utilize numerous connections based on their business needs, which include a desire to attempt to access the market quicker using the lowest latency connections. These firms are generally engaged in sending

Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR-IEX-2022-02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. See, e.g., *supra* note 71. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

liquidity removing orders to the Exchange and seek to add more connections to competitively access resting liquidity. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an

important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, and one comment letter on the Fourth Proposal, all from the same commenter.¹¹⁸ In their letters, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has attempted to raise new issues in its letters, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,¹¹⁹ and Rule 19b-4(f)(2)¹²⁰ thereunder. 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-EMERALD-2023-19 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-EMERALD-2023-19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All

submissions should refer to file number SR-EMERALD-2023-19 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²¹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-18300 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98171; File No. SR-NYSE-2023-18]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing of Proposed Change To Amend the Connectivity Fee Schedule Regarding Power Allocation

August 21, 2023.

Pursuant to section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on August 17, 2023, NYSE National, Inc. ("NYSE National" or the "Exchange") 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.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Connectivity Fee Schedule to provide an alternative procedure by which the Exchange can allocate power in the Mahwah Data Center via deposit-guaranteed orders from Users made within a 90-day "Ordering Window." The proposed change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of,

¹¹⁸ See letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP ("SIG"), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, and letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023 and July 24, 2023.

¹¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹²⁰ 17 CFR 240.19b-4(f)(2).

¹²¹ 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.

and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule to provide an alternative procedure by which the Exchange can allocate power in the Mahwah Data Center ("MDC")⁴ via deposit-guaranteed orders from Users made within a 90-day "Ordering Window."

Background

Shortly after the onset of the Covid-19 pandemic, the Exchange began experiencing unprecedented User⁵ demand for cabinets and power at the MDC. In order to manage its inventory, in late 2020, the Exchange filed to create purchasing limits and a waitlist for cabinet orders.⁶ In early 2021, the Exchange filed to create additional purchasing limits and a waitlist for orders for additional power in the MDC.⁷ Pursuant to the terms of those

filings, a Combined Waitlist is currently in place.

In 2021 and 2022, the Exchange expanded the amount of space and power available in the MDC by opening a new colocation hall (*i.e.*, Hall 4), yet User demand for additional power continues to climb. Currently, the waitlist includes 27 Users collectively requesting in excess of an additional 700 kilowatts ("kW") of power. That number, however, may be a mere fraction of Users' true demand for additional power at the MDC, since, due to the existing waitlist procedures, the Exchange may not accept orders for more than 32 kW of power, and a User and its Affiliates⁸ may have only one order on the waitlist at a time. Of the 27 Users on the current waitlist, many have mentioned that they are actually interested in purchasing much more than 32 kW of power, with several claiming that they are seeking additional power of several hundred kilowatts.⁹

ICE is currently expanding the amount of colocation space and power available at the MDC. ICE is already developing a new colocation hall (*i.e.*, Hall 5) to deliver power that would satisfy all orders currently on the waitlist with some extra power remaining.

ICE proposes this rule change to address two issues posed by the current situation. First, while the development of Hall 5 is underway, ICE must also evaluate whether customer demand would support additional expansion projects to provide further power. ICE must anticipate future demand now because each colocation expansion project is a significant capital project requiring long lead times, especially given current supply-chain constraints on equipment, and substantial up-front investment. It may be possible for ICE to leverage certain efficiencies and economies of scale by planning for future expansion now.

Yet ICE currently lacks any real indication of customers' true demands. As noted above, the current waitlist of 700 kW may represent a mere fraction

of Users' true power requirements, since waitlist orders are limited to one order of 32 kW per User. On the one hand, ICE does not know whether the extra power that will be provided in Hall 5 will be enough to meet Users' needs. On the other hand, ICE cannot justify the investment of time and expense that it would take to create additional colocation space based on only casual indications of interest from customers. Without firm, guaranteed commitments from Users to purchase the power if it is made available, ICE runs the risk of underestimating or overestimating Users' true demand for power and faces the possibility of undersupplying or oversupplying space and power.

Second, the existing procedures in the Connectivity Fee Schedule are not well-tailored to allocating large amounts of power that become available all at once, such as when a new colocation hall opens. Under the existing procedures, if less than 350 kW of unallocated power is available, the Purchasing Limits in Colocation Note 6 restrict all orders to 32 kW—but any time more than 350 kW of unallocated power is available, Users can place unlimited orders that the Exchange must allocate on a first-come, first-served basis. Regarding Hall 5, the Exchange anticipates large amounts of unallocated power becoming available at several intervals. This could create a race condition in which the largest Users place early orders for many hundreds of kilowatts of power, effectively shutting out other customers with more modest power needs. The Exchange therefore believes that it needs a different procedure when allocating substantial amounts of power at one time due to a hall expansion or other similar expansion of available power.

Proposed "Ordering Window" Procedure

The Exchange proposes to solve these issues by providing a temporary procedure to permit the Exchange to accept unlimited, deposit-guaranteed orders from Users for a period of 90 days (the "Ordering Window"). The Colocation Notes in the Connectivity Fee Schedule would be amended accordingly.

Based on the total power ordered by Users during the Ordering Window, ICE would gain insight into whether further expansion beyond Hall 5 is likely to be required in the future. Requiring Users to submit deposits with their orders during this Ordering Window would encourage Users to carefully assess their true power needs and would protect against Users ordering more power than they actually intend to purchase. After

⁴ Through its Fixed Income and Data Services ("FIDS") business, Intercontinental Exchange, Inc. ("ICE") operates the MDC. The Exchange and its affiliates NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (the "Affiliate SROs") are indirect subsidiaries of ICE. Each of the Exchange's Affiliate SROs has submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2023-29, SR-NYSEAMER-2023-39, SR-NYSEARCA-2023-53, and SR-NYSECHX-2023-16.

⁵ For purposes of the Exchange's colocation services, a "User" means any market participant that requests to receive colocation services directly from the Exchange. See Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSE-2018-07). As specified in the Connectivity Fee Schedule, a User that incurs colocation fees for a particular colocation service pursuant thereto would not be subject to colocation fees for the same colocation service charged by the Affiliate SROs.

⁶ See Securities Exchange Act Release No. 90732 (December 18, 2020), 85 FR 84443 (December 28, 2020) (SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSEARCA-2020-82, SR-NYSECHX-2020-26, SR-NYSE-2020-28) (establishing the procedures in current Colocation Note 6(a) and 7(a)).

⁷ See Securities Exchange Act Release No. 91515 (April 8, 2021), 86 FR 19674 (April 14, 2021) (SR-NYSE-2021-12, SR-NYSEAMER-2021-08, SR-NYSEARCA-2021-11, SR-NYSECHX-2021-02, SR-NYSE-2021-03) (establishing the procedures in current Colocation Note 6(b) and 7(b)).

⁸ An "Affiliate" of a User is defined as "any other User or Hosted Customer that is under 50% or greater common ownership or control of the first User." Connectivity Fee Schedule, at 1.

⁹ Such demand for increased power is not unique to the MDC. Customers have told the Exchange that available power is in short supply at several other data centers as well, including the Equinix-owned data center in Secaucus, New Jersey, the Equinix-owned data center in Carteret, New Jersey, and the Digital Realty-owned data center at Cermak, Illinois. Since none of those data centers is operated by an exchange or regulated by the Commission, the operators of those data centers are free to ask customers to indicate their interest in future build-outs by submitting orders guaranteed by deposits.

the Ordering Window closes, the Exchange would allocate power to Users according to terms described below, which would ensure that every User submitting an order would receive at least some power and no Users would be shut out of the allocation. Following the Ordering Window, the existing purchasing limits and waitlist procedures in Colocation Notes 6 and 7 would then resume.

Specifically, the Exchange proposes to amend the Connectivity Fee Schedule to add new Colocation Note 8, entitled "Ordering Window."

Paragraph (a) of Colocation Note 8 would provide that the Exchange may announce, by customer notice, a 90-day Ordering Window during which the Exchange may accept orders and deposits pursuant to the terms below. Paragraph (a) would specify that if the Exchange announces an Ordering Window while the Cabinet and Power Purchasing Limits in Colocation Note 6 and/or the Cabinet and Combined Waitlist provisions in Colocation Note 7 are in effect, the terms of the Ordering Window as set out in Colocation Note 8 would temporarily supersede those terms.¹⁰

Paragraph (b) of Colocation Note 8 would specify the procedures for placing orders and paying deposits during the Ordering Window. Subparagraph (1) would provide that during the Ordering Window, Users may submit orders for their anticipated power needs, subject to the following. First, a User and its Affiliates, if any, may finalize only one order for power during the Ordering Window. Second, the provision of Colocation Note 7 that prohibits the Exchange from accepting orders for more than four dedicated cabinets and/or 32 kW of power would not apply. Third, a User may submit an order during the Ordering Window even if it already has an order pending on a waitlist pursuant to Colocation Note 7.

Subparagraph (2) of paragraph (b) would provide that orders submitted during the Ordering Window are subject to deposits equal to two months' worth of the monthly recurring costs of the amount of new power ordered.¹¹ The

subparagraph would further provide that a User's order would be finalized when the User's signed order form and deposit are received by the Exchange, and that orders that are not finalized before the Ordering Window closes will be considered void. Subparagraph (2) of paragraph (b) would further provide that the deposit would be applied to the User's first and subsequent months' invoices after the power is delivered until the deposit is depleted. If the User withdraws its order during the Ordering Window, the deposit would be returned.¹²

Subparagraph (3) of paragraph (b) would provide that a User may modify its order during the Ordering Window, but such modification would not be finalized until the User's signed modified order form and any additional deposit are received by the Exchange.

Paragraph (c) of Colocation Note 8 would specify the Exchange's procedure for allocating available power after the Ordering Window ends. After determining the total amount of power available to allocate, the Exchange would allocate the available power as follows. In Step 1, per subparagraph (1) of paragraph (c), the Exchange would allocate power to fill any orders on any waitlist in effect pursuant to Colocation Note 7 (e.g., the current waitlist of 32 kW orders totaling 700 kW).

In Step 2, per subparagraph (2) of paragraph (c), the Exchange would allocate up to 32 kW of power to each User that finalized an order during the Ordering Window, subject to the following. If sufficient power is available, the Exchange would allocate 32 kW of power to each User, except that orders for less than 32 kW would be filled only up to the number of kilowatts actually ordered. If sufficient power is not available to allocate 32 kW of power to each User, the Exchange would allocate the available power equally among all Users (rounded to a whole number of kilowatts), except that no User would be allocated more kilowatts than it actually ordered. If no power remains to be allocated after Step 2, all orders finalized during the Ordering Window would be considered to be completed.¹³

In Step 3, per subparagraph (3) of paragraph (c), if any power remains to be allocated after Step 2, the Exchange would allocate power to any orders that were not completely filled during Step 2, as follows. If sufficient power is available, the Exchange would allocate power to completely fill all remaining orders finalized during the Ordering Window. If sufficient power is not available to completely fill all such orders, the Exchange would allocate power to fill an identical percentage of each remaining order (rounded to a whole number of kilowatts). All such orders would then be considered completed.¹⁴

Paragraph (d) of Colocation Note 8 would specify that any orders received by the Exchange after the end of the Ordering Window would not be included in the allocation process described in Colocation Note 8. Such orders would be subject to the terms of Colocation Notes 6 and 7.

Application and Impact of the Proposed Changes

The Exchange currently anticipates invoking the proposed Ordering Window procedure to assist in determining Users' power needs and to allocate power in Hall 5. The procedure could also be used in the future each time the Exchange or ICE must assess customer demand for additional space and power in the MDC or allocate large amounts of power that become available at one time.

The Exchange does not propose to eliminate or alter the existing purchasing limits and waitlist procedures in Colocation Notes 6 and 7. Rather, those procedures would be temporarily superseded during the Ordering Window and would resume immediately after the Ordering Window ends.

The Exchange expects that the proposed changes would apply equally to all types and sizes of market participants. All Users would receive equal notice of the opening of the Ordering Window; the Ordering Window dates would be the same for all Users; and each order during the Ordering Window would be secured with a deposit equal to two months of the monthly recurring costs of the

order for additional power after the Ordering Window (subject to the Purchasing Limits, if then in effect).

¹⁴ To illustrate, if a User finalized an order for 100 kW during the Ordering Window and was allocated a total of 90 kW of power in Steps 2 and 3, the order would be considered completed. The residual 10 kW ordered would not be transferred to a waitlist. The User would be free to submit a new order for additional power after the Ordering Window (subject to the Purchasing Limits, if then in effect).

¹⁰ During the Ordering Window, any orders submitted by Users must meet the requirements of Colocation Note 8. The Exchange would not accept new orders to the waitlist established under Colocation Note 7 while the Ordering Window is open.

¹¹ For instance, the required deposit would be calculated as the number of kilowatts ordered by the User in its Ordering Window order, multiplied by the appropriate "Per kW Monthly Fee" as indicated in the Connectivity Fee Schedule. The Per kW Monthly Fee is a factor of the total number of kilowatts allocated to all of a User's dedicated cabinets and varies based on the total kilowatts allocated to a User.

¹² In the event that a User wishes to reduce an order that it placed during the Ordering Window, its deposit would not be reduced or returned, but rather would be applied against the User's first and subsequent months' invoices after the power is delivered until the deposit is depleted.

¹³ To illustrate, if a User finalized an order for 100 kW during the Ordering Window and was allocated 32 kW of power during Step 2 and no further power remained to be allocated after Step 2, the User's order would be considered completed. The residual 68 kW ordered would not be transferred to a waitlist. The User would be free to submit a new

power ordered during the Ordering Window.

The proposed Ordering Window procedure would not disadvantage Users on the current waitlist pursuant to Colocation Note 7, since power would be allocated to those orders first under the Ordering Window procedure.

Smaller Users with more modest power needs would not be disadvantaged by the proposed changes. In Step 2, each User that finalized an order during the Ordering Window would be allocated up to 32 kW of power (subject to sufficient power being available) before any User's order for more than 32 kW would be filled. This would ensure that all Users that participate in the Ordering Window would receive at least some power and no Users would be shut out of the allocation. In addition, because the deposit is proportional to the size of the order, and not a fixed amount, smaller Users would not be disproportionately affected by the deposit requirement.

The proposed changes are not otherwise intended to address any other issues relating to colocation services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,¹⁵ in general, and furthers the objectives of section 6(b)(5) of the Act,¹⁶ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system by creating an alternative procedure by which the Exchange can allocate power in the MDC. The current procedures provide for only two allocation methods: orders that must be limited to 32 kW when the Purchasing Limits are

in effect, and unlimited orders that the Exchange must fill on a first-come, first-served basis when the Purchasing Limits are not in effect. Neither of those current procedures gives the Exchange a way to obtain accurate information from Users about their actual and anticipated power needs—information that the Exchange requires in order to properly plan for future hall expansions at the MDC. The current procedures are not well-tailored to allocating large amounts of power that become available all at once, such as when a new colocation hall opens. When a large amount of power becomes available at one time, such as through a hall expansion, the current procedures could create a race condition in which the largest Users place early orders for many hundreds of kilowatts of power that the Exchange must fill on a first-come, first-served basis, effectively shutting out other customers with more modest power needs. In contrast, the proposed alternative procedure would remove impediments and perfect the mechanism of a free and open market and a national market system by permitting the Exchange to allocate up to 32 kW of power (subject to sufficient power being available) to each User before any User's order for more than 32 kW would be filled. This would ensure that each User submitting a finalized order during the Ordering Window would be guaranteed to receive at least some power and no Users would be shut out of the allocation.

The proposed requirement that orders submitted during the Ordering Window be guaranteed by a deposit is also designed to remove impediments and to perfect the mechanism of a free and open market and a national market system. The current procedures give the Exchange no way to accurately measure User demand for additional power. The existing waitlist is no indication of Users' actual demand, since waitlist orders are capped at 32 kW. Users' comments that they are interested in purchasing hundreds more kilowatts of power are mere casual mentions, which, in the Exchange's experience, Users sometimes walk back when the power actually becomes available. Without firm, guaranteed commitments from Users to purchase the power if it is made available, the Exchange runs the risk of underestimating or overestimating Users' true demand for power. The proposed deposit requirement would address these issues by discouraging Users from submitting orders for more power than they actually intend to purchase and would indicate the true amount of additional

power that each User would agree to purchase if it were made available. The proposed deposit requirement of two months' worth of the monthly recurring costs of the amount of new power ordered during the Ordering Window is reasonable because, on the one hand, it is not so onerous as to dissuade Users from submitting orders, and, on the other hand, it is not so trivial that it would fail to deter Users from submitting exaggerated orders.¹⁷ The Exchange requires market participants to submit deposits in other contexts, and as such, the deposit requirement here would not be novel.¹⁸

Under the proposed procedure, if a User wishes to reduce an order that it placed during the Ordering Window, its deposit would not be reduced or returned, but rather would be applied against the User's first and subsequent months' invoices after the power is delivered until the deposit is completely depleted. The Exchange believes that this would remove impediments and perfect the mechanism of a free and open market and a national market system because it would ensure that a User would be reimbursed for all of its deposit even if it reduces its order after the Ordering Window closes. This would remove any incentive a User otherwise might have to understate its needs for power out of a concern that it would not be reimbursed for the full amount of its deposit.

The proposed rule change would protect investors and the public interest in that it would provide the Exchange with accurate insight into Users' true power requirements. It is in the public interest for the Exchange to take User demand into account and to make reasoned, informed decisions about whether and how to expand the MDC.

The proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed changes would apply equally

¹⁷ To illustrate, for a large User ordering an additional 300 kW of power, the deposit required would be \$540,000 (*i.e.*, two times the monthly recurring cost of \$270,000), while a smaller User ordering an additional 32 kW of power would pay an estimated deposit of \$60,000 (*i.e.*, two times the monthly recurring cost of \$30,000), depending on how much power it already had at the MDC.

¹⁸ For example, since 2012, the Exchange has required prospective issuers to pay a \$25,000 initial application fee as part of the process for listing a new security on the exchange. This fee functions as a deposit that is credited toward the issuer's listing fees after it is listed on the exchange. The deposit functions as "a disincentive for impractical applications by issuers." The deposit is forfeited if the issuer does not ultimately list on the exchange. See Securities Exchange Act Release No. 68470 (December 19, 2021), 77 FR 76116 at 76117 (December 26, 2012) (SR-NYSE-2012-68).

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

to all types and sizes of market participants. All Users would receive equal notice of the opening of the Ordering Window; the Ordering Window dates would be the same for all Users; and each order during the Ordering Window would be secured with a deposit equal to two months of the monthly recurring costs of the power ordered. Smaller Users with more modest power needs would not be disadvantaged by the proposed changes. In Step 2, each User that finalized an order during the Ordering Window would be allocated up to 32 kW of power (subject to sufficient power being available) before any User's order for more than 32 kW would be filled. This would ensure that all Users that participate in the Ordering Window would receive at least some power and no Users would be shut out of the allocation. In addition, because the deposit is proportional to the size of the order and not a fixed amount, smaller Users would not be disproportionately affected by the deposit requirement. Finally, the proposed Ordering Window procedure would not disadvantage Users on the current waitlist pursuant to Colocation Note 7, since power would be allocated to those orders first under the Ordering Window procedure.

For all these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act,¹⁹ the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the proposed rule change would not place any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would provide an alternative procedure by which the Exchange can allocate power in the MDC that both provides the Exchange with reliable information about Users' true power needs and allows all Users that submit deposit-guaranteed orders during the Ordering Window to be assured of receiving at least some additional power. The Exchange does not expect the proposed rule change to impact intra-market or intermarket competition between exchanges, Users, or any other 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

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSENAT-2023-18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NYSENAT-2023-18. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSENAT-2023-18 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-18297 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98182; File No. SR-ISE-2023-18]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 15 (Simple Order Risk Protections) To Adopt an Active Quote Protection

August 21, 2023.

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 August 11, 2023, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 3, Section 15 (Risk Protections) to adopt an active quote protection.

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁹ 15 U.S.C. 78f(b)(8).

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to adopt an active risk counter functionality called active quote protection ("Active Quote Protection") in Options 3, Section 15. The Exchange intends to introduce the foregoing changes with its upcoming technology migration to enhanced Nasdaq, Inc. ("Nasdaq") functionality, and intends to begin implementation prior to December 20, 2024.³ The Exchange will announce the initial migration date and symbol rollout schedule to Members in an Options Trader Alert at a later date.

The Exchange proposes to offer an optional active risk counter functionality called Active Quote Protection, which will be available to Market Makers as an alternative to existing passive risk counter functionality described in Options 3, Section 15(a)(3)(B) (*i.e.*, "Automated Quotation Adjustments").⁴ The proposed Active Quote Protection functionality will be similar to existing active risk counter functionality on another options exchange, which currently allows exchange users to actively decrement the risk counter by a specified amount at any time, rather than waiting until a risk limit is reached or the user otherwise sends a specific

instruction to the exchange to completely reset the counting program.⁵

Today, the Exchange requires Market Makers to configure risk exposure thresholds based on various metrics for each options class, including percentage of executed quotes ("Percentage Threshold"), total number of executed contracts ("Volume Threshold"), absolute value of the difference between long and short positions ("Delta Threshold"), and absolute value of the difference between contracts bought and contracts sold ("Vega Threshold") (collectively, "Thresholds").⁶ As set forth in Options 3, Section 15(a)(3)(B)(i), the System tracks each Threshold with a corresponding risk counter over a Market Maker-specified rolling time period not to exceed 30 seconds. Furthermore, Section 15(a)(3)(B)(i) and (ii) describes that when a risk counter exceeds the corresponding Threshold during the specified time period, the System would automatically remove the Market Maker's quotes in all series of the applicable options class (each, a "Purge Event"). As a result of a Purge Event, the corresponding risk counter and Threshold would reset upon such removal. The Exchange also notes that pursuant to Section 15(a)(3)(B)(iii) today, the Thresholds and risk counters can be completely reset if the Market Maker specifically requests the System to remove quotes in all series of an options class. This risk protection is passive in that the risk counters wait to reset until the expiry of a specified time period, a Purge Event, or when the Market Maker otherwise sends a specific instruction to the Exchange to remove quotes to completely reset the counters.

The Exchange now proposes to introduce a new risk protection called Active Quote Protection that would enable Market Makers to actively manage their executed contract limit ("Contract Limit") by sending an electronic instruction to the Exchange to decrement their executed contract limit

counter ("Limit Counter") by a specified amount at any time, rather than waiting until the expiry of a defined time period, when the risk limit is exceeded (like a Purge Event), or when the Market Maker otherwise sends a specific instruction to purge quotes to completely reset the risk counter. The Contract Limit, as set by the Market Maker, would apply for the duration of the trading day. Once the Market Maker's Limit Counter exceeds the Contract Limit set by the Market Maker, the System would automatically remove quotes in all series of the applicable options class submitted through the Exchange's Specialized Quote Feed protocol,⁷ identical to how the quote removal mechanism works for a Purge Event today.⁸ Today, Purge Events are triggered under the existing Automated Quotation Adjustments on the first execution that exceeds the applicable Threshold. Once an execution occurs, the System checks all Thresholds to see if they have been exceeded. If exceeded, the Market Maker's quote would be purged pursuant to Options 3, Section 15(a)(3)(B)(iii). In order to remain consistent with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS, any marketable orders or quotes that are executable against a Market Maker's quotes that are received⁹ prior to the time the applicable Threshold is triggered will be automatically executed up to the size of the Market Maker's quote, regardless of whether the execution would cause the Market Maker to exceed their pre-set Percentage Threshold, Volume Threshold, Delta Threshold, or Vega Threshold.¹⁰

Under Active Quote Protection, the System would similarly handle the Market Maker's quote in that the quote could be filled one execution over the Contract Limit before the Market Maker's remaining quotes are cancelled by the System in order to be consistent with the firm quote obligations under Rule 602 of Regulation NMS. Specifically, the Exchange notes that any marketable orders or quotes that are executable against a Market Maker's

⁵ See MEMX LLC ("MEMX") Rule 21.16(b) (Active Risk Counter). See also Securities Exchange Act Release No. 95445 (August 8, 2022), 87 FR 49894 (August 12, 2022) (SR-MEMX-2022-10). Similar to the proposed Active Quote Protection, the active risk counter on MEMX is voluntary and offers a way for users to proactively manage their risk. The MEMX risk protection, however, allows the user to actively manage all the risk limits specified in MEMX's rule (*e.g.*, executed contracts, notional value, etc.) whereas the Exchange's proposal would allow Market Makers to actively manage executed contracts only, as discussed later in this filing. In addition, the Exchange's proposal will only apply to quotes whereas MEMX's functionality applies to both orders and quotes.

⁶ The Thresholds are described in detail in Options 3, Section 15(a)(3)(B)(i)(a)–(d). If a Market Maker does not provide a parameter for each Threshold, the Exchange will apply default parameters announced to Members.

⁷ Specialized Quote Feed or "SQF" is an interface that only Market Makers may use to submit quotes to the Exchange. See Supplementary Material .03(c) to Options 3, Section 7.

⁸ See Options 3, Section 15(a)(3)(B)(ii) (renumbered as Section 15(a)(3)(B)(iii) under this proposal, as noted below).

⁹ The time of receipt for an order or quote is the time such message is processed by the Exchange's order book.

¹⁰ See current Options 3, Section 15(a)(3)(B)(ii)(b). The Exchange will renumber this as Section 15(a)(3)(B)(iii)(b) and clarify this provision in the manner described later in this filing.

³ See Securities Exchange Act Release No. 97605 (May 26, 2023), 88 FR 36350 (June 2, 2023) (SR-ISE-2023-10) (delaying the implementation of all ISE technology migration rule filings).

⁴ As described below, the Exchange will specifically define this passive risk counter functionality as "Rapid Fire" within this Rule.

quotes that are received ¹¹ prior to the time the Contract Limit is triggered will be automatically executed up to the size of the Market Maker's quote, regardless of whether the execution would cause the Market Maker to exceed the Contract Limit.¹²

Additionally, under Active Quote Protection, Market Makers will be able to submit a request (i) to decrement their Limit Counter by a specified number of contracts, or (ii) to fully decrement their Limit Counter to zero.¹³ Market Makers that elect to use the proposed Active Quote Protection on a badge ¹⁴ will not be able to use the existing Threshold risk protections described above on the same badge (*i.e.*, the active and passive risk counter functionality would be mutually exclusive per badge) given that it would be unnecessarily complex to implement from a technology standpoint. Market Makers may be associated with multiple badges today, so if they want to use both risk protections for their activity on the Exchange, they will be able to set either the active or passive risk counter functionality on each one.

To effectuate the foregoing changes, the Exchange proposes to set forth the new risk protection in subparagraph (B)(ii) of Options 3, Section 15(a)(3), as follows:¹⁵

In lieu of Rapid Fire, a Market Maker may provide an executed contract limit ("Contract Limit") that, if exceeded, the System will automatically remove the Market Maker's quotes in all series of an options class submitted through SQF. The System will apply the Contract Limit for the duration of the trading day. For each class of options, the System will maintain an active limit counter that will track the current number of contracts executed through the Market Maker's quotes ("Limit Counter"). If the Limit Counter exceeds the Contract Limit established by the Market Maker, the System will automatically remove the Market

Maker's quotes as described in Section 15(a)(3)(B)(iii). Market Makers may submit a request (i) to decrement their Limit Counter by a specified number of contracts, or (ii) to fully decrement their Limit Counter to zero, including to re-enter the System as described in Section 15(a)(3)(B)(v). For Market Makers that elect to utilize the Contract Limit, the Percentage Threshold, Volume Threshold, Delta Threshold, and Vega Threshold will not be available for use on the Market Maker's badge.

As described above, once the Limit Counter exceeds the Contract Limit set by the Market Maker under the proposed Active Quote Protection, the System would automatically remove quotes in the same manner as currently specified for a Purge Event in proposed subparagraph (B)(iii) of Options 3, Section 15(a)(3). Accordingly, the Exchange proposes to add Active Quote Protection's Contract Limit throughout this Rule. Specifically, proposed subparagraph (B)(iii) will provide that the System will automatically remove quotes in all series of an options class when the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or Contract Limit has been exceeded. The System will send a Purge Notification Message to the Market Maker for all affected series when the above thresholds have been exceeded. Proposed subparagraph (B)(iii)(a) will provide that the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, and Contract Limit are considered independently of each other.

Further, as discussed above, any marketable orders or quotes that are executable against a Market Maker's quotes that are received ¹⁶ prior to the time the applicable Threshold or Contract Limit is triggered will be automatically executed up to the size of the Market Maker's quote, even if such execution would cause the Market Maker to exceed any of their pre-set risk limits with respect to any of the foregoing risk parameters. The Exchange notes that the current related Rule in sub-paragraph (B)(ii)(b)(3) only mentions that quotes will execute up to the Market Maker's size, and is silent on marketable orders. In addition, the current Rule does not specify the time of receipt of such marketable interest that is executable against the size of the Market Maker's quote. As such, the Exchange proposes to add this specificity in proposed sub-paragraph (B)(iii)(b)(3) to better describe how the System operates today for Automated Quotation Adjustments and how the System will operate for proposed Active

Quote Protection. In particular, subparagraph (B)(iii)(b)(3) will provide:

The System will execute any marketable orders or quotes that are executable against a Market Maker's quote and received prior to the time the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or Contract Limit is triggered up to the size of the Market Maker's quote, even if such execution results in executions in excess of the Market Maker's applicable Threshold or Contract Limit with respect to any parameter.

In addition, when the System removes quotes as a result of exceeding the Contract Limit under Active Quote Protection, the Exchange proposes to require the Market Maker to submit a request to re-enter the System. This request will be the same type of message as the request described in proposed subparagraph (B)(ii) where the Market Maker must request to fully decrement their Limit Counter back to zero in order to re-enter the System. This requirement will be added in proposed subparagraph (B)(v) of Options 3, Section 15(a)(3), and will be similar to how the existing quote purge mechanism works for the Thresholds today, except the Market Maker needs to send a separate message (*i.e.*, a re-entry indicator) to re-enter the System when their quotes are purged as a result of exceeding any of the existing Thresholds.

Similar to how default parameters are currently applied for each of the existing Thresholds described above, the Exchange proposes to apply a default parameter for the Active Quote Protection Contract Limit (which would be announced to Members) if the Market Maker opting to use Active Quote Protection does not provide a Contract Limit at the outset.¹⁷ Accordingly, proposed subparagraph (B)(vi) will provide that if a Market Maker does not provide a parameter for each of the automated quotation removal protections described in (B)(i)(a)–(d) and (B)(ii) above, the Exchange will apply default parameters, which are announced to Members.

The Exchange also proposes that the new Active Quote Protection would leverage the existing market-wide speed bump ("MWSB") functionality currently set forth in Options 3, Section 15(a)(3)(B)(vi) (renumbered as Section 15(a)(3)(B)(vii) under this proposal). Today, MWSB is a risk protection offered alongside the current Automated Quotation Adjustments and triggers when, during a time period established by the Market Maker, the total number of Purge Events exceeds a market-wide parameter provided to the Exchange by

¹¹ See *supra* note 9.

¹² For both the current Automated Quotation Adjustments and proposed Active Quote Protection, the System will execute marketable interest up to the size of the Market Maker's quote, but cannot guarantee interest will be fully executed, as is the case with any execution in the Exchange's order book. There is always the possibility that the Market Maker's quote size (and/or Market Maker's quote plus other interest on the order book) may not be sufficient volume to fill the incoming interest.

¹³ As discussed later in this filing, in order to re-enter the System after their quotes are purged pursuant to the Active Quote Protection, Market Makers will need to submit the same request to fully decrement their Limit Counter to zero.

¹⁴ A "badge" shall mean an account number, which may contain letters and/or numbers, assigned to Market Makers. A Market Maker account may be associated with multiple badges. See Options 1, Section 1(a)(5).

¹⁵ As a result, the Exchange will also renumber existing subparagraphs (B)(ii)–(vi) as proposed subparagraphs (B)(iii)–(vii).

¹⁶ See *supra* note 9.

¹⁷ The Exchange will initially set the default Contract Limit at 100 contracts.

the Market Maker.¹⁸ When MWSB is triggered, the Exchange automatically purges the Market Maker's quotes in all classes, and the Market Maker must request re-entry to the System by contacting the Exchange's Operations Department. Today, MWSB is meant to provide Market Makers with protection from the risk of multiple executions across multiple series of an option or across multiple options. This risk protection recognizes that risk to Market Makers is not limited to a single series in an option or even to all series in an option; Market Makers that quote in multiple series of multiple options have significant exposure, requiring them to offset or hedge their overall positions. Market Makers are required to continuously quote in assigned options, and quoting across many series in an option or multiple options creates the possibility of executions that can create large, unintended principal positions that could expose Market Makers to unnecessary risk. MWSB is therefore intended to assist Market Makers in managing their market risk by tracking the number of Purge Events relative to the market-wide parameter set by the Market Maker. The Exchange believes that tracking the number of Active Quote Protection Purge Events for a Market Maker against its MWSB market-wide parameter would be similarly useful for managing market risk.

To that end, the Exchange proposes to update MWSB to add purge events under Active Quote Protection to the MWSB counter such that Active Quote Protection purge events and Purge Events under the current Automated Quotation Adjustments will be aggregated together as counting toward the specified market-wide parameter. Accordingly, the Exchange proposes to add references to the Active Quote Protection rule (*i.e.*, proposed subparagraph (B)(ii) of Options 3, Section 15(a)(3)) throughout the MWSB rule in proposed subparagraph (B)(vii), specifically:

In addition to the automated quotation removal protections described in (B)(i)(a)–(d) and (B)(ii) above, a Market Maker must provide a market wide parameter by which the Exchange will automatically remove a Market Maker's quotes in all classes when, during a time period established by the Market Maker, the total number of quote removal events specified in (B)(i)(a)–(d) and (B)(ii) above exceeds the market wide parameter provided to the Exchange by the

Market Maker. Market Makers may request the Exchange to set the market wide parameter to apply to just Nasdaq ISE or across Nasdaq ISE and Nasdaq GEMX. Market Makers must request the Exchange enable re-entry by contacting the Exchange's Operations Department.

The following example illustrates the proposed behavior of the Active Quote Protection risk protection:

Market Maker AAPL

Contract Limit: 100.

- Market Maker trades a transaction for 10 contracts in AAPL; Limit Counter goes from 0 to 10.
- Market Maker sends a request to decrement its Limit Counter in AAPL for 10 contracts; Limit Counter goes from 10 to 0.
- Market Maker trades a transaction for 20 contracts in AAPL; Limit Counter goes from 0 to 20.
- Market Maker trades a transaction for 50 contracts in AAPL; Limit Counter goes from 20 to 70.
- Market Maker sends a request to decrement its Limit Counter in AAPL for 20 contracts; Limit Counter goes from 70 to 50.
- Market Maker trades a transaction for 60 contracts in AAPL; Limit Counter goes from 50 to 110 and all Market Maker quotes in AAPL are automatically purged after the execution because the Limit Counter exceeded the Market Maker's Contract Limit of 100 executed contracts.
- At this point, the Market Maker must send a request to fully decrement its Limit Counter in AAPL back to zero in order to begin quoting again.

The following example illustrates how MWSB will work with the proposed Active Quote Protection functionality:

- Assume Market Maker in AAPL and SPY has Automated Quotation Adjustments set for AAPL and Active QP set for SPY.
- Market Maker sets its MWSB market-wide parameter so that it is triggered at 25 purge events within a 20 second time period.

- On a given trading day, if an Active Quote Protection Purge Event is triggered 15 times in SPY and an Automated Quotation Adjustment Purge Event is triggered 10 times in AAPL, all within 20 seconds, then the Exchange will automatically remove all of the Market Maker's quotes AAPL and SPY.

Technical Amendments

The Exchange proposes a few technical, non-substantive amendments in Options 3, Section 15(a)(3)(B). With the addition of the new Active Quote Protection rule in proposed

subparagraph (B)(ii), the Exchange proposes to renumber existing subparagraphs (B)(ii)–(vi) as proposed subparagraphs (B)(iii)–(vii) and make related changes to update existing cross-cites within Section 15(a)(3)(B). The Exchange also proposes to title subparagraph (B)(i) as “Rapid Fire” and subparagraph (B)(vii) as “Market-Wide Speed Bump” to more clearly identify which rules apply to which risk protections.

Lastly, the Exchange proposes in the MWSB rule (*i.e.*, proposed Options 3, Section 15(a)(3)(B)(vii)) to delete the reference to Supplementary Material .04 to Options 3, Section 14. When the Exchange originally adopted the MWSB rule, the intent was for the MWSB risk protection to cover curtailment events under Supplementary Material .04 to Rule 722.¹⁹ Supplementary Material .04 to Rule 722 previously governed Automated Spread Quotation Adjustments for complex quotes. The Exchange subsequently removed complex quoting and all related functionality (including Automated Spread Quotation Adjustments), but did not remove the cross-cite to Supplementary Material .04 to Rule 722 in the MWSB rule.²⁰ As a result, this cross-cite was ported over to the Exchange's relocated Rulebook in 2019 and updated to Supplementary Material .04 to Options 3, Section 14,²¹ when it should have been deleted as an obsolete reference at the time the Exchange removed complex quoting functionality.²² The Exchange now proposes to eliminate this cross-cite in the MWSB rule as an obsolete reference.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,²³ in general, and furthers the objectives of section 6(b)(5) of the Act,²⁴ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and

¹⁹ See Securities Exchange Act Release No. 71446 (January 30, 2014), 79 FR 6951 (February 5, 2014) (SR–ISE–2014–04). The MWSB rule was originally set forth in Rule 804, relocated to Rule 714, and finally relocated to its current place in Options 3, Section 15. See Securities Exchange Act Release Nos. 84237 (September 20, 2018), 83 FR 48660 (September 26, 2018) (SR–ISE–2018–80); and 86138 (June 18, 2019), 84 FR 29567 (June 24, 2019) (SR–ISE–2019–17).

²⁰ See Securities Exchange Act Release No. 85308 (March 13, 2019), 84 FR 10136 (March 19, 2019) (SR–ISE–2019–05).

²¹ See Securities Exchange Act Release No. 86138 (June 18, 2019), 84 FR 29567 (June 24, 2019) (SR–ISE–2019–17).

²² See *supra* note 20.

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(5).

¹⁸ Market Makers may request the Exchange to set the market wide parameter to apply to just Nasdaq ISE or across Nasdaq ISE and Nasdaq GEMX. The Exchange notes that the MWSB rule currently refers to Supplementary Material .04 to Options 3, Section 14, which will be deleted as an obsolete reference, as described later in this filing.

open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed Active Quote Protection risk protection is consistent with the Act because it will enhance the risk protection tools available to Market Makers by introducing a new method of establishing and monitoring for risk parameters that will be offered as an alternative to existing Rapid Fire risk parameters, thereby supporting a Market Maker's ability to manage their risk on the Exchange, and also providing them with flexibility to use additional tools to manage risk. As noted above, while the passive (Rapid Fire) and active (Active QP) risk counter functionality will be mutually exclusive on each badge, Market Makers will still be able to use both to cover their activity on the Exchange by getting multiple badges and setting each risk counter by badge. The Exchange believes that offering more risk management tools to Market Makers would mitigate their exposure to excessive risk. The Exchange further believes that having the new Active Quote Protection functionality leverage the existing MWSB functionality will similarly support a Market Maker's ability to manage their risk on the Exchange by including Active Quote Protection purge events to the MWSB counter. As noted above, the risk to Market Makers is not limited to a single series in an option or even multiple series in an option as Market Makers that quote in multiple series of multiple options have significant exposure, requiring them to offset or hedge their overall positions. Market Makers are required to continuously quote in assigned options, and quoting across many series in an option or multiple options creates the possibility of executions that can create large, unintended principal positions that could expose Market Makers to unnecessary risk. Today, MWSB is designed to assist Market Makers in managing their market risk by tracking the number of Purge Events relative to the market-wide parameter set by the Market Maker. The Exchange therefore believes that tracking the number of Active Quote Protection purge events for a Market Maker against its MWSB market-wide parameter would be similarly useful for managing market risk so that they can provide deep and liquid markets to the benefit of all investors. Ultimately, the Exchange believes that providing Market Makers with additional tools in the manner described above to manage their risk parameters serves to perfect the

mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest because Market Makers will be better able to manage risks with these tools.

With regard to the impact of this proposal on system capacity, the Exchange notes that it has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle any potential additional traffic associated with the proposed rule change. The Exchange believes that its members will not have a capacity issue as a result of this proposal.

The Exchange further represents that its proposal will continue to operate consistently with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS. Specifically, any marketable interest that is executable against a Market Maker's quotes that are received²⁵ by the Exchange prior to the time this functionality is triggered will be automatically executed at the price up to the Market Maker's size, regardless of whether such execution results in executions in excess of the Market Maker's pre-set Contract Limit.²⁶ As discussed above, this is also in line with how current Rapid Fire operates today. The Exchange believes that the proposed changes in proposed subparagraph (B)(iii)(b) to specify that this Rule will apply to marketable orders and quotes (currently silent on marketable orders), and to specify the time of receipt of such marketable interest that is executable against the size of the Market Maker's quote, will promote clarity in how the System currently operates for Rapid Fire and will operate for Active Quote Protection.

As noted above, the proposed Active Quote Protection functionality is similar to existing active risk counter functionality on another options exchange, which currently allows users to actively decrement the risk counter by a specified amount at any time, rather than waiting until a risk limit is reached or the user otherwise sends a specific instruction to the exchange to completely reset the counting program.²⁷

Technical Amendments

The Exchange believes that the technical amendments in Options 3, Section 15(a)(3)(B) described above are consistent with the Act because they

will promote clarity in the rules and make the Rulebook easier to navigate for market participants by updating rule numbering and existing cross-cites as described above. Furthermore, the Exchange also believes that adding the defined terms for Rapid Fire and MWSB in the rule text will promote clarity so that Members can more easily locate the relevant functionalities in the Rulebook. Lastly, the Exchange believes that the proposed changes to remove the cross-cite to Supplementary Material .04 to Options 3, Section 14 from the MWSB rule is consistent with the Act because it will eliminate an obsolete reference to functionality that no longer exists on the Exchange, which will promote clarity in the Rulebook and avoid any potential confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed Active Quote Protection functionality will impose any undue burden on intra-market competition as it is aimed at mitigating exposure to excessive risk when trading on the Exchange. While the Exchange will offer the proposed functionality to Market Makers only, the proposed risk protection is intended to provide Market Makers with an additional tool to manage their risk parameters in a manner they deem appropriate. As such, the Exchange believes that the proposed functionality may facilitate Market Makers' provision of liquidity on the Exchange, thereby benefitting all market participants through additional execution opportunities at potentially improved prices.

The Exchange also believes that its Active Quote Protection proposal does not impose an undue burden on inter-market competition as the proposed risk protection is similar to an existing risk protection on MEMX²⁸ as described above, and any options market could adopt similar rules.

Lastly, the Exchange does not believe that the proposed technical amendments in Options 3, Section 15(a)(3)(B) will impose an undue burden on competition as these are non-substantive changes to promote clarity in the rules and make the Rulebook easier to navigate for market participants.

²⁵ See *supra* note 9.

²⁶ See proposed subparagraph (B)(iii)(b) of Options 3, Section 15(a)(3).

²⁷ See *supra* note 5.

²⁸ See *supra* note 5.

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)(iii) of the Act²⁹ and subparagraph (f)(6) of Rule 19b-4 thereunder.³⁰

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ISE-2023-18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-ISE-2023-18. This file

number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-ISE-2023-18 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-18304 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98179; File No. SR-BX-2023-019]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 15 (Risk Protections) To Adopt an Active Quote Protection

August 21, 2023.

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 August

11, 2023, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 3, Section 15 (Risk Protections) to adopt an active quote protection.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/bx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to adopt an active risk counter functionality called active quote protection ("Active Quote Protection") in Options 3, Section 15. The Exchange intends to begin implementation prior to December 20, 2024, and will provide prior notice of the implementation date to Members in an Options Trader Alert.

The Exchange proposes to offer an optional active risk counter functionality called Active Quote Protection, which will be available to Market Makers as an alternative to existing passive risk counter functionality described in Options 3, Section 15(c)(2)(A) (*i.e.*, "Quotation Adjustments").³ The proposed Active

²⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

³⁰ 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.

³¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ As described below, the Exchange will specifically define this passive risk counter functionality as "Rapid Fire" within this Rule.

Quote Protection functionality will be similar to existing active risk counter functionality on another options exchange, which currently allows exchange users to actively decrement the risk counter by a specified amount at any time, rather than waiting until a risk limit is reached or the user otherwise sends a specific instruction to the exchange to completely reset the counting program.⁴

Today, the Exchange requires Market Makers to configure risk exposure thresholds based on either percentage of executed quotes (“Percentage Threshold”) or total number of executed contracts (“Volume Threshold”). The Exchange also offers two optional risk exposure thresholds based on the absolute value of the difference between long and short positions (“Delta Threshold”), and absolute value of the difference between contracts bought and contracts sold (“Vega Threshold”) (collectively, “Thresholds”).⁵ As set forth in Options 3, Section 15(c)(2)(A), the System tracks each Threshold with a corresponding risk counter over a Market Maker-specified rolling time period not to exceed 30 seconds. Furthermore, Section 15(c)(2)(A) describes that when a risk counter exceeds the corresponding Threshold during the specified time period, the System would automatically remove the Market Maker’s quotes in all series of the applicable options class (each, a “Purge Event”). As a result of a Purge Event, the corresponding risk counter and Threshold would reset upon such removal. The Exchange also notes that pursuant to Section 15(c)(2)(D) today, the Thresholds and risk counters can be completely reset if the Market Maker specifically requests the System to remove quotes in all options series in an underlying issue. This risk protection is passive in that the risk counters wait to reset until the expiry of a specified time period, a Purge Event, or when the Market Maker otherwise sends a specific

instruction to the Exchange to remove quotes to completely reset the counters.

The Exchange now proposes to introduce a new risk protection called Active Quote Protection that would enable Market Makers to actively manage their executed contract limit (“Contract Limit”) by sending an electronic instruction to the Exchange to decrement their executed contract limit counter (“Limit Counter”) by a specified amount at any time, rather than waiting until the expiry of a defined time period, when the risk limit is exceeded (like a Purge Event), or when the Market Maker otherwise sends a specific instruction to purge quotes to completely reset the risk counter.⁶

The Contract Limit, as set by the Market Maker, would apply for the duration of the trading day. Once the Market Maker’s Limit Counter exceeds the Contract Limit set by the Market Maker, the System would automatically remove quotes in all series of the applicable options class submitted through the Exchange’s Specialized Quote Feed protocol,⁷ identical to how the quote removal mechanism works for a Purge Event today.⁸ Today, Purge Events are triggered under the existing Quotation Adjustments on the first execution that exceeds the applicable Threshold. Once an execution occurs, the System checks all Thresholds to see if they have been exceeded. If exceeded, the Market Maker’s quote would be purged pursuant to Options 3, Section 15(c)(2)(D). In order to remain consistent with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS, any marketable orders or quotes that are executable against a Market Maker’s quotes that are received⁹ prior to the time the applicable Threshold is triggered will be automatically executed up to the size of the Market Maker’s quote, regardless of whether the execution would cause the Market Maker to exceed their pre-set Percentage Threshold, Volume Threshold, Delta Threshold, or Vega Threshold.¹⁰

⁶ If the Market Maker opting to use Active Quote Protection does not provide a Contract Limit at the outset, the Exchange will apply a default parameter for the Active Quote Protection Contract Limit (which would be announced to Participants). The Exchange will initially set the default Contract Limit at 100 contracts.

⁷ Specialized Quote Feed or “SQF” is an interface that only Market Makers may use to submit quotes to the Exchange. See Options 3, Section 7(e)(1)(B).

⁸ See Options 3, Section 15(c)(2)(C) (renumbered as Section 15(c)(2)(D) under this proposal, as noted below).

⁹ The time of receipt for an order or quote is the time such message is processed by the Exchange’s order book.

¹⁰ See current Options 3, Section 15(c)(2)(C)(ii). The Exchange will renumber this as Section

Under Active Quote Protection, the System would similarly handle the Market Maker’s quote in that the quote could be filled one execution over the Contract Limit before the Market Maker’s remaining quotes are cancelled by the System in order to be consistent with the firm quote obligations under Rule 602 of Regulation NMS. Specifically, the Exchange notes that any marketable orders or quotes that are executable against a Market Maker’s quotes that are received¹¹ prior to the time the Contract Limit is triggered will be automatically executed up to the size of the Market Maker’s quote, regardless of whether the execution would cause the Market Maker to exceed the Contract Limit.¹²

Additionally, under Active Quote Protection, Market Makers will be able to submit a request (i) to decrement their Limit Counter by a specified number of contracts, or (ii) to fully decrement their Limit Counter to zero.¹³ Market Makers that elect to use the proposed Active Quote Protection on a badge¹⁴ will not be able to use the existing Threshold risk protections described above on the same badge (*i.e.*, the active and passive risk counter functionality would be mutually exclusive per badge) given that it would be unnecessarily complex to implement from a technology standpoint. Market Makers may be associated with multiple badges today, so if they want to use both risk protections for their activity on the Exchange, they will be able to set either the active or passive risk counter functionality on each one.

To effectuate the foregoing changes, the Exchange proposes to set forth the new risk protection in paragraph (B) of Options 3, Section 15(c)(2), as follows:¹⁵

15(c)(2)(D)(ii) and clarify this provision in the manner described later in this filing.

¹¹ See *supra* note 9.

¹² For both the current Quotation Adjustments and proposed Active Quote Protection, the System will execute marketable interest up to the size of the Market Maker’s quote, but cannot guarantee interest will be fully executed, as is the case with any execution in the Exchange’s order book. There is always the possibility that the Market Maker’s quote size (and/or Market Maker’s quote plus other interest on the order book) may not be sufficient volume to fill the incoming interest.

¹³ As discussed later in this filing, in order to re-enter the System after their quotes are purged pursuant to the Active Quote Protection, Market Makers will need to submit the same request to fully decrement their Limit Counter to zero.

¹⁴ The term “badge” means an account number, which may contain letters and/or numbers, assigned to BX Market Makers. A BX Market Maker account may be associated with multiple badges. See Options 1, Section 1(a)(6).

¹⁵ As a result, the Exchange will also renumber existing paragraphs (C)–(F) as proposed paragraphs (D)–(G).

⁴ See MEMX LLC (“MEMX”) Rule 21.16(b) (Active Risk Counter). See also Securities Exchange Act Release No. 95445 (August 8, 2022), 87 FR 49894 (August 12, 2022) (SR–MEMX–2022–10). Similar to the proposed Active Quote Protection, the active risk counter on MEMX is voluntary and offers a way for users to proactively manage their risk. The MEMX risk protection, however, allows the user to actively manage all the risk limits specified in MEMX’s rule (*e.g.*, executed contracts, notional value, etc.) whereas the Exchange’s proposal would allow Market Makers to actively manage executed contracts only, as discussed later in this filing. In addition, the Exchange’s proposal will only apply to quotes whereas MEMX’s functionality applies to both orders and quotes.

⁵ The Thresholds are described in detail in Options 3, Section 15(c)(2)(A)(i)–(iv). If a Market Maker does not provide a parameter for each Threshold, the Exchange will apply default parameters announced to Members.

In lieu of Rapid Fire, a Market Maker may provide an executed contract limit ("Contract Limit") that, if exceeded, the System will automatically remove the Market Maker's quotes in all series of an options class submitted through SQF. The System will apply the Contract Limit for the duration of the trading day. For each class of options, the System will maintain an active limit counter that will track the current number of contracts executed through the Market Maker's quotes ("Limit Counter"). If the Limit Counter exceeds the Contract Limit established by the Market Maker, the System will automatically remove the Market Maker's quotes as described in paragraph (D) below. Market Makers may submit a request (i) to decrement their Limit Counter by a specified number of contracts, or (ii) to fully decrement their Limit Counter to zero, including to re-enter the System as described in paragraph (F) below.

The Exchange also proposes to amend current paragraph (F) (renumbered to paragraph (G) under this proposal) of Options 3, Section 15(c)(2) to specify that the active and passive risk counter functionality will be mutually exclusive per badge). As amended, proposed paragraph (G) will provide:

The Exchange will require BX Market Makers to utilize the Percentage Threshold, the Volume Threshold, or the Contract Limit. For Market Makers that elect to utilize the Contract Limit, the Percentage Threshold, Volume Threshold, Delta Threshold, and Vega Threshold will not be available for use on the Market Maker's badge. The Delta, Vega and Multi-Trigger Thresholds are optional.

As described above, once the Limit Counter exceeds the Contract Limit set by the Market Maker under the proposed Active Quote Protection, the System would automatically remove quotes in the same manner as currently specified for a Purge Event in proposed paragraph (D) of Options 3, Section 15(c)(2). Accordingly, the Exchange proposes to add Active Quote Protection's Contract Limit throughout this Rule. Specifically, proposed paragraph (D) will provide that the System will automatically remove quotes in all series of an options class in an underlying security when the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or the Contract Limit has been exceeded. The System will automatically remove quotes in all series of an option class in all underlying securities when the Multi-Trigger Threshold¹⁶ has been exceeded.

¹⁶ Multi-Trigger Threshold is defined in current paragraph (B) (proposed paragraph (D)) of Section 15(c)(2) as the number of allowable triggers by which the Exchange will automatically remove quotes in all options series in all underlying issues submitted through designated BX protocols as specified by the Exchange. This threshold is part of the Exchange's Multi-Trigger risk protection.

The System will send a Purge Notification Message to the BX Market Maker for all affected options when the above thresholds have been exceeded. Proposed subparagraph (D)(i) will provide that the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, Contract Limit, and Multi-Trigger Threshold are considered independently of each other.

Further, as discussed above, any marketable orders or quotes that are executable against a Market Maker's quotes that are received¹⁷ prior to the time the applicable Threshold or Contract Limit is triggered will be automatically executed up to the size of the Market Maker's quote, even if such execution would cause the Market Maker to exceed any of their pre-set risk limits with respect to any of the foregoing risk parameters. The Exchange notes that the current related Rule in sub-paragraph (C)(ii) only mentions that quotes will execute up to the Market Maker's size, and is silent on marketable orders. In addition, the current Rule does not specify the time of receipt of such marketable interest that is executable against the size of the Market Maker's quote. As such, the Exchange proposes to add this specificity in proposed sub-paragraph (D)(ii) to better describe how the System operates today for Quotation Adjustments and how the System will operate for proposed Active Quote Protection. In particular, sub-paragraph (D)(ii) will provide:

The System will execute any marketable orders or quotes that are executable against a Market Maker's quote and received prior to the time the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or Contract Limit is triggered up to the size of the Market Maker's quote, even if such execution results in executions in excess of the Market Maker's applicable Threshold or Contract Limit with respect to any parameter.

In addition, when the System removes quotes as a result of exceeding the Contract Limit under Active Quote Protection, the Exchange proposes to require the Market Maker to submit a request to re-enter the System. This request will be the same type of message as the request described in proposed paragraph (B) where the Market Maker must request to fully decrement their Limit Counter back to zero in order to re-enter the System. This requirement will be added in proposed paragraph (F) of Options 3, Section 15(c)(2), and will be similar to how the existing quote purge mechanism works for the Thresholds today, except the Market Maker needs to send a separate message (*i.e.*, a re-entry indicator) to re-enter the

System when their quotes are purged as a result of exceeding any of the existing Thresholds.

The Exchange also proposes that the new Active Quote Protection would leverage the existing multi-trigger ("Multi-Trigger") functionality currently set forth in Options 3, Section 15(c)(2)(B) (renumbered as Section 15(c)(2)(C) under this proposal). Today, Multi-Trigger is a risk protection offered alongside the current Quotation Adjustments. A BX Market Maker or BX Market Maker Group, which is defined as multiple affiliated BX Market Makers,¹⁸ may provide the specified time period and number of allowable Purge Events by which the Exchange will automatically remove quotes in all options series in all underlying issues submitted through designated BX protocols as specified by the Exchange ("Multi-Trigger Threshold"). Multi-Trigger is triggered when during a time period established by the Market Maker not to exceed 30 seconds, the total number of Quotation Adjustment Purge Events exceeds the Multi-Trigger Threshold provided to the Exchange by the BX Market Maker or BX Market Maker Group. When Multi-Trigger is triggered, the System automatically purges all of the Market Maker's or Group's quotes in all options series in an underlying issue. As set forth in current Options 3, Section 15(c)(2)(E) (renumbered to Section 15(c)(2)(F) under this proposal), when the System removes quotes as a result of the Multi-Trigger Threshold, the Market Maker must manually request re-entry to the System by contacting the Exchange. Exchange staff must then set a re-entry indicator in this case to enable re-entry, which will cause the System to send a Reentry Notification Message to the BX Market Maker or Group for all options series in all underlying issues. The Market Maker's Clearing Firm will be notified regarding the trigger and re-entry into the System after quotes are removed as a result of the Multi-Trigger Threshold, provided the Market Maker's Clearing Firm has requested to receive such notification.

Today, Multi-Trigger is meant to provide Market Makers or a Group with protection from the risk of multiple executions across multiple series of an option or across multiple options. This risk protection recognizes that risk to

¹⁸ This would be more than one BX Market Maker, but does not require the aggregation of all of the Participant's Market Makers. A Group would be comprised of BX Market Makers affiliated with one Participant (*i.e.*, one BX options member firm). The Participant would be required to define a Group by providing a list of such affiliated BX Market Makers to the Exchange.

¹⁷ See *supra* note 9.

Market Makers is not limited to a single series in an option or even to all series in an option; Market Makers that quote in multiple series of multiple options have significant exposure, requiring them to offset or hedge their overall positions. Market Makers are required to continuously quote in assigned options, and quoting across many series in an option or multiple options creates the possibility of executions that can create large, unintended principal positions that could expose Market Makers to unnecessary risk. Multi-Trigger is therefore intended to assist Market Makers or Groups in managing their market risk by tracking the number of Purge Events relative to the Multi-Trigger Threshold set by the Market Maker or Group. The Exchange believes that tracking the number of Active Quote Protection Purge Events for a Market Maker or Group against its Multi-Trigger Threshold would be similarly useful for managing market risk.

To that end, the Exchange proposes to update Multi-Trigger to add purge events under Active Quote Protection to the Multi-Trigger counter such that Active Quote Protection purge events and Purge Events under the current Quotation Adjustments will be aggregated together as counting toward the specified Multi-Trigger Threshold. Accordingly, the Exchange proposes to add references to the Active Quote Protection rule (*i.e.*, proposed paragraph (B) of Options 3, Section 15(c)(2)) throughout the Multi-Trigger rule in proposed paragraph (C), specifically:

A BX Market Maker or BX Market Maker Group (multiple affiliated BX Market Makers is a “Group” as defined by a BX Participant and provided by such Participant to the Exchange) may provide a specified time period and number of allowable triggers by which the Exchange will automatically remove quotes in all options series in all underlying issues submitted through designated BX protocols as specified by the Exchange (“Multi-Trigger Threshold”). During a specified time period established by the BX Market Maker not to exceed 30 seconds (“Multi-Trigger Specified Time Period”), the number of times the System automatically removes the BX Market Maker’s or Group’s quotes in all options series will be based on the number of triggers of the Percentage Threshold described in paragraph (A)(i) above, the Volume Threshold described in paragraph (A)(ii) above, the Delta Threshold described in paragraph (A)(iii) above, the Vega Threshold described in paragraph (A)(iv) above, and the Contract Limit described in paragraph (B) above. Once the System determines that the number of triggers exceeds a number established by either the BX Market Maker or Group, during a Multi-Trigger Specified Time Period, the System will automatically remove

all quotes in all options series in all underlying issues for that BX Market Maker or Group. A trigger is defined as the event which causes the System to automatically remove quotes in all options series in an underlying issue. A Multi-Trigger Specified Time Period will commence after every trigger of the Percentage Threshold, Volume Threshold, Delta Threshold, Vega Threshold, or Contract Limit, and will continue until the System removes quotes as described in paragraph (D) below or the Multi-Trigger Specified Time Period expires. The System counts triggers within the Multi-Trigger Specified Time Period across all triggers for the BX Market Maker or Group. A Multi-Trigger Specified Time Period operates on a rolling basis in that there may be multiple Multi-Trigger Specified Time Periods occurring simultaneously and such Multi-Trigger Specified Time Periods may overlap.

The following example illustrates the proposed behavior of the Active Quote Protection risk protection:

Market Maker AAPL

Contract Limit: 100

- Market Maker trades a transaction for 10 contracts in AAPL; Limit Counter goes from 0 to 10.
- Market Maker sends a request to decrement its Limit Counter in AAPL for 10 contracts; Limit Counter goes from 10 to 0.
- Market Maker trades a transaction for 20 contracts in AAPL; Limit Counter goes from 0 to 20.
- Market Maker trades a transaction for 50 contracts in AAPL; Limit Counter goes from 20 to 70.
- Market Maker sends a request to decrement its Limit Counter in AAPL for 20 contracts; Limit Counter goes from 70 to 50.
- Market Maker trades a transaction for 60 contracts in AAPL; Limit Counter goes from 50 to 110 and all Market Maker quotes in AAPL are automatically purged after the execution because the Limit Counter exceeded the Market Maker’s Contract Limit of 100 executed contracts.

- At this point, the Market Maker must send a request to fully decrement its Limit Counter in AAPL back to zero in order to begin quoting again.

The following example illustrates how Multi-Trigger will work with the proposed Active Quote Protection functionality:

- Assume Market Maker in AAPL and SPY has Quotation Adjustments set for AAPL and Active QP set for SPY.
- Market Maker sets its Multi-Trigger Threshold so that it is triggered at 25 purge events within a 20 second time period.
- On a given trading day, if an Active Quote Protection Purge Event is triggered 15 times in SPY and a

Quotation Adjustment Purge Event is triggered 10 times in AAPL, all within 20 seconds, then the Exchange will automatically remove all of the Market Maker’s quotes AAPL and SPY.

Technical Amendments

The Exchange proposes a few technical, non-substantive amendments in Options 3, Section 15(c)(2). With the addition of the new Active Quote Protection rule in proposed paragraph (B), the Exchange proposes to renumber existing paragraphs (B)–(F) as proposed paragraphs (C)–(G) and make related changes to update existing cross-cites within Section 15(c)(2). The Exchange also proposes in paragraph (A) to correct the current cross-cites to paragraphs (B) and (C) to paragraphs (D) and (E) because the Exchange originally intended to refer to how the System removes quotes either pursuant to a Purge Event (which is governed by proposed paragraph (D)) or pursuant to a Market Maker specifically requesting the System to remove quotes in all series of an underlying issue (which is governed by proposed paragraph (E)). The Exchange proposes to reword the rule text within proposed Options 3, Section 15(c)(2)(D) to replace the term “options” with the words “series of an options class” to conform the wording in this paragraph to other rule text with Options 3, Section 15. Additionally, the Exchange proposes to add the words “or Group” to Options 3, Section 15(c)(2)(F) because a Group may also request re-entry pursuant to proposed Options 3, Section 15(c)(2)(C) and would receive a Reentry Notification Message.

Lastly, the Exchange proposes to title paragraph (A) as “Rapid Fire” and paragraph (C) as “Multi-Trigger” to more clearly identify which rules apply to which risk protections.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,¹⁹ in general, and furthers the objectives of section 6(b)(5) of the Act,²⁰ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed Active Quote Protection risk protection is consistent with the Act because it will enhance the risk protection tools available to Market Makers and Groups by introducing a

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(5).

new method of establishing and monitoring for risk parameters that will be offered as an alternative to existing Rapid Fire risk parameters, thereby supporting a Market Maker's ability to manage their risk on the Exchange, and also providing them with flexibility to use additional tools to manage risk. As noted above, while the passive (Rapid Fire) and active (Active QP) risk counter functionality will be mutually exclusive on each badge, Market Makers will still be able to use both to cover their activity on the Exchange by getting multiple badges and setting each risk counter by badge. The Exchange believes that offering more risk management tools to Market Makers would mitigate their exposure to excessive risk. The Exchange further believes that having the new Active Quote Protection functionality leverage the existing Multi-Trigger functionality will similarly support a Market Maker's ability to manage their risk on the Exchange by including Active Quote Protection purge events to the Multi-Trigger counter. As noted above, the risk to Market Makers is not limited to a single series in an option or even multiple series in an option as Market Makers that quote in multiple series of multiple options have significant exposure, requiring them to offset or hedge their overall positions. Market Makers are required to continuously quote in assigned options, and quoting across many series in an option or multiple options creates the possibility of executions that can create large, unintended principal positions that could expose Market Makers to unnecessary risk. Today, Multi-Trigger is designed to assist Market Makers or a Group in managing their market risk by tracking the number of Purge Events relative to the market-wide parameter set by the Market Maker or the Group. The Exchange therefore believes that tracking the number of Active Quote Protection purge events for a Market Maker against its Multi-Trigger Threshold would be similarly useful for managing market risk so that they can provide deep and liquid markets to the benefit of all investors. Ultimately, the Exchange believes that providing Market Makers with additional tools in the manner described above to manage their risk parameters serves to perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest because Market Makers will be better able to manage risks with these tools.

With regard to the impact of this proposal on system capacity, the

Exchange notes that it has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle any potential additional traffic associated with the proposed rule change. The Exchange believes that its members will not have a capacity issue as a result of this proposal.

The Exchange further represents that its proposal will continue to operate consistently with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS. Specifically, any marketable interest that is executable against a Market Maker's quotes that are received²¹ by the Exchange prior to the time this functionality is triggered will be automatically executed at the price up to the Market Maker's size, regardless of whether such execution results in executions in excess of the Market Maker's pre-set Contract Limit.²² As discussed above, this is also in line with how current Rapid Fire operates today. The Exchange believes that the proposed changes in proposed subparagraph (D)(ii) to specify that this Rule will apply to marketable orders and quotes (currently silent on marketable orders), and to specify the time of receipt of such marketable interest that is executable against the size of the Market Maker's quote, will promote clarity in how the System currently operates for Rapid Fire and will operate for Active Quote Protection.

As noted above, the proposed Active Quote Protection functionality is similar to existing active risk counter functionality on another options exchange, which currently allows users to actively decrement the risk counter by a specified amount at any time, rather than waiting until a risk limit is reached or the user otherwise sends a specific instruction to the exchange to completely reset the counting program.²³

Technical Amendments

The Exchange believes that the technical amendments in Options 3, Section 15(c)(2) described above are consistent with the Act because they will promote clarity in the rules and make the Rulebook easier to navigate for market participants by updating rule numbering and existing cross-cites as described above. Furthermore, the Exchange also believes that adding the defined terms for Rapid Fire and Multi-Trigger in the rule text will promote

clarity so that Members can more easily locate the relevant functionalities in the Rulebook. Rewording the rule text within proposed Options 3, Section 15(c)(2)(D) to replace the term "options" with the words "series of an options class" will conform the wording in this paragraph to other rule text with Options 3, Section 15. Finally, adding the words "or Group" to Options 3, Section 15(c)(2)(F) will make the sentence more accurate because a Group may also request re-entry pursuant to proposed Options 3, Section 15(c)(2)(C) and would receive a Reentry Notification Message.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed Active Quote Protection functionality will impose any undue burden on intra-market competition as it is aimed at mitigating exposure to excessive risk when trading on the Exchange. While the Exchange will offer the proposed functionality to Market Makers only, the proposed risk protection is intended to provide Market Makers with an additional tool to manage their risk parameters in a manner they deem appropriate. As such, the Exchange believes that the proposed functionality may facilitate Market Makers' provision of liquidity on the Exchange, thereby benefitting all market participants through additional execution opportunities at potentially improved prices.

The Exchange also believes that its Active Quote Protection proposal does not impose an undue burden on inter-market competition as the proposed risk protection is similar to an existing risk protection on MEMX²⁴ as described above, and any options market could adopt similar rules.

Lastly, the Exchange does not believe that the proposed technical amendments in Options 3, Section 15(c)(2) will impose an undue burden on competition as these are non-substantive changes to promote clarity in the rules and make the Rulebook easier to navigate for market participants.

²¹ See *supra* note 9.

²² See proposed subparagraph (D)(ii) of Options 3, Section 15(c)(2).

²³ See *supra* note 4.

²⁴ See *supra* note 4.

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)(iii) of the Act²⁵ and subparagraph (f)(6) of Rule 19b-4 thereunder.²⁶

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-BX-2023-019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-BX-2023-019. This file

number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BX-2023-019 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-18301 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98173; File No. SR-MIAX-2023-30]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

August 21, 2023.

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 August 8, 2023, Miami International Securities Exchange, LLC ("MIAX" 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 is filing a proposal to amend the MIAX Options Exchange Fee Schedule ("Fee Schedule") to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxoptions.com/rule-filings>, at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit ("Gb") ultra-low latency ("ULL") fiber connection for Members³ and non-Members; and (2) amend the fees for Limited Service MIAX Express Interface ("MEI") Ports⁴ available to Market Makers.⁵ The

³ The term "Member" means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed "members" under the Exchange Act. See Exchange Rule 100.

⁴ The MIAX Express Interface ("MEI") is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX. See Fee Schedule, note 26.

⁵ The term "Market Makers" refers to Lead Market Makers ("LMMs"), Primary Lead Market Makers ("PLMMs"), and Registered Market Makers ("RMMs") collectively. See Exchange Rule 100. For

²⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁶ 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.

²⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Exchange and its affiliate, MIAx PEARL, LLC (“MIAx Pearl”) operated 10Gb ULL connectivity (for MIAx Pearl’s options market) on a single shared network that provided access to both exchanges via a single 10Gb ULL connection. The Exchange last increased fees for 10Gb ULL connections from \$9,300 to \$10,000 per month on January 1, 2021.⁶ At the same time, MIAx Pearl also increased its 10Gb ULL connectivity fee from \$9,300 to \$10,000 per month.⁷ The Exchange and MIAx Pearl shared a combined cost analysis in those filings due to the single shared 10Gb ULL connectivity network for both exchanges. In those filings, the Exchange and MIAx Pearl allocated a combined total of \$17.9 million in expenses to providing 10Gb ULL connectivity.⁸

Beginning in late January 2023, the Exchange also recently determined a substantial operational need to no longer operate 10Gb ULL connectivity on a single shared network with MIAx Pearl. The Exchange bifurcated 10Gb ULL connectivity due to ever-increasing capacity constraints and to enable it to continue to satisfy the anticipated access needs for Members and other market participants.⁹ Since the time of the 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses.¹⁰ As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of \$12,034,554 for providing 10Gb

ULL connectivity on a single unshared network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAx Pearl) and \$2,157,178 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber’s connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber’s experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAx Pearl as well as the ongoing costs and increase in expenses set forth below in the Exchange’s cost analysis.¹¹ The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR-MIAx-2022–50) (the “Initial Proposal”).¹² On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR-MIAx-2023–08) (the “Second Proposal”).¹³ On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR-MIAx-2023–18) (the “Third Proposal”).¹⁴ On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised proposal (SR-MIAx-2023–25) (the “Fourth Proposal”).¹⁵ On August 8,

2023, the Exchange withdrew the Fourth Proposal and replaced it with this further revised proposal (SR-MIAx-2023–30).

The Exchange previously included a cost analysis in the Initial, Second, Third, and Fourth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAx Pearl (separately among MIAx Pearl Options and MIAx Pearl Equities) and MIAx Emerald¹⁶ (together with MIAx Pearl Options and MIAx Pearl Equities, the “affiliated markets”)) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. Although the baseline cost analysis used to justify the proposed fees was made in the Initial, Second, Third, and Fourth Proposals, the fees themselves have not changed since the Initial, Second, Third, or Fourth Proposals and the Exchange still proposes fees that are intended to cover the Exchange’s cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia’s *Susquehanna Decision*¹⁷ and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from its prior review process

information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff’s information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. See Securities Exchange Act Release No. 97814 (June 27, 2023), 88 FR 42844 (July 3, 2023) (SR-MIAx-2023–25).

¹⁶ The term “MIAx Emerald” means MIAx Emerald, LLC. See Exchange Rule 100.

¹⁷ See *Susquehanna International Group, LLP v. Securities & Exchange Commission*, 866 F.3d 442 (D.C. Circuit 2017) (the “*Susquehanna Decision*”).

purposes of Limit Service MEI Ports, Market Makers also include firms that engage in other types of liquidity activity, such as seeking to remove resting liquidity from the Exchange’s Book.

⁶ See Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR-MIAx-2021–02).

⁷ See Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR-PEARL-2021–01).

⁸ See *id.*

⁹ See *MIAx Options and MIAx Pearl Options—Announce planned network changes related to shared 10G ULL extranet*, issued August 12, 2022, available at <https://www.miaxglobal.com/alert/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-0>. The Exchange will continue to provide access to both the Exchange and MIAx Pearl over a single shared 1Gb connection. See Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR-PEARL-2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR-MIAx-2022–48).

¹⁰ For example, the New York Stock Exchange, Inc.’s (“NYSE”) Secure Financial Transaction Infrastructure (“SFTI”) network, which contributes to the Exchange’s connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange’s actual 2021 and proposed 2023 budgets.

¹¹ The Exchange notes that MIAx Pearl Options will make a similar filing to increase its 10Gb ULL connectivity fees.

¹² See Securities Exchange Act Release No. 96629 (January 10, 2023), 88 FR 2729 (January 17, 2023) (SR-MIAx-2022–50).

¹³ See Securities Exchange Act Release No. 97081 (March 8, 2023), 88 FR 15782 (March 14, 2023) (SR-MIAx-2023–08).

¹⁴ See Securities Exchange Act Release No. 97419 (May 2, 2023), 88 FR 29777 (May 8, 2023) (SR-MIAx-2023–18).

¹⁵ The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently,

(hereinafter referred to as the “Revised Review Process”). In the *Susquehanna Decision*, the D.C. Circuit Court stated that the Commission could not maintain a practice of “unquestioning reliance” on claims made by a self-regulatory organization (“SRO”) in the course of filing a rule or fee change with the Commission.¹⁸ Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.¹⁹ On that same day, the Commission issued an order remanding to various exchanges and national market system (“NMS”) plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the “Remand Order”).²⁰ The Remand Order directed the exchanges to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”²¹ The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.²² However, the Commission did extend the deadlines in the Remand Order “so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court’s mandate.”²³ Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (“BOX”) to establish connectivity fees (the “BOX Order”), which significantly increased the level of information needed for the Commission to believe that an exchange’s filing satisfied its obligations under the Act with respect to changing

a fee.²⁴ Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a “market-based” test, the Commission changed course and disapproved BOX’s proposal to begin charging connectivity at one-fourth the rate of competing exchanges’ pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance “to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.”²⁵ In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”²⁶ The Staff Guidance also states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”²⁷

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission’s SIFMA Decision in *NASDAQ Stock Market, LLC v. SEC*²⁸ and remanded for further proceedings consistent with its opinion.²⁹ That same day, the D.C.

Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ*. The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision “has now been vacated, the basis for the [Remand Order] has evaporated.”³⁰ Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ v. SEC* that Exchange Act section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.³¹ The Commission further invited “the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq v. SEC*.”³² Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg’s request to withdraw their applications for review and dismissed the proceedings.³³

As a result of the Commission’s loss of the *NASDAQ vs. SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”³⁴ As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff’s fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent

challenge the fees at issue” in the SIFMA Decision. *Id.*

³⁰ *Id.* at *2; *see also id.* (“[T]he sole purpose of the challenged remand has disappeared.”).

³¹ *Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 89504*, 2020 WL 4569089 (August 7, 2020) (the “Order Vacating Prior Order and Requesting Additional Briefs”).

³² *Id.*

³³ *Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 90087* (October 5, 2020).

³⁴ *See supra* note 29, at page 2.

²⁴ *See Securities Exchange Act Release No. 85459* (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it “historically applied a ‘market-based’ test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.” *Id.* at page 16. Despite this admission, the Commission disapproved BOX’s proposal to begin charging \$5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing “market-based” fee filings from years prior).

²⁵ *See Staff Guidance on SRO Rule Filings Relating to Fees* (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (the “Staff Guidance”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *NASDAQ Stock Mkt., LLC v. SEC*, No 18–1324, --- Fed. App’x ---, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court’s mandate was issued on August 6, 2020.

²⁹ *Nasdaq v. SEC*, 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court’s mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act “Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.” *Id.* The court held that “for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.” *Id.* Thus, the court held that “Section 19(d) is not an available means to

¹⁸ *Id.*

¹⁹ *See Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84433*, 2018 WL 5023228 (October 16, 2018) (the “SIFMA Decision”).

²⁰ *See Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84433*, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

²¹ *Id.* at page 2.

²² *Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 85802*, 2019 WL 2022819 (May 7, 2019) (the “Order Denying Reconsideration”).

²³ *Order Denying Reconsideration*, 2019 WL 2022819, at *13.

exchanges prior to 2019, to remain in effect and not subject to the “record” or “review” earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission’s related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (“non-legacy exchanges”), while favoring larger, incumbent, entrenched, legacy exchanges (“legacy exchanges”).³⁵ The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings³⁶ to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.³⁷ These fees remain in effect today.

³⁵ Commission Chair Gary Gensler recently reiterated the Commission’s mandate to ensure competition in the equities markets. See “Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots”, by Chair Gary Gensler, dated December 14, 2022 (stating “[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and enhance competition in the securities markets, including the equity markets” (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring “fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets . . .” (*emphasis added*). *Id.* at note 1. See also Securities Acts Amendments of 1975, available at <https://www.govtrack.us/congress/bills/94/s249>.

³⁶ This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. See *Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. See *The Nasdaq Stock Market, LLC v. SEC*, Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule filings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

³⁷ See, e.g., Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26);

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a “market-based” test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.*, non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.³⁸ By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish “fee parity” with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful,

70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

³⁸ The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee change numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff’s change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (“Cboe”) reported “access and capacity fee” revenue of \$70,893,000 for 2020³⁹ and \$80,383,000 for 2021.⁴⁰ Cboe C2 Exchange, Inc. (“C2”) reported “access and capacity fee” revenue of \$19,016,000 for 2020⁴¹ and \$22,843,000 for 2021.⁴² Cboe BZX Exchange, Inc. (“BZX”) reported “access and capacity fee” revenue of \$38,387,000 for 2020⁴³ and \$44,800,000 for 2021.⁴⁴ Cboe EDGX Exchange, Inc. (“EDGX”) reported “access and capacity fee” revenue of \$26,126,000 for 2020⁴⁵ and \$30,687,000 for 2021.⁴⁶ For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported \$178,712,000 in “access and capacity fees” in 2021. NASDAQ Phlx, LLC (“NASDAQ Phlx”) reported “Trade Management Services” revenue of \$20,817,000 for 2019.⁴⁷ The Exchange notes it is unable to compare “access fee” revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the “Trade Management Services” line item was bundled into a much larger line item in

³⁹ According to Cboe’s 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. See Cboe 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf>.

⁴⁰ See Cboe 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf>.

⁴¹ See C2 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf>.

⁴² See C2 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf>.

⁴³ See BZX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf>.

⁴⁴ See BZX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf>.

⁴⁵ See EDGX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf>.

⁴⁶ See EDGX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf>.

⁴⁷ According to PHLX, “Trade Management Services” includes “a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX’s] published fee schedules.” See PHLX 2020 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf>.

PHLX's Form 1, simply titled "Market services."⁴⁸

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,⁴⁹ new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and "is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .",⁵⁰ this is not the reality experienced by exchanges such as MIAX. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification

numerous times, having submitted over six filings.⁵¹ However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in section 6(b)(4) of the Act⁵² in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,⁵³ to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing

exchanges to ensure fee parity;⁵⁴ or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.⁵⁵

* * * * *

⁴⁸ See PHLX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2100/21000475.pdf>. The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

⁴⁹ See, e.g., *CNBC Debuts New Set on NYSE Floor*, available at <https://www.cnbc.com/id/46517876>.

⁵⁰ See *supra* note 25, at note 1.

⁵¹ See Securities Exchange Act Release Nos. 94890 (May 11, 2022), 87 FR 29945 (May 17, 2022) (SR-MIAX-2022-20); 94720 (April 14, 2022), 87 FR 23586 (April 20, 2022) (SR-MIAX-2022-16); 94719 (April 14, 2022), 87 FR 23600 (April 20, 2022) (SR-MIAX-2022-14); 94259 (February 15, 2022), 87 FR 9747 (February 22, 2022) (SR-MIAX-2022-08); 94256 (February 15, 2022), 87 FR 9711 (February 22, 2022) (SR-MIAX-2022-07); 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021) (SR-MIAX-2021-60); 93775 (December 14, 2021), 86 FR 71996 (December 20, 2021) (SR-MIAX-2021-59); 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR-MIAX-2021-43); 93165 (September 28, 2021), 86 FR 54750 (October 4, 2021) (SR-MIAX-2021-41); 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR-MIAX-2021-37); 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR-MIAX-2021-35).

⁵² 15 U.S.C. 78f(b)(4).

⁵³ To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

⁵⁴ In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. See, e.g., *CSA Staff Consultation Paper 21-401, Real-Time Market Data Fees*, available at https://www.bccsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consultation_Paper.pdf.

⁵⁵ The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (e.g., healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to "develop a record," and to "explain their conclusions, based on that record, in a written decision that is sufficient to

10Gb ULL Connectivity Fee Change

The Exchange filed a proposal to no longer operate 10Gb connectivity to the Exchange on a single shared network with its affiliate, MIAx Pearl Options. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.⁵⁶ This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the Fee Schedule that provide for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both the Exchange and MIAx Pearl Options via the 1Gb network.

The Exchange bifurcated the Exchange and MIAx Pearl Options 10Gb ULL networks on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.⁵⁷ Upon bifurcation of the 10Gb ULL network, subscribers need to purchase separate connections to the Exchange and MIAx Pearl Options at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Prior to the bifurcation of the 10Gb ULL networks, subscribers to 10Gb ULL connectivity would be able to connect to both the Exchange and MIAx Pearl Options at the applicable rate set forth below.

The Exchange, therefore, proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks⁵⁸ via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to the Exchange and no longer provides access to MIAx Pearl Options. Specifically, the Exchange proposes to amend Sections 5(a)–(b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from \$10,000 per month to \$13,500 per month ("10Gb ULL Fee").⁵⁹ The

Exchange also proposes to amend the Fee Schedule to reflect the bifurcation of the 10Gb ULL network and specify that only the 1Gb network provides access to both the Exchange and MIAx Pearl Options.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAx Pearl Options. The Exchange proposes to amend the explanatory paragraphs below the network connectivity fee tables in Sections 5(a)–(b) of the Fee Schedule to specify that, with the bifurcated 10Gb ULL network, Members (and non-Members) utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAx Pearl Options via a single, can only do so via a shared 1Gb connection.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Limited Service MEI Ports

Background

The Exchange also proposes to amend Section 5(d) of the Fee Schedule to adopt a tiered-pricing structure for Limited Service MEI Ports available to Market Makers. The Exchange allocates two (2) Full Service MEI Ports⁶⁰ and

two (2) Limited Service MEI Ports⁶¹ per matching engine⁶² to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Currently, Market Makers are assessed a \$100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free. This fee was unchanged since 2016.⁶³

Limited Service MEI Port Fee Changes

The Exchange now proposes to move from a flat monthly fee per Limited Service MEI Port for each matching engine to a tiered-pricing structure for Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of Limited Service MEI Ports each Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second Limited Service MEI Ports for each matching engine free of charge. For Limited Service MEI Ports, the Exchange proposes to adopt the following tiered-pricing structure: (i) the third and fourth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of \$100 to \$150 per port; (ii) the fifth and sixth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of \$100 to \$200 per port; and (iii) the seventh or more Limited Service MEI Ports will increase from the current monthly flat fee of \$100 to \$250 per port. The Exchange believes a tiered-pricing

⁶¹ Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAx System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine. See Fee Schedule, Section 5(d)(ii), note 28.

⁶² A "matching engine" is a part of the MIAx electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. See Fee Schedule, Section 5(d)(ii), note 29.

⁶³ See Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR-MIAx-2016-47).

enable us to perform our review," and to ensure a comparable review process with the Exchange's filing.

⁵⁶ See *supra* note 9.

⁵⁷ *Id.*

⁵⁸ The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

⁵⁹ Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4(c) of the Exchange's fee schedule. See Section 4(c) of the Exchange's Fee Schedule available at <https://www.miaxglobal.com/markets/>

us-options/miax-options/fees (providing that "Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.").

⁶⁰ Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAx System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. See Fee Schedule, Section 5(d)(ii), note 27.

structure will encourage Market Makers to be more efficient when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System⁶⁴ in accordance with its fair access requirements under section 6(b)(5) of the Act.⁶⁵

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on May 2023 trading results, the Exchange handles more than 12.3 billion quotes on an average day, and more than 271 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 156 billion quotes (and more than 7 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports generated approximately 78 billion quotes (and approximately 3.5 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 1.3 billion quotes per day and Market Makers who utilized 5–6 Limited Service MEI Ports submitted an average of 356 million quotes on an average day. In May 2023, the Exchange did not have any Market Makers that

utilized only 3–4 Limited Service MEI Ports.

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.⁶⁶ Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (e.g., storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers.

The Exchange proposes to increase its monthly Limited Service MEI Port fees since it has not done so since 2016,⁶⁷ which is designed to recover a portion of the costs associated with directly accessing the Exchange.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with section 6(b) of the Act⁶⁸ in general, and furthers the objectives of section 6(b)(4) of the Act⁶⁹ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of section 6(b)(5) of the Act⁷⁰ in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order⁷¹ and the Staff Guidance,⁷² the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

⁶⁴ The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

⁶⁵ See 15 U.S.C. 78f(b). The Exchange may offer access on terms that are not unfairly discriminatory among its Members, and ensure sufficient capacity and headroom in the System. The Exchange monitors the System's performance and makes adjustments to its System based on market conditions and Member demand.

⁶⁶ 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

⁶⁷ See Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR-MIAX-2016-47).

⁶⁸ 15 U.S.C. 78f(b).

⁶⁹ 15 U.S.C. 78f(b)(4).

⁷⁰ 15 U.S.C. 78f(b)(5).

⁷¹ See *supra* note 24.

⁷² See *supra* note 25.

In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”⁷³ The Staff Guidance further states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”⁷⁴ In the Staff Guidance, the Commission Staff further states that, “[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO’s costs, . . . , specific information, including quantitative information, should be provided to support that argument.”⁷⁵

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges’ ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation of the 10Gb ULL network) and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the

Exchange’s flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in 2012 and adopted its initial fee schedule, with all connectivity and port fees set at \$0.00 (the Exchange originally had a non-ULL 10Gb connectivity option, which it has since removed).⁷⁶ As a new exchange entrant, the Exchange chose to offer connectivity and ports free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange’s technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.⁷⁷

⁷⁶ See Securities Exchange Act Release No. 68415 (December 12, 2012), 77 FR 74905 (December 18, 2012) (SR–MIAx–2012–01).

⁷⁷ See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, “[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . .”). See also Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that “[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application

Later in 2013, as the Exchange’s market share increased,⁷⁸ the Exchange adopted a nominal \$10 fee for each additional Limited Service MEI Port.⁷⁹ The Exchange last increased the fees for its 10Gb ULL fiber connections from \$9,300 to \$10,000 per month on January 1, 2021.⁸⁰ The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”⁸¹

sessions.”). MEMX’s market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. See Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) and 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). See also, e.g., Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), available at <https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf> (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

⁷⁸ The Exchange experienced a monthly average equity options trading volume of 1.87% for the month of November 2013. See the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/>.

⁷⁹ See Securities Exchange Act Release No. 70903 (November 20, 2013), 78 FR 70615 (November 26, 2013) (SR–MIAx–2013–52).

⁸⁰ See Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAx–2021–02).

⁸¹ See *NetCoalition*, 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁸²

Congress directed the Commission to “rely on ‘competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.’”⁸³ As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or

unfairly discriminatory. “If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”⁸⁴ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”⁸⁵ In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a “proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.”⁸⁶

The Exchange believes the competing exchanges’ 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange

believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs with a reasonable margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange’s proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by similar market share. Each of the connectivity or port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX (as proposed) (equity options market share of 6.60% for the month of May 2023) ^a .	10Gb ULL connection Limited Service MEI Ports	\$13,500. 1–2 ports: FREE (not changed in this proposal). 3–4 ports: \$150 each. 5–6 ports: \$200 each. 7 or more ports: \$250 each.
NASDAQ ^b (equity options market share of 6.59% for the month of May 2023) ^c .	10Gb Ultra fiber connection SQF Port ^d	\$15,000 per connection. 1–5 ports: \$1,500 per port. 6–20 ports: \$1,000 per port. 21 or more ports: \$500 per port.
NASDAQ ISE LLC (“ISE”) ^e (equity options market share of 6.18% for the month of May 2023) ^f .	10Gb Ultra fiber connection SQF Port	\$15,000 per connection. \$1,100 per port.
NYSE American LLC (“NYSE American”) ^g (equity options market share of 7.34% for the month of May 2023) ^h .	10Gb LX LCN connection Order/Quote Entry Port	\$22,000 per connection. 1–40 ports: \$450 per port. 41 or more ports: \$150 per port.
NASDAQ GEMX, LLC (“GEMX”) ⁱ (equity options market share of 2.00% for the month of May 2023) ^j .	10Gb Ultra connection SQF Port	\$15,000 per connection. \$1,250 per port.

^a See the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/>.

^b See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

^c See *supra* note a.

^d Similar to the Exchange’s MEI Ports, SQF ports are primarily utilized by Market Makers.

^e See ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees and ISE Rules, General 8: Connectivity.

^f See *supra* note a.

^g See NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

^h See *supra* note a.

ⁱ See GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees and GEMX Rules, General 8: Connectivity.

^j See *supra* note a.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options

exchanges based on the market participant’s assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, the Exchange’s affiliate,

MIAX Pearl Options, experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023, as a direct

⁸² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁸³ See *NetCoalition*, 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (“[I]t is the intent

of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.”).

⁸⁴ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

⁸⁵ *Id.*

⁸⁶ See *supra* note 25.

result of the proposed connectivity and port fee changes proposed by MIAIX Pearl Options.

It is not a requirement for market participants to become members of all options exchanges; in fact, certain market participants conduct an options business as a member of only one options market.⁸⁷ A very small number of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.⁸⁸

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAIX, and BOX, 42 firms access only one of the three exchanges.⁸⁹ The Exchange and its affiliated options markets, MIAIX Pearl Options and MIAIX Emerald, have a total of 46 members. Of those 46 total members, 37 are members of all three affiliated options markets, two are members of only two affiliated options markets, and seven are members of only one affiliated options market. The

Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no "de facto" or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAIX Pearl Options Market Maker terminated their MIAIX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAIX Pearl Options (which are similar to the changes proposed herein). Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not "lock" a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.⁹⁰ If the Exchange is not at the national best bid or offer ("NBBO")⁹¹, the Exchange will route an order to any away market that is at the NBBO to ensure that the order was

executed at a superior price and prevent a trade-through.⁹²

With respect to the submission of orders, Members may also choose not to purchase any connection from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an exchange. An institutional investor may utilize a broker-dealer, a service bureau,⁹³ or request sponsored access⁹⁴ through a member of an exchange in order to submit a trade directly to an options exchange.⁹⁵ A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.*, fees based on the number of firms that connect to the Exchange indirectly via the third-party).⁹⁶ Indeed, the Exchange does not

⁸⁷ BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17). In that proposal, BOX stated that, "... it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX]." Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR-MEMX-2021-19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee "is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange" and that "neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange."

⁸⁸ Service Bureaus may obtain ports on behalf of Members.

⁸⁹ *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

⁹⁰ *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.

⁹¹ *See* Exchange Rule 100.

⁹² Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

⁹³ Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

⁹⁴ Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

⁹⁵ This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

⁹⁶ *See, e.g.*, Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, U.S.

receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.⁹⁷ Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange. This is again evidenced by the fact that one MIAAX Pearl Options Market Maker terminated their MIAAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAAX Pearl Options. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange began to operate on a single shared network with MIAAX Pearl Options when MIAAX Pearl commenced operations as a national securities exchange on February 7, 2017.⁹⁸ The Exchange and MIAAX Pearl Options operated on a single shared network to provide Members with a single convenient set of access points for both exchanges. Both the Exchange and MIAAX Pearl Options offer two methods of connectivity, 1Gb and 10Gb ULL connections. The 1Gb connection services are supported by a discrete set of switches providing 1Gb access ports to Members. The 10Gb ULL connection services are supported by a second and mutually exclusive set of switches providing 10Gb ULL access ports to Members. Previously, both the 1Gb and 10Gb ULL shared extranet ports allowed Members to use one connection to access both exchanges, namely their trading platforms, market data systems, test systems, and disaster recovery facilities.

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAAX Pearl Options was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change was necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Operating two separate national securities exchanges on a single shared network provided certain benefits, such as streamlined connectivity to multiple exchanges, and simplified exchange infrastructure. However, doing so was no longer sustainable due to ever-increasing capacity constraints and current system limitations. The network is not an unlimited resource. As described more fully in the proposal to bifurcate the 10Gb ULL network,⁹⁹ the connectivity needs of Members and market participants has increased every year since the launch of MIAAX Pearl Options

and the operations of the Exchange and MIAAX Pearl Options on a single shared 10Gb ULL network is no longer feasible. This required constant System expansion to meet Member demand for additional ports and 10Gb ULL connections has resulted in limited available System headroom, which eventually became operationally problematic for both the Exchange and its customers.

As stated above, the shared network is not an unlimited resource and its expansion was constrained by MIAAX's and MIAAX Pearl Options' ability to provide fair and equitable access to all market participants of both markets. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAAX Pearl Options' Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.¹⁰⁰

Unlike the switches that provide 1Gb connectivity, the availability for additional 10Gb ULL connections on each switch had significantly decreased. This was mostly driven by the connectivity demands of latency sensitive Members (e.g., Market Makers and liquidity removers) that sought to maintain connectivity across multiple 10Gb ULL switches. Based on the Exchange's experience, such Members did not typically use a shared 10Gb ULL connection to reach both the Exchange and MIAAX Pearl Options due to related latency concerns. Instead, those Members maintain dedicated separate 10Gb ULL connections for the Exchange and separate dedicated 10Gb ULL connections for MIAAX Pearl Options. This resulted in a much higher 10Gb ULL usage per switch by those Members on the shared 10Gb ULL network than would otherwise be needed if the Exchange and MIAAX Pearl Options had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAAX Pearl Options 10Gb ULL networks naturally lends itself to reduced 10Gb ULL port consumption on each switch and, therefore, increased 10Gb ULL port availability for current Members and new Members.

Prior to bifurcating the 10Gb ULL network, the Exchange and MIAAX Pearl Options continued to add switches to meet ongoing demand for 10Gb ULL connectivity. That was no longer sustainable because simply adding additional switches to expand the

Direct-Extranet Connection (nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR-NASDAQ-2015-002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR-NASDAQ-2017-114).

⁹⁷ The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

⁹⁸ See Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (establishing MIAAX Pearl Fee Schedule and establishing that the MENI can also be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facility of the MIAAX Pearl's affiliate, MIAAX, via a single, shared connection).

⁹⁹ See Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR-PEARL-2022-60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR-MIAAX-2022-48).

¹⁰⁰ Currently, the Exchange maintains sufficient headroom to meet ongoing and future requests for 1Gb connectivity. Therefore, the Exchange did not propose to alter 1Gb connectivity and continues to provide 1Gb connectivity over a shared network.

current shared 10Gb ULL network would not adequately alleviate the issue of limited available port connectivity. While it would have resulted in a gain in overall port availability, the existing switches on the shared 10Gb ULL network in use would have continued to suffer from lack of port headroom given many latency sensitive Members' needs for a presence on each switch to reach both the Exchange and MIAx Pearl Options. This was because those latency sensitive Members sought to have a presence on each switch to maximize the probability of experiencing the best network performance. Those Members routinely decide to rebalance orders and/or messages over their various connections to ensure each connection is operating with maximum efficiency. Simply adding switches to the extranet would not have resolved the port availability needs on the shared 10Gb ULL network since many of the latency sensitive Members were unwilling to relocate their connections to a new switch due to the potential detrimental performance impact. As such, the impact of adding new switches and rebalancing ports would not have been effective or responsive to customer needs. The Exchange has found that ongoing and continued rebalancing once additional switches are added has had, and would have continued to have had, a diminishing return on increasing available 10Gb ULL connectivity.

Based on its experience and expertise, the Exchange found the most practical way to increase connectivity availability on its switches was to bifurcate the existing 10Gb ULL networks for the Exchange and MIAx Pearl Options by migrating the exchanges' connections from the shared network onto their own set of switches. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees are necessary to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change further support that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and the January 23, 2023 implementation date to provide market participants adequate time to prepare.¹⁰¹ Since August 12, 2022, the Exchange has worked with current 10Gb

ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange experienced a minimal net increase of six (6) overall 10Gb ULL connectivity subscriptions across the Exchange and MIAx Pearl Options. This immaterial increase in overall connections reflects a minimal fee impact for all types of subscribers and reflects that subscribers elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAx Pearl Options, or choose to decrease or cease connectivity as a result of the change.

Should the Commission Staff disapprove such fees, it would effectively dictate how an exchange manages its technology and would hamper the Exchange's ability to continue to invest in and fund access services in a manner that allows it to meet existing and anticipated access demands of market participants. Disapproval could also have the adverse effect of discouraging an exchange from optimizing its operations and deploying innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from covering its costs and monetizing operational enhancements, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.*, to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on

smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of section 19(b)(1) under the Act,¹⁰² and Rule 19b-4 thereunder,¹⁰³ with respect to the types of information exchanges should provide when filing fee changes, and section 6(b) of the Act,¹⁰⁴ which requires, among other things, that exchange fees be reasonable and equitably allocated,¹⁰⁵ not designed to permit unfair discrimination,¹⁰⁶ and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁰⁷ This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.¹⁰⁸ The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at \$12,034,554 (or approximately \$1,002,880 per month, rounded up to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at \$2,157,178 (or approximately \$179,765 per month, rounded down to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members¹⁰⁹) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of \$13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL

¹⁰² 15 U.S.C. 78s(b)(1).

¹⁰³ 17 CFR 240.19b-4.

¹⁰⁴ 15 U.S.C. 78f(b).

¹⁰⁵ 15 U.S.C. 78f(b)(4).

¹⁰⁶ 15 U.S.C. 78f(b)(5).

¹⁰⁷ 15 U.S.C. 78f(b)(8).

¹⁰⁸ See *supra* note 25.

¹⁰⁹ Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

¹⁰¹ See *supra* note 9.

network between the Exchange and MIAx Pearl Options. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for additional Limited Service MEI Ports.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the “Cost Analysis”).¹¹⁰ The Cost Analysis required a detailed analysis of the Exchange’s aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.*, personnel), and certain general and administrative expenses (“cost drivers”).

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a “bottom up” budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.*, price time or pro-rata, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,¹¹¹ storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of

available connections, and employees allocated time. All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.*, the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange’s parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange’s parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange’s parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.*, connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (*e.g.*, message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (60.6% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to additional Limited Service MEI Ports (7.2%), and the remainder to the provision of other connectivity, other

ports, transaction execution, membership services and market data services (32.3%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange’s operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange’s system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and, the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange’s costs, the Exchange’s methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In

¹¹⁰ The Exchange frequently updates its Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange’s most recent Cost Analysis was conducted ahead of this filing.

¹¹¹ For example, the Exchange maintains 24 matching engines, MIAx Pearl Options maintains 12 matching engines, MIAx Pearl Equities maintains 24 matching engines, and MIAx Emerald maintains 12 matching engines.

the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a

relationship that is, "in nature and closeness," directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is \$1,182,645 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for

Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (e.g., as set forth below, the Exchange allocated approximately 25.6% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Allocated annual cost ^k	Allocated monthly cost ^l	% of all
Human Resources	\$3,867,297	\$322,275	25
Connectivity (external fees, cabling, switches, etc.)	70,163	5,847	60.6
Internet Services and External Market Data	424,584	35,382	73.3
Data Center	718,950	59,912	60.6
Hardware and Software Maintenance and Licenses	727,734	60,645	49.8
Depreciation	2,310,898	192,575	61.6
Allocated Shared Expenses	3,914,928	326,244	49.1
Total	12,034,554	1,002,880	39.4

^k The Annual Cost includes figures rounded to the nearest dollar.

^l The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

The Exchange notes that it and its affiliated markets have 184 employees (excluding employees at non-options/

equities exchange subsidiaries of Miami International Holdings, Inc. ("MIH"), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market's individual Human Resources expense. Then, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof

(primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange's parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 42% of each employee's time from the above group. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (*i.e.*, only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 18%).

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees

are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 42% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, relocation, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades, vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breadth of functions those employees perform in support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, Etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and

switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority ("OPRA"). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (e.g., re-pricing of orders to avoid locked or crossed markets and

trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though but for MIAX Emerald, the allocation percentages are generally consistent across markets (e.g., MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to MIAX Emerald and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) MIAX Emerald itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its

systems. The Exchange notes while the percentage MIAX Emerald allocated to the internet Services and External Market Data cost driver is greater than the Exchange and its other affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small. For instance, despite the difference in cost allocation percentages for the internet Services and External Market Data cost driver across the Exchange and MIAX Emerald, the actual dollar amount difference is approximately only \$4,000 per month, a non-significant amount.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (60.6%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical

connectivity to the Exchange.¹¹² The Exchange notes that this allocation is less than MIAX Pearl Options by a significant amount, and slightly less than MIAX Emerald, as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, MIAX Pearl Options is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees.

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain

¹¹² This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl (the options and equities markets), because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl. This expense also differs in dollar amount among the Exchange, MIAX Pearl (options and equities), and MIAX Emerald because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 61.6% of its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX Emerald, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is greater than that of MIAX Emerald by approximately \$32,000 per month due to two factors: first, the Exchange has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of the Exchange's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also

included in the Exchange's general shared expense cost driver.¹¹³ These general shared expenses are incurred by the Exchange's parent company, MIH, as a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, *i.e.*, 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to

10Gb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

The Exchange notes that the 49.1% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited Service MEI Ports. This is based on its allocation methodology that weighted costs attributable to each core service. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.*, Data Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb ULL Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, the total monthly cost for 10Gb ULL connectivity of \$1,002,880 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (93), to arrive at a cost of approximately \$10,784 per month, per physical 10Gb ULL connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.*, actual number of 10Gb ULL connections.

* * * * *

Costs Related To Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.*, as set forth below, the Exchange allocated approximately 5.8% of its overall Human Resources cost to offering Limited Service MEI Ports).

Cost drivers	Allocated annual cost ^m	Allocated monthly cost ⁿ	% of all
Human Resources	\$898,480	\$74,873	5.8
Connectivity (external fees, cabling, switches, etc.)	4,435	370	3.8
Internet Services and External Market Data	41,601	3,467	7.2
Data Center	85,214	7,101	7.2
Hardware and Software Maintenance and Licenses	104,859	8,738	7.2
Depreciation	237,335	19,778	6.3
Allocated Shared Expenses	785,254	65,438	9.8
Total	2,157,178	179,765	7.1

^m See *supra* note k (describing rounding of Annual Costs).

ⁿ See *supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the

actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as

¹¹³ The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for

directors to providing physical connectivity. The Exchange does not calculate is expenses at that

granular a level. Instead, director costs are included as part of the overall general allocation.

sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Limited

Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (e.g., halted securities).¹¹⁴ Thus, since market data from other exchanges is consumed at the Exchange's Limited Service MEI Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX allocated 7.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

¹¹⁴ The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX allocated 7.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is

owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 6.3% of all depreciation costs to providing Limited Service MEI Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the Exchange notes that the percentages it and its affiliate, MIAX Emerald, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 2.6%. However, the Exchange's approximate dollar amount is greater than that of MIAX Emerald by approximately \$10,000 per month. This is due to two primary factors. First, the Exchange has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware than software that is subject to depreciation. Second, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of the Exchange's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external

and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 10% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 9.8% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted towards providing such service (e.g., Data Center, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX allocated 9.8% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.¹¹⁵

* * * * *

¹¹⁵ The Exchange allocated a slightly lower amount (9.8%) of this cost as compared to MIAX Emerald (10.3%). This is not a significant difference. However, both allocations resulted in an identical cost amount of \$0.8 million, despite the Exchange having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the

Approximate Cost per Limited Service MEI Port per Month

Based on May 2023 data, the total monthly cost allocated to Limited Service MEI Ports of \$179,765 was divided by the total number of Limited Service MEI Ports (including the two free Limited Service MEI Ports per matching engine that each Member receives) the Exchange maintained at the time that proposed pricing was determined (1,770), to arrive at a cost of approximately \$102 per month, per charged Limited Service MEI Port. In the prior filings, the Exchange did not include the expense of maintaining the two free Limited Service MEI Ports per matching engine that each Member receives in this paragraph but did include them in the total expense amounts. The total number of Limited Service MEI Ports that the Exchange does not charge for is 1,146 and amounts to a total expense of \$116,892 per month to the Exchange.

* * * * *

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.4% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 17.8% for 10Gb ULL

additional resources and expenditures associated with maintaining its recently enhanced low latency network.

connectivity or 18.2% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 25.6% of its personnel costs to providing 10Gb ULL and 1Gb ULL connectivity and 5.8% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 31.4% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 68.6% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 67.9% of the Exchange's overall depreciation and amortization expense to connectivity services (61.6% attributed to 10Gb ULL physical connections and 6.3% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 32.1%) toward the cost of providing transaction services,

membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases. However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (e.g., to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking

any future changes to fees, and the Exchange commits to do so.

Projected Revenue ¹¹⁶

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal \$12,034,554. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately \$15,066,000. The Exchange believes this represents a modest profit of 20% when compared to

¹¹⁶ For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used revenues for February 2023, the first full month for which it provided dedicated 10Gb ULL connectivity to the Exchange and ceased operating a shared 10Gb ULL network with MIAAX Pearl Options.

the cost of providing 10Gb ULL connectivity services, which could decrease over time.¹¹⁷

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal \$2,157,178. Based on current Limited Service MEI Port services usage, the Exchange would generate annual revenue of approximately \$3,300,600. The Exchange believes this would result in an estimated profit margin of 35% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.¹¹⁸ The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAX Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, MIAX Market Makers are currently allocated 1,770 Limited Service MEI Ports compared to only 384 Full Service MEO Ports (Bulk and Single combined) allocated to MIAX Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Limited Service MEI Port services.

The Exchange also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and

operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.*, the number of matching engines per exchange, *i.e.*, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.*, start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection (\$13,500 per month for the Exchange vs. \$15,000 per month for Nasdaq).¹¹⁹ NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees (\$13,500 for the Exchange vs. \$22,000 per month for NYSE American).¹²⁰ Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.*, more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2012.¹²¹ This is due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and

absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to

¹¹⁷ Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g.*, <https://www.usinflationcalculator.com/inflation/current-inflation-rates/> (last visited August 4, 2023).

¹¹⁸ *Id.*

¹¹⁹ *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

¹²⁰ *See* NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

¹²¹ The Exchange has incurred a cumulative loss of \$71 million since its inception in 2012 through full year 2022. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, available at <https://www.sec.gov/Archives/edgar/vpr/2300/23007741.pdf>.

the above-described allocation methodology. In contrast, the Investors Exchange LLC (“IEX”) and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange’s experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange’s high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange’s resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.¹²² Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (e.g., storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is

reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants’ benefit.

Limited Service MEI Ports

The Exchange designed the proposed tiered-pricing structure to link fees to the number of connections a firm purchases due to the strong correlation between number of connections and related cost burdens imposed upon the Exchange from the largest connection (Limited MEI Ports) users. This is explicitly designed to link fees to related costs imposed on the exchange. Market Makers that purchase more connections cause significantly greater costs and expenses to the Exchange, whereas the opposite is also true. With this in mind, the Exchange proposes (a) no fee or lower fees for Market Makers who utilize fewer Limited Service MEI Ports since those Market Makers generally tend to send the fewest number of orders and messages over those connections, imposing substantially lower costs;¹²³ and (b) incrementally higher fees for those that purchase additional Limited Service MEI Ports, because those with the greatest number of Limited Service MEI Ports generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange.¹²⁴

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity alternatives because it is specifically designed to ensure that those users that create the highest costs burden on the Exchange pay the highest fees. As is discussed below, the cost burden associated with Market Makers that use the maximum number of Limited Service MEI ports is significantly higher than costs associated with Market Makers that use fewer of these ports.

As noted above, users with the greatest number of Limited Service MEI Ports consume a disproportionate amount of bandwidth and network resources. Specifically, for 10Gb ULL connectivity, Market Makers who take the maximum number of Limited Service MEI Ports account for greater

¹²³ The Exchange notes that those Members who purchase three or more Limited Service MEI Ports receive their first two Limited Service Ports for free.

¹²⁴ Note that the firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and based on their business needs, which include a desire to access the market more quickly using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and may require more connections as they compete to access resting liquidity.

¹²² 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do so primarily because of the trade-through requirements under Regulation NMS or best execution obligations and do not have the same business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports.

The Exchange's high performance network solutions and supporting infrastructure (including employee support) provide increased system throughput and the capacity to handle approximately 18 million quote messages per second. This is important for the efficient operation of the Exchange and to ensure system resiliency in times of stress (abnormally high capacity demand). For example, based on May 2023 trading results, the Exchange handled more than 12.3 billion quotes on an average day, and more than 271 billion quotes in an average month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 156 billion quotes (and more than 7 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports per matching engine generated approximately 78 billion quotes (and approximately 3.5 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 1.3 billion quotes per day and Market Makers who utilized 5–6 Limited Service MEI Ports submitted an average of 356 million quotes on an average day. In May 2023, the Exchange did not have any Market Makers that utilized only 3–4 Limited Service MEI Ports.

To achieve consistent, premium network performance, the Exchange must build and maintain a network that has the capacity to handle the message rate requirements of its heaviest network consumers during anticipated peak market conditions. The resultant need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. This need also requires the Exchange to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record

keeping requirements under the Exchange Act.¹²⁵ Thus, as the number of connections per Market Maker increases, other costs incurred by the Exchange also increase, *e.g.*, storage costs, surveillance costs, service expenses.

According to the statistics provided above for May 2023, Market Makers with the maximum amount of Limited Service MEI Ports sent almost twice as many orders as those that utilize the minimal amount of Limited Service MEI Ports. Due to latency consideration, those Market Makers typically send the same order over multiple Limited Service MEI Ports to attempt to execute against the same contra-side order resting on the Book. This results in a disproportionate number of messages being returned to the Market Maker notifying them which order did or did not result in an execution. This results in an increased amount of message traffic generated by Market Makers who utilize the maximum amount of Limited Service MEI Ports. These Market Makers use a disproportionate amount of System capacity and, therefore, put greater strain on the Exchange's network and other resources discussed below. This is due to higher order to trade ratios that results in increased message traffic that is not recouped via a separate Exchange fee based on each message sent by a Market Maker or other similar fee. The Exchange must purchase and maintain additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.¹²⁶

The following presents another example of how the cost burden associated with Members that use the maximum number of Limited Service MEI ports is significantly higher than costs associated with Members that use fewer of these ports. Members with the maximum amount of Limited Service MEI Ports frequently add, drop, or rebalance connections mid-month to determine which connections have the least latency (and engage in the same practice with Limited Service MEI Ports). This requires constant System expansion to meet Market Maker demand for additional Limited Service MEI Ports and results in limited available System headroom, *e.g.*, additional hardware to accommodate

demand for additional Limited Service MEI Ports. This also results in increased costs and customer service resources for the Exchange to frequently make changes in the data center (or its network) and provide the additional technical and personnel support necessary to satisfy these requests. The Exchange does not charge a separate fee for these services for Limited Service MEI Ports.¹²⁷ Given the difference in network utilization and technical support provided, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who utilize the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, because the network is largely designed and maintained to specifically handle the message rate, capacity and performance requirements of those Market Makers.

Finally, charging an incrementally higher fee (above the first two that are provided free of charge) to firms that choose to purchase more Limited Service MEI Ports does not provide those firms with any competitive advantage or incentivize firms to purchase additional Limited Service MEI Ports. Certain firms choose to purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and, if anything, higher fees act as a disincentive for inefficient and excessive use of Exchange bandwidth and capacity. The Exchange notes that firms may continue to choose to only utilize the two free Limited Service MEI Ports to accommodate their own trading/quoting strategies, business models, and for Market Makers, to meet their quoting obligations. The proposed pricing structure is designed to address the above described increased pull on Exchange resources by firms that choose to purchase the maximum number of Limited Service MEI Ports and to incentivize efficient port usage.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

¹²⁵ 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

¹²⁶ See *id.*

¹²⁷ The Member and non-Member network connectivity testing and certification fee is unrelated to this practice. That fee is for the first time firms are credentialed to begin live-trading on the Exchange or when the firm makes an internal system change requiring it to re-test its system with the Exchange's system. See Fee Schedule, Sections (4)(c)–(d).

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2012¹²⁸ due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally

discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAx Pearl Options Market Maker terminated their MIAx Pearl Options membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAx Pearl Options.¹²⁹ The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth,

¹²⁹ The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. See Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR-IEX-2022-02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. See *supra* note 77. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Lastly, the Exchange does not believe its proposal to implement incrementally higher fees for those that purchase more Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants because those with the greatest number of Limited Service MEI Ports tend generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange, resulting in greater demands and additional burdens on Exchange resources (as described above). The firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and choose to utilize numerous connections based on their business needs, which include a desire to attempt to access the market quicker using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more connections to competitively access resting liquidity. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market

¹²⁸ See *supra* note 121.

participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted and would not impose any burden on competition. This is a technology driven change designed to meet customer needs. The proposed fees would assist the Exchange in recovering costs related to providing dedicated 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX Pearl Options enables the Exchange to better compete with other exchanges by ensuring it can continue to provide adequate connectivity to existing and new Members, which may increase in ability to compete for order flow and deepen its liquidity pool, improving the overall quality of its market. The proposed rates for 10Gb ULL connectivity are structured to enable the Exchange to bifurcate its 10Gb ULL network shared with MIAX Pearl Options so that it can continue to meet current and anticipated connectivity demands of all market participants.

Similarly, and also in connection with a technology change, Cboe Exchange, Inc. ("Cboe") amended its access and connectivity fees, including port fees.¹³⁰ Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.*, orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports, tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.¹³¹ Cboe justified its proposal by stating that, ". . . the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other

options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over-the-Counter (OTC) markets."¹³² The Exchange concurs with the following statement by CBOE,

The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no "de facto" or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.¹³³

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan"),¹³⁴ wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.¹³⁵ Further, the Commission explicitly stated that "[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by

existing competitors."¹³⁶ Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.¹³⁷

Cboe also filed to establish a monthly fee for Certification Logical Ports of \$250 per Certification Logical Port.¹³⁸ Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production environment, including live production trading on the Exchange.¹³⁹

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.¹⁴⁰ Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.¹⁴¹ Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange's certification environment.¹⁴² Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR-Cboe-2022-011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, DROP Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange's certification environment to test proprietary systems and applications (*i.e.*, "Certification Logical Ports").

¹³⁹ See Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR-Cboe-2022-011).

¹⁴⁰ *Id.* at 18426.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹³⁰ See Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR-CBOE-2020-105). The Exchange notes that Cboe submitted this filing *after* the Staff Guidance and contained no cost based justification.

¹³¹ *Id.* at 71676.

¹³² *Id.*

¹³³ *Id.* at 71676.

¹³⁴ See Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7-13-19).

¹³⁵ *Id.*

Cboe BYX Exchange, Inc.,¹⁴³ BZX,¹⁴⁴ and Cboe EDGA Exchange, Inc.¹⁴⁵

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets' filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would

enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, and one comment letter on the Fourth Proposal, all from the same commenter.¹⁴⁶ In their letters, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has attempted to raise new issues in its letters, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,¹⁴⁷ and Rule 19b-4(f)(2)¹⁴⁸ thereunder. 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MIAX-2023-30 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-MIAX-2023-30. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MIAX-2023-30 and should be submitted on or before September 15, 2023.

¹⁴³ See Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR-CboeBYX-2022-004).

¹⁴⁴ See Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR-CboeBZX-2022-021).

¹⁴⁵ See Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR-CboeEDGA-2022-004).

¹⁴⁶ See letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP ("SIG"), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, and letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023 and July 24, 2023.

¹⁴⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁴⁸ 17 CFR 240.19b-4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18299 Filed 8–24–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98180; File No. SR–PEARL–2023–35]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAx Pearl Options Exchange Fee Schedule To Modify Certain Connectivity and Port Fees

August 21, 2023.

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 August 8, 2023, MIAx PEARL, LLC (“MIAx Pearl” 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 is filing a proposal to amend the MIAx Pearl Options Exchange Fee Schedule (the “Fee Schedule”) to amend certain connectivity and port fees.³

The text of the proposed rule change is available on the Exchange’s website at <https://www.miaxoptions.com/rule-filings>, at MIAx Pearl’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (“Gb”) ultra-low latency (“ULL”) fiber connection for Members⁴ and non-Members; (2) amend the calculation of fees for MIAx Express Network Full Service (“MEO”) ⁵ Ports (Bulk and Single); and (3) amend the fees for Full Service MEO Ports (Bulk and Single). The Exchange and its affiliate, Miami International Securities Exchange, LLC (“MIAx”) operated 10Gb ULL connectivity on a single shared network that provided access to both exchanges via a single 10Gb ULL connection. The Exchange last increased fees for 10Gb ULL connections from \$9,300 to \$10,000 per month on January 1, 2021.⁶ At the same time, MIAx also increased its 10Gb ULL connectivity fee from \$9,300 to \$10,000 per month.⁷ The Exchange and MIAx shared a combined cost analysis in those filings due to the single shared 10Gb ULL connectivity network for both exchanges. In those filings, the Exchange and MIAx allocated a combined total of \$17.9 million in expenses to providing 10Gb ULL connectivity.⁸

Beginning in late January 2023, the Exchange also recently determined a substantial operational need to no longer operate 10Gb ULL connectivity on a single shared network with MIAx. The Exchange bifurcated 10Gb ULL connectivity due to ever-increasing capacity constraints and to enable it to continue to satisfy the anticipated access needs for Members and other

market participants.⁹ Since the time of the 2021 increase discussed above,¹⁰ the Exchange experienced ongoing increases in expenses, particularly internal expenses.¹¹ As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of \$11,567,509 for providing 10Gb ULL connectivity on a single unshared network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAx) and \$1,644,132 for providing Full Service MEO Ports.¹²

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber’s connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber’s experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Full Service

⁹ See *MIAx Options and MIAx Pearl Options—Announce planned network changes related to shared 10G ULL extranet*, issued August 12, 2022, available at <https://www.miaxglobal.com/alert/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-0>. The Exchange will continue to provide access to both the Exchange and MIAx over a single shared 1Gb connection. See Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAx–2022–48).

¹⁰ The Exchange notes it last filed to amend the fees for Full Service MEO Ports in 2018 (excluding filings made in July 2021 through early 2022), prior to which the Exchange provided Full Service MEO Ports free of charge since the it launched operations in 2017 and absorbed all costs since that time. See Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

¹¹ For example, the New York Stock Exchange, Inc.’s (“NYSE”) Secure Financial Transaction Infrastructure (“SFTI”) network, which contributes to the Exchange’s connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange’s actual 2021 and proposed 2023 budgets.

¹² For the avoidance of doubt, all references to costs in this filing, including the cost categories discussed below, refer to costs incurred by MIAx Pearl Options only and not MIAx Pearl Equities, the equities trading facility.

¹⁴⁹ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ All references to the “Exchange” in this filing mean MIAx Pearl Options. Any references to the equities trading facility of MIAx PEARL, LLC, will specifically be referred to as “MIAx Pearl Equities.”

⁴ The term “Member” means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed “members” under the Exchange Act. See Exchange Rule 100.

⁵ The term “MEO Interface” or “MEO” means a binary order interface for certain order types as set forth in Rule 516 into the MIAx Pearl System. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁶ See Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

⁷ See Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAx–2021–02).

⁸ See *id.*

MEO Ports (Bulk and Single) in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAx as well as the ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.¹³ The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR-PEARL-2022-62) (the "Initial Proposal").¹⁴ On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR-PEARL-2023-08) (the "Second Proposal").¹⁵ On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR-PEARL-2023-19) (the "Third Proposal").¹⁶ On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised proposal (SR-PEARL-2023-27) (the "Fourth Proposal").¹⁷ On August 8, 2023, the Exchange withdrew the Fourth Proposal and replaced it with this further revised proposal (SR-PEARL-2023-35).

The Exchange previously included a cost analysis in the Initial, Second, Third, and Fourth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (separately

among MIAx Pearl Options and MIAx Pearl Equities, MIAx and MIAx Emerald¹⁸ (together with MIAx and MIAx Pearl Equities, the "affiliated markets")) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. Although the baseline cost analysis used to justify the proposed fees was made in the Initial, Second, Third, and Fourth Proposals, the fees themselves have not changed since the Initial, Second, Third, or Fourth Proposals and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Full Service MEO Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision*¹⁹ and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from its prior review process (hereinafter referred to as the "Revised Review Process"). In the *Susquehanna Decision*, the D.C. Circuit Court stated that the Commission could not maintain a practice of "unquestioning reliance" on claims made by a self-regulatory organization ("SRO") in the course of filing a rule or fee change with the Commission.²⁰ Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.²¹ On that same day, the Commission issued an order remanding to various exchanges and national market system ("NMS") plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the "Remand Order").²² The Remand Order directed

the exchanges to "develop a record," and to "explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review."²³ The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.²⁴ However, the Commission did extend the deadlines in the Remand Order "so that they did not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate."²⁵ Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC ("BOX") to establish connectivity fees (the "BOX Order"), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.²⁶ Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a "market-based" test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance "to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities

Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

²³ *Id.* at page 2.

²⁴ *Sec. Indus. & Fin. Mkts. Ass'n, Securities Exchange Act Release No. 85802*, 2019 WL 2022819 (May 7, 2019) (the "Order Denying Reconsideration").

²⁵ *Order Denying Reconsideration*, 2019 WL 2022819, at * 13.

²⁶ *See Securities Exchange Act Release No. 85459* (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it "historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein." *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging \$5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing "market-based" fee filings from years prior).

¹³ The Exchange notes that MIAx will make a similar filing to increase its 10Gb ULL connectivity fees.

¹⁴ *See Securities Exchange Act Release No. 96632* (January 10, 2023), 88 FR 2707 (January 17, 2023) (SR-PEARL-2022-62).

¹⁵ *See Securities Exchange Act Release No. 97082* (March 8, 2023), 88 FR 15825 (March 14, 2023) (SR-PEARL-2023-05).

¹⁶ *See Securities Exchange Act Release No. 97420* (May 2, 2023), 88 FR 29701 (May 8, 2023) (SR-PEARL-2023-19).

¹⁷ The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. *See Securities Exchange Act Release No. 97815* (June 27, 2023), 88 FR 42759 (July 3, 2023) (SR-PEARL-2023-27).

¹⁸ The term "MIAx Emerald" means MIAx Emerald, LLC. *See* Exchange Rule 100.

¹⁹ *See Susquehanna International Group, LLP v. Securities & Exchange Commission*, 866 F.3d 442 (D.C. Circuit 2017) (the "Susquehanna Decision").

²⁰ *Id.*

²¹ *See Sec. Indus. & Fin. Mkts. Ass'n, Securities Exchange Act Release No. 84432*, 2018 WL 5023228 (October 16, 2018) (the "SIFMA Decision").

²² *See Sec. Indus. & Fin. Mkts. Ass'n, Securities Exchange Act Release No. 84433*, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k-1, 78s; *see also*

Exchange Act.”²⁷ In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”²⁸ The Staff Guidance also states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”²⁹

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission’s SIFMA Decision in *NASDAQ Stock Market, LLC v. SEC*³⁰ and remanded for further proceedings consistent with its opinion.³¹ That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ*. The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision “has now been vacated, the basis for the [Remand Order] has evaporated.”³² Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ v. SEC* that Exchange Act section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.³³ The Commission further invited “the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed,

and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq v. SEC*.”³⁴ Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg’s request to withdraw their applications for review and dismissed the proceedings.³⁵

As a result of the Commission’s loss of the *NASDAQ v. SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”³⁶ As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff’s fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the “record” or “review” earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission’s related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (“non-legacy exchanges”), while favoring larger, incumbent, entrenched, legacy exchanges (“legacy exchanges”).³⁷ The

legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings³⁸ to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.³⁹ These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a “market-based” test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.*, non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair

²⁷ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (the “Staff Guidance”).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *NASDAQ Stock Mkt., LLC v. SEC*, No 18–1324, --- Fed. App’x ---, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court’s mandate was issued on August 6, 2020.

³¹ *Nasdaq v. SEC*, 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court’s mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act “section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.” *Id.* The court held that “for a fee rule to be challengeable under section 19(d), it must, at a minimum, be targeted at specific individuals or entities.” *Id.* Thus, the court held that “Section 19(d) is not an available means to challenge the fees at issue” in the SIFMA Decision. *Id.*

³² *Id.* at *2; see also *id.* (“[T]he sole purpose of the challenged remand has disappeared.”).

³³ *Sec. Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the “Order Vacating Prior Order and Requesting Additional Briefs”).

³⁴ *Id.*

³⁵ *Sec. Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 90087 (October 5, 2020).

³⁶ See *supra* note 31, at page 2.

³⁷ Commission Chair Gary Gensler recently reiterated the Commission’s mandate to ensure competition in the equities markets. See “Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots”, by Chair Gary Gensler, dated December 14, 2022 (stating “[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and enhance competition in the securities markets, including the equity markets” (emphasis added)). In that same statement, Chair Gary Gensler cited the

five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k-1), including ensuring “fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets . . .” (emphasis added). *Id.* at note 1. See also Securities Acts Amendments of 1975, available at <https://www.govtrack.us/congress/bills/94/s249>.

³⁸ This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass’n*, Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. See *The Nasdaq Stock Market, LLC v. SEC*, Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule filings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

³⁹ See, e.g., Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as MIAX Pearl, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.⁴⁰ By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish “fee parity” with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff’s change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (“Cboe”) reported “access and capacity fee” revenue of \$70,893,000 for 2020⁴¹ and \$80,383,000 for 2021.⁴² Cboe C2 Exchange, Inc. (“C2”) reported “access and capacity fee” revenue of \$19,016,000 for 2020⁴³ and \$22,843,000 for 2021.⁴⁴ Cboe BZX Exchange, Inc. (“BZX”) reported “access and capacity

fee” revenue of \$38,387,000 for 2020⁴⁵ and \$44,800,000 for 2021.⁴⁶ Cboe EDGX Exchange, Inc. (“EDGX”) reported “access and capacity fee” revenue of \$26,126,000 for 2020⁴⁷ and \$30,687,000 for 2021.⁴⁸ For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported \$178,712,000 in “access and capacity fees” in 2021. NASDAQ Phlx, LLC (“NASDAQ Phlx”) reported “Trade Management Services” revenue of \$20,817,000 for 2019.⁴⁹ The Exchange notes it is unable to compare “access fee” revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the “Trade Management Services” line item was bundled into a much larger line item in PHLX’s Form 1, simply titled “Market services.”⁵⁰

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,⁵¹ new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility,

eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and “is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .”,⁵² this is not the reality experienced by exchanges such as MIAX Pearl. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.⁵³ However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in section 6(b)(4) of

⁴⁰ The Exchange has filed, and subsequently withdrew, various forms of this proposed fee change numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

⁴¹ According to Cboe’s 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. See Cboe 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf>.

⁴² See Cboe 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf>.

⁴³ See C2 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf>.

⁴⁴ See C2 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf>.

⁴⁵ See BZX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf>.

⁴⁶ See BZX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf>.

⁴⁷ See EDGX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf>.

⁴⁸ See EDGX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf>.

⁴⁹ According to PHLX, “Trade Management Services” includes “a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX’s] published fee schedules.” See PHLX 2020 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf>.

⁵⁰ See PHLX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf>. The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

⁵¹ See, e.g., *CNBC Debuts New Set on NYSE Floor*, available at <https://www.cnn.com/id/46517876>.

⁵² See *supra* note 27, at note 1.

⁵³ See Securities Exchange Act Release Nos. 92798 (August 27, 2021), 86 FR 49360 (September 2, 2021) (SR-PEARL–2021–33); 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR-PEARL–2021–36); 93162 (September 28, 2021), 86 FR 54739 (October 4, 2021) (SR-PEARL–2021–45); 93556 (November 10, 2021), 86 FR 64235 (November 17, 2021) (SR-PEARL–2021–53); 93774 (December 14, 2021), 86 FR 71952 (December 20, 2021) (SR-PEARL–2021–57); 93894 (January 4, 2022), 87 FR 1203 (January 10, 2022) (SR-PEARL–2021–58); 94258 (February 15, 2022), 87 FR 9659 (February 22, 2022) (SR-PEARL–2022–03); 94286 (February 18, 2022), 87 FR 10860 (February 25, 2022) (SR-PEARL–2022–04); 94721 (April 14, 2022), 87 FR 23573 (April 20, 2022) (SR-PEARL–2022–11); 94722 (April 14, 2022), 87 FR 23660 (April 20, 2022) (SR-PEARL–2022–12); 94888 (May 11, 2022), 87 FR 29892 (May 17, 2022) (SR-PEARL–2022–18).

the Act⁵⁴ in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,⁵⁵ to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;⁵⁶ or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-

transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and place a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.⁵⁷

* * * * *

10Gb ULL Connectivity Fee Change

MIAX Pearl Options filed a proposal to no longer operate 10Gb connectivity to MIAX Pearl Options on a single shared network with its affiliate, MIAX. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.⁵⁸ This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the Fee Schedule that provide for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both MIAX Pearl Options and MIAX via the 1Gb network.

MIAX Pearl Options bifurcated the MIAX Pearl Options and MIAX 10Gb ULL networks in the first quarter of 2023, which change became effective on January 23, 2023. The Exchange issued

an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.⁵⁹ Upon bifurcation of the 10Gb ULL network, subscribers need to purchase separate connections to MIAX Pearl Options and MIAX at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Prior to the bifurcation of the 10Gb ULL networks, subscribers to 10Gb ULL connectivity were able to connect to both MIAX Pearl Options and MIAX at the applicable rate set forth below.

The Exchange, therefore, proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks⁶⁰ via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to MIAX Pearl Options and no longer provides access to MIAX. Specifically, MIAX Pearl Options proposes to amend Sections 5(a)-b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from \$10,000 per month to \$13,500 per month ("10Gb ULL Fee").⁶¹ The Exchange also proposes to amend the Fee Schedule to reflect the bifurcation of the 10Gb ULL network and specify that only the 1Gb network provides access to both MIAX Pearl Options and MIAX.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAX. First, in the Definitions section of the Fee Schedule, the Exchange proposes to amend the last sentence in the definition of "MENI" to specify that the MENI can be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange's affiliate, MIAX, via a single, shared 1Gb

⁵⁴ 15 U.S.C. 78f(b)(4).

⁵⁵ To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

⁵⁶ In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. See, e.g., *CSA Staff Consultation Paper 21-401, Real-Time Market Data Fees*, available at https://www.bsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policy2/21401_Market_Data_Fee_CSA_Staff_Consultation_Paper.pdf.

⁵⁷ The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (e.g., healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to "develop a record," and to "explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review," and to ensure a comparable review process with the Exchange's filing.

⁵⁸ See *supra* note 9.

⁵⁹ *Id.*

⁶⁰ The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

⁶¹ Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4(c) of the Exchange's Fee Schedule. See Section 4(c) of the Exchange's fee schedule available at <https://www.miaxglobal.com/markets/us-options/pearl-options/fees> (providing that "Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.").

connection. Next, the Exchange proposes to amend the explanatory paragraphs below the network connectivity fee tables in Sections 5(a)-b) of the Fee Schedule to specify that, with the bifurcated 10Gb ULL network, Members (and non-Members) utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX via a single, can only do so via a shared 1Gb connection.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Full Service MEO Ports—Bulk and Single

Background

The Exchange also proposes to amend Section 5(d) of the Fee Schedule to amend the calculation and amount of fees for Full Service MEO Ports. The Exchange currently offers different types of MEO Ports depending on the services required by the Member, including a Full Service MEO Port-Bulk,⁶² a Full Service MEO Port-Single,⁶³ and a Limited Service MEO Port.⁶⁴ For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine⁶⁵ and may request Limited

Service MEO Ports for which MIAX Pearl will assess Members Limited Service MEO Port fees based on a sliding scale for the number of Limited Service MEO Ports utilized each month. The two (2) Full-Service MEO Ports that may be allocated per matching engine to a Member may consist of: (a) two (2) Full Service MEO Ports—Bulk; (b) two (2) Full Service MEO Ports—Single; or (c) one (1) Full Service MEO Port—Bulk and one (1) Full Service MEO Port—Single.

Currently, the Exchange assesses Members Full Service MEO Port Fees, either for a Full Service MEO Port—Bulk and/or for a Full Service MEO Port—Single, based upon the monthly total volume executed by a Member and its Affiliates⁶⁶ on the Exchange, across all origin types, not including Excluded Contracts,⁶⁷ as compared to the Total Consolidated Volume (“TCV”),⁶⁸ in all MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of “Non-Transaction Fees Volume-Based Tiers” described in the Definitions section of the Fee Schedule. The Exchange assesses these and other monthly Port fees to Members in each month the market participant is credentialed to use a Port in the production environment.

Full Service MEO Port (Bulk) Fee Changes

Current Full Service MEO Port (Bulk) Fees. The Exchange currently assesses all Members (Market Makers⁶⁹ and Electronic Exchange Members⁷⁰

orders and trades on a symbol-by-symbol basis. See the Definitions Section of the Fee Schedule.

⁶² “Affiliate” means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm’s Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). See the Definitions Section of the Fee Schedule.

⁶⁷ “Excluded Contracts” means any contracts routed to an away market for execution. See the Definitions Section of the Fee Schedule.

⁶⁸ “TCV” means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). See the Definitions Section of the Fee Schedule.

⁶⁹ The term “Market Maker” means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of Exchange Rules. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁷⁰ The term “Electronic Exchange Member” or “EEM” means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting

(“EEMs”) monthly Full Service MEO Port—Bulk fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, \$3,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, \$4,500; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, \$5,000.

Proposed Full Service MEO Port (Bulk) Fees. The Exchange proposes to amend the calculation and amount of Full Service MEO Port (Bulk) fees for EEMs and Market Makers. In particular, for EEMs, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all EEMs that utilize Full Service MEO Ports (Bulk) a flat monthly fee of \$7,500. For this flat monthly fee, EEMs will continue to be entitled to two (2) Full Service MEO Ports (Bulk) for each Matching Engine for the single monthly fee of \$7,500. The Exchange now proposes to amend the calculation and amount of Full Service MEO Port (Bulk) fees for Market Makers by moving away from the above-described volume tier-based fee structure to harmonize the Full Service MEO Port (Bulk) fee structure for Market Makers with that of the Exchange’s affiliates, MIAX and MIAX Emerald.⁷¹ The Exchange proposes that the amount of the monthly Full Service MEO Port (Bulk) fees for Market Makers would be based on the lesser of either the per class traded or percentage of total national average daily volume (“ADV”) measurement based on classes traded by volume. The amount of monthly Market Maker Full Service MEO Port (Bulk) fee would be based upon the number of classes in which the Market Maker was registered to quote on any given day within the calendar month, or upon the class volume percentages. This change in how Full Service MEO Port (Bulk) fees are calculated is identical to how the Exchange assesses Market Makers Trading Permit fees, which is in line with how numerous exchanges charge similar membership fees.

Specifically, the Exchange proposes to adopt the following Full Service MEO Port (Bulk) fees for Market Makers: (i) \$5,000 for Market Maker registrations in

proprietary trading. Electronic Exchange Members are deemed “members” under the Exchange Act. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁷¹ See MIAX Fee Schedule, Section 5(d)jii) and MIAX Emerald Fee Schedule, Section 5(d)jii).

⁶² “Full Service MEO Port—Bulk” means an MEO port that supports all MEO input message types and binary bulk order entry. See the Definitions Section of the Fee Schedule.

⁶³ “Full Service MEO Port—Single” means an MEO port that supports all MEO input message types and binary order entry on a single order-by-order basis, but not bulk orders. See the Definitions Section of the Fee Schedule.

⁶⁴ “Limited Service MEO Port” means an MEO port that supports all MEO input message types, but does not support bulk order entry and only supports limited order types, as specified by the Exchange via Regulatory Circular. See the Definitions Section of the Fee Schedule.

⁶⁵ A “Matching Engine” is a part of the Exchange’s electronic system that processes options

up to 10 option classes or up to 20% of option classes by national ADV; (ii) \$7,500 for Market Maker registrations in up to 40 option classes or up to 35% of option classes by ADV; (iii) \$10,000 for Market Maker registrations in up to 100 option classes or up to 50% of option classes by ADV; and (iv) \$12,000 for Market Maker registrations in over 100 option classes or over 50% of option classes by ADV up to all option classes listed on MIAx Pearl. For example, if Market Maker 1 elects to quote the top 40 option classes which consist of 58% of the total national average daily volume in the prior calendar quarter, the Exchange would assess \$7,500 to Market Maker 1 for the month which is the lesser of 'up to 40 classes' and 'over 50% of classes by volume up to all classes listed on MIAx Pearl'. If Market Maker 2 elects to quote the bottom 1000 option classes which consist of 10% of the total national average daily volume in the prior quarter, the Exchange would assess \$5,000 to Market Maker 2 for the month which is the lesser of 'over 100 classes' and 'up to 20% of classes by volume'. The Exchange notes that the proposed tiers (ranging from \$5,000 to \$12,000) are lower than the tiers that the Exchange's affiliates charge for their comparable ports (ranging from \$5,000 to \$20,500) for similar per class tier thresholds.⁷²

With the proposed changes, a Market Maker would be determined to be registered in a class if that Market Maker has been registered in one or more series in that class.⁷³ The Exchange will assess MIAx Pearl Options Market Makers the monthly Market Maker Full Service MEO Port (Bulk) fee based on the greatest number of classes listed on MIAx Pearl Options that the MIAx Pearl Options Market Maker registered to quote in on any given day within a calendar month. Therefore, with the proposed changes to the calculation of Market Maker Full Service MEO Port (Bulk) fees, the Exchange's Market Makers would be encouraged to quote in more series in each class they are registered in because each additional series in that class would not count against their total classes for purposes of the Full Service MEO Port (Bulk) fee tiers. The class volume percentage is based on the total national ADV in classes listed on MIAx Pearl Options in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly Market Maker Full Service MEO Port (Bulk) fee

until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national ADV.

The Exchange also proposes to adopt an alternative lower Full Service MEO Port (Bulk) fee for Market Makers who fall within the 2nd, 3rd and 4th levels of the proposed Market Maker Full Service MEO Port (Bulk) fee table: (i) Market Maker registrations in up to 40 option classes or up to 35% of option classes by volume; (ii) Market Maker registrations in up to 100 option classes or up to 50% of option classes by volume; and (iii) Market Maker registrations in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAx Pearl Options. In particular, the Exchange proposes to adopt footnote "***" following the Market Maker Full Service MEO Port (Bulk) fee table for these Monthly Full Service MEO Port (Bulk) tier levels. New proposed footnote "***" will provide that if the Market Maker's total monthly executed volume during the relevant month is less than 0.040% of the total monthly TCV for MIAx Pearl-listed option classes for that month, then the fee will be \$6,000 instead of the fee otherwise applicable to such level.

The purpose of the alternative lower fee designated in proposed footnote "***" is to provide a lower fixed fee to those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed fees to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option marketplace, but have been decreasing in number in recent years, due to industry consolidation. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and equitable to offer such Market Makers a lower fixed fee. The Exchange notes that the Exchange's affiliates, MIAx and MIAx Emerald, also provide lower MIAx Express Interface ("MEI") Port fees (the comparable ports on those exchanges) for Market Makers who quote the entire MIAx and MIAx Emerald markets (or substantial amount of those markets), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a

significant amount of volume on MIAx or MIAx Emerald.⁷⁴ The proposed changes to the Full Service MEO Port (Bulk) fees for Market Makers who fall within the 2nd, 3rd and 4th levels of the fee table are based upon a business determination of current Market Maker assignments and trading volume.

Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,⁷⁵ the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports (described above) per matching engine to which that Member connects. The Exchange currently has twelve (12) matching engines, which means Market Makers may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on the lesser of either the per class traded or percentage of total national ADV measurement based on classes traded by volume, as described above. For illustrative purposes, the Exchange currently assesses a fee of \$5,000 per month for Market Makers that reach the highest Full Service MEO Port (Bulk) tier, regardless of the number of Full Service MEO Ports allocated to the Market Maker. For example, assuming a Market

⁷⁴ See MIAx Fee Schedule, Section 5(d)ii), note "***" and MIAx Emerald Fee Schedule, Section 5(d)ii), note "***".

⁷⁵ See NYSE American Options Fee Schedule, Section V.A., Port Fees (each port charged on a per matching engine basis, with NYSE American having 17 match engines). See NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange); NYSE Arca Options Fee Schedule, Port Fees (each port charged on a per matching engine basis, NYSE Arca having 19 match engines); and NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange). See NASDAQ Fee Schedule, NASDAQ Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services (each port charged on a per matching engine basis, with Nasdaq having multiple matching engines). See NASDAQ Specialized Quote Interface (SQI) Specification, Version 6.5b (updated February 13, 2020), Section 2, Architecture, available at <https://www.nasdaq.com/docs/2020/02/18/Specialized-Quote-Interface-SQI-6.5b.pdf> (the "NASDAQ SQI Interface Specification"). The NASDAQ SQI Interface Specification also provides that NASDAQ's affiliates, NASDAQ Phlx and NASDAQ BX, Inc. ("BX"), have trading infrastructures that may consist of multiple matching engines with each matching engine trading only a range of option classes. Further, the NASDAQ SQI Interface Specification provides that the SQI infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.

⁷² See *id.*

⁷³ Pursuant to Exchange Rule 602(a), a Member that has qualified as a Market Maker may register to make markets in individual series of options.

Maker connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports (Bulk) per matching engine, this results in an effective fee of \$208.33 per Full Service MEO Port (\$5,000 divided by 24) for the month, as compared to other exchanges that charge over \$1,000 per port and require multiple ports to connect to all

of their matching engines.⁷⁶ This fee had been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.⁷⁷ The Exchange proposes to increase Full Service MEO Port fees, with the highest monthly fee of \$12,000 for the Full Service MEO Ports (Bulk). Market Makers will continue to receive two (2) Full Service MEO Ports to each

matching engine to which they connect for the single flat monthly fee. Assuming a Market Maker connects to all twelve (12) matching engines during the month, with two Full Service MEO Ports per matching engine, this would result in an effective fee of \$500 per Full Service MEO Port (\$12,000 divided by 24).

FULL SERVICE MEO PORTS (BULK)

	Number of match engines	Total number of ports for market maker to connect to all match engines	Total fee (monthly)	Effective per port fee
Pricing Based on Market Maker Being Charged the Highest Tier (Current) ..	12	24	\$5,000	\$208.33
Pricing Based on Market Maker Being Charged the Highest Tier (as proposed)	12	24	12,000	500

Full Service MEO Port (Single) Fee Changes

Current Full Service MEO Port (Single) Fees. The Exchange currently assesses all Members (Market Makers and EEMs) monthly Full Service MEO Port (Single) fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, \$2,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, \$3,375; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, \$3,750.

Proposed Full Service MEO Port (Single) Fees. The Exchange proposes to amend the calculation and amount of Full Service MEO Port (Single) fees for EEMs and Market Makers. In particular, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all Members that utilize Full Service MEO Ports (Single) a flat monthly fee of \$4,000. For this flat monthly fee, all Members will continue to be entitled to two (2) Full Service MEO Ports (Single) for each Matching Engine for the single monthly fee of \$4,000.

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts

of the network. For instance, MEO ports allow for a higher throughput and can handle much higher quote/order rates than FIX ports. Members that are Market Makers or high frequency trading firms utilize these ports (typically coupled with 10Gb ULL connectivity) because they transact in significantly higher amounts of messages being sent to and from the Exchange, versus FIX port users, who are traditionally customers sending only orders to the Exchange (typically coupled with 1Gb connectivity). The different types of ports cater to the different types of Exchange Memberships and different capabilities of the various Exchange Members. Certain Members need ports and connections that can handle using far more of the network's capacity for message throughput, risk protections, and the amount of information that the System has to assess. Those Members account for the vast majority of network capacity utilization and volume executed on the Exchange, as discussed throughout. For example, three (3) Members account for 64% of all 10Gb ULL connections and Full Service MEO Ports purchased.

The Exchange proposes to increase its monthly Full Service MEO Port fees since it has not done so since the fees were adopted in 2018,⁷⁸ which are designed to recover a portion of the costs associated with directly accessing the Exchange. As described above, the Exchange's affiliates, MIAX and MIAX Emerald, also charge fees for their high throughput, low latency ports in a

similar fashion as the Exchange proposes to charge for its MEO Ports—generally, the more active user the Member (*i.e.*, the greater number/greater national ADV of classes assigned to quote on MIAX and MIAX Emerald), the higher the MEI Port fee.⁷⁹ This concept is, therefore, not new or novel.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with section 6(b) of the Act⁸⁰ in general, and furthers the objectives of section 6(b)(4) of the Act⁸¹ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of section 6(b)(5) of the Act⁸² in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised

⁷⁶ *Id.* See also *infra* notes 101 to 108 and accompanying text.

⁷⁷ See Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR-PEARL-2018-07).

⁷⁸ See *id.*

⁷⁹ See MIAX Fee Schedule, Section 5)d)ii); MIAX Emerald Fee Schedule, Section 5)d)ii).

⁸⁰ 15 U.S.C. 78f(b).

⁸¹ 15 U.S.C. 78f(b)(4).

⁸² 15 U.S.C. 78f(b)(5).

Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order⁸³ and the Staff Guidance,⁸⁴ the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, "[a]n initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces."⁸⁵ The Staff Guidance further states that, ". . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act."⁸⁶ In the Staff Guidance, the Commission Staff further states that, "[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument."⁸⁷

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation

of the 10Gb ULL network) and Full Service MEO Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in February 2017⁸⁸ and adopted its initial fee schedule, with 10Gb ULL connectivity fees set at \$8,500 (the Exchange originally had a non-ULL 10Gb connectivity option, which it has since removed) and a fee waiver for all Full Service MEO Port fees.⁸⁹ As a new

exchange entrant, the Exchange chose to offer Full Service MEO Ports free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.⁹⁰

Later in 2018, as the Exchange's market share increased,⁹¹ the Exchange adopted nominal fees for Full Service MEO Ports.⁹² The Exchange last increased the fees for its 10Gb ULL fiber connections from \$9,300 to \$10,000 per

⁹⁰ See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (stating, "[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . ."). See also Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR-MEMX-2020-10) (proposing to adopt the initial fee schedule and stating that "[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions."). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. See Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR-MEMX-2021-19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR-MEMX-2022-32) and 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR-MEMX-2022-26) (proposing to adopt fees for connectivity). See also, e.g., Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR-NYSE-NAT-2020-05), available at <https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf> (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

⁹¹ The Exchange experienced a monthly average trading volume of 3.94% for the month of March 2018. See the "Market Share" section of the Exchange's website, available at www.miaxglobal.com.

⁹² See Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR-PEARL-2018-07).

⁸³ See *supra* note 26.

⁸⁴ See *supra* note 27.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See MIAx PEARL Successfully Launches Trading Operations, dated February 6, 2017, available at https://www.miaxglobal.com/sites/default/files/alert-files/MIAx_Press_Release_02062017.pdf.

⁸⁹ See Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR-PEARL-2017-10).

month on January 1, 2021.⁹³ The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution;’ [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”⁹⁴

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices,

products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹⁵

Congress directed the Commission to “rely on ‘competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.’”⁹⁶ As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. “If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”⁹⁷ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”⁹⁸ In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost,

only if a “proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.”⁹⁹

The Exchange believes the competing exchanges’ 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs with a reasonable margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange’s proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the connectivity and port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Pearl Options (as proposed) (equity options market share of 7.05% for the month of May 2023) ^a .	10Gb ULL connection	\$13,500.
	Full Service MEO Port (Bulk) for Market Makers.	Lesser of either the per class basis or percentage of total national ADV by the Market Maker, as follows: \$5,000—up to 10 classes or up to 20% of classes by volume. \$7,500**—up to 40 classes or up to 35% of classes by volume. \$10,000**—up to 100 classes or up to 50% of classes by volume. \$12,000**—over 100 classes or over 50% of all classes by volume up to all classes (or \$500 per port per matching engine). ** A lower rate of \$6,000 will apply to these tiers if the Market Maker’s total monthly executed volume is less than 0.040% of total monthly TCV for MIAX Pearl options.
	Full Service MEO Port (Bulk) for EEMs	\$7,500 (or \$312.50 per port per matching engine).
	Full Service MEO Port (Single) for Market Makers and EEMs.	\$4,000 (or \$166.66 per port per matching engine).

⁹³ See Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR-PEARL-2021-01).

⁹⁴ See *NetCoalition*, 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR-NYSEArca-2006-21)).

⁹⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁹⁶ See *NetCoalition*, 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (“[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces

as unnecessary regulatory restrictions are removed.”).

⁹⁷ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR-NYSEArca-2006-21).

⁹⁸ *Id.*

⁹⁹ See Staff Guidance, *supra* note 27.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
NASDAQ ^b (equity options market share of 6.59% for the month of May 2023) ^c .	10Gb Ultra fiber connection SQF Port ^d	\$15,000 per connection. 1–5 ports: \$1,500 per port. 6–20 ports: \$1,000 per port. 21 or more ports: \$500 per port.
NASDAQ ISE LLC (“ISE”) ^e (equity options market share of 6.18% for the month of May 2023) ^f .	10Gb Ultra fiber connection SQF Port	\$15,000 per connection. \$1,100 per port.
NYSE American LLC (“NYSE American”) ^g (equity options market share of 7.34% for the month of May 2023) ^h .	10Gb LX LCN connection Order/Quote Entry Port	\$22,000 per connection. 1–40 ports: \$450 per port. 41 or more ports: \$150 per port.
NASDAQ GEMX, LLC (“GEMX”) ⁱ (equity options market share of 2.00% for the month of May 2023) ^j .	10Gb Ultra connection SQF Port	\$15,000 per connection. \$1,250 per port.

^a See the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/>.

^b See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

^c See *supra* note a.

^d Similar to the MIAX Pearl Options’ MEO Ports, SQF ports are primarily utilized by Market Makers.

^e See ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees and ISE Rules, General 8: Connectivity.

^f See *supra* note a.

^g See NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

^h See *supra* note a.

ⁱ See GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees and GEMX Rules, General 8: Connectivity.

^j See *supra* note a.

The Exchange acknowledges that, without additional contextual information, the above table may lead someone to believe that the Exchange’s proposed fees for Full Service MEO Ports is higher than other exchanges when in fact, that is not true. The Exchange provides each Member or non-Member access to two (2) ports on all twelve (12) matching engines for a single fee and a vast majority choose to connect to all twelve (12) matching engines and utilize both ports for a total of 24 ports. Other exchanges charge on a per port basis and require firms to connect to multiple matching engines, thereby multiplying the cost to access their full market.¹⁰⁰ On the Exchange, this is not the case. The Exchange provides each Member or non-Member access, but does not require they connect to, all twelve (12) matching engines.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a

member of one or more options exchanges based on the market participant’s assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, one Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

It is not a requirement for market participants to become members of all options exchanges; in fact, certain market participants conduct an options business as a member of only one options market.¹⁰¹ A very small number of market participants choose to become

a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.¹⁰²

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.¹⁰³ The Exchange and its affiliated options markets, MIAX and MIAX Emerald, have a total of 46 members. Of those 46 total members, 37 are members of all three affiliated options markets, two are members of only two affiliated options markets, and seven are members of only one affiliated options market. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may

¹⁰¹ BOX recently adopted an electronic market maker trading permit fee. See Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, “. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].” Also in 2022, MEMX established a monthly membership fee. See Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee “is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange” and that “neither the trade-through requirements under Regulation NMS nor broker-dealers’ best execution obligations require a broker-dealer to become a member of every exchange.”

¹⁰² Service Bureaus may obtain ports on behalf of Members.

¹⁰³ See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX’s observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

¹⁰⁰ See Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), available at <http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf>. The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. See also NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no "de facto" or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAAX Pearl Options Market Maker terminated their MIAAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAAX Pearl Options. Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not "lock" a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.¹⁰⁴ If the Exchange is not at the national best bid or offer ("NBBO"),¹⁰⁵ the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.¹⁰⁶

With respect to the submission of orders, Members may also choose not to purchase any connection from the Exchange, and instead rely on the port

of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an exchange. An institutional investor may utilize a broker-dealer, a service bureau,¹⁰⁷ or request sponsored access¹⁰⁸ through a member of an exchange in order to submit a trade directly to an options exchange.¹⁰⁹ A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.*, fees based on the number of firms that connect to the Exchange indirectly via the third-party).¹¹⁰ Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency

broker-dealers that have numerous customers of their own.¹¹¹ Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange. This is again evidenced by the fact that one MIAAX Pearl Options Market Maker terminated their MIAAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAAX Pearl Options. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange began to operate on a single shared network with MIAAX when MIAAX Pearl Options commenced operations as a national securities exchange on February 7, 2017.¹¹² The

¹⁰⁴ See Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.

¹⁰⁵ See Exchange Rule 100.

¹⁰⁶ Members may elect to not route their orders by utilizing the Do Not Route order type. See Exchange Rule 516(g).

¹⁰⁷ Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

¹⁰⁸ Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

¹⁰⁹ This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

¹¹⁰ See, e.g., Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at [US Direct-Extranet Connection \(nasdaqtrader.com\)](https://www.nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

¹¹¹ The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

¹¹² See Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 17, 2017).

Exchange and MIAX operated on a single shared network to provide Members with a single convenient set of access points for both exchanges. Both the Exchange and MIAX offer two methods of connectivity, 1Gb and 10Gb ULL connections. The 1Gb connection services are supported by a discrete set of switches providing 1Gb access ports to Members. The 10Gb ULL connection services are supported by a second and mutually exclusive set of switches providing 10Gb ULL access ports to Members. Previously, both the 1Gb and 10Gb ULL shared extranet ports allowed Members to use one connection to access both exchanges, namely their trading platforms, market data systems, test systems, and disaster recovery facilities.

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change was necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Operating two separate national securities exchanges on a single shared network provided certain benefits, such as streamlined connectivity to multiple exchanges, and simplified exchange infrastructure. However, doing so was no longer sustainable due to ever-increasing capacity constraints and current system limitations. The network is not an unlimited resource. As described more fully in the proposal to bifurcate the 10Gb ULL network,¹¹³ the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl Options and the operations of the Exchange and MIAX on a single shared 10Gb ULL network is no longer feasible. This required constant System expansion to meet Member demand for additional ports and 10Gb ULL connections has resulted in limited available System headroom, which eventually became

operationally problematic for both the Exchange and its customers.

As stated above, the shared network is not an unlimited resource and its expansion was constrained by MIAX's and MIAX Pearl Options' ability to provide fair and equitable access to all market participants of both markets. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX's Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.¹¹⁴

Unlike the switches that provide 1Gb connectivity, the availability for additional 10Gb ULL connections on each switch had significantly decreased. This was mostly driven by the connectivity demands of latency sensitive Members (e.g., Market Makers and liquidity removers) that sought to maintain connectivity across multiple 10Gb ULL switches. Based on the Exchange's experience, such Members did not typically use a shared 10Gb ULL connection to reach both the Exchange and MIAX due to related latency concerns. Instead, those Members maintain dedicated separate 10Gb ULL connections for the Exchange and separate dedicated 10Gb ULL connections for MIAX. This resulted in a much higher 10Gb ULL usage per switch by those Members on the shared 10Gb ULL network than would otherwise be needed if the Exchange and MIAX had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX 10Gb ULL networks naturally lends itself to reduced 10Gb ULL port consumption on each switch and, therefore, increased 10Gb ULL port availability for current Members and new Members.

Prior to bifurcating the 10Gb ULL network, the Exchange and MIAX continued to add switches to meet ongoing demand for 10Gb ULL connectivity. That was no longer sustainable because simply adding additional switches to expand the current shared 10Gb ULL network would not adequately alleviate the issue of limited available port connectivity. While it would have resulted in a gain in overall port availability, the existing switches on the shared 10Gb ULL network in use would have continued to suffer from lack of port headroom given many latency sensitive Members' needs for a presence on each switch to reach

both the Exchange and MIAX. This was because those latency sensitive Members sought to have a presence on each switch to maximize the probability of experiencing the best network performance. Those Members routinely decide to rebalance orders and/or messages over their various connections to ensure each connection is operating with maximum efficiency. Simply adding switches to the extranet would not have resolved the port availability needs on the shared 10Gb ULL network since many of the latency sensitive Members were unwilling to relocate their connections to a new switch due to the potential detrimental performance impact. As such, the impact of adding new switches and rebalancing ports would not have been effective or responsive to customer needs. The Exchange has found that ongoing and continued rebalancing once additional switches are added has had, and would have continued to have had, a diminishing return on increasing available 10Gb ULL connectivity.

Based on its experience and expertise, the Exchange found the most practical way to increase connectivity availability on its switches was to bifurcate the existing 10Gb ULL networks for the Exchange and MIAX by migrating the exchanges' connections from the shared network onto their own set of switches. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees necessary to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change further support that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and January 23, 2023 implementation date to provide market participants adequate time to prepare.¹¹⁵ Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange experienced a minimal net increase of six (6) overall 10Gb ULL connectivity subscriptions across MIAX Pearl Options and MIAX. This immaterial increase in overall connections reflects a minimal fee impact for all types of subscribers and reflects that subscribers

24, 2017) (establishing MIAX Pearl Options Fee Schedule and establishing that the MENI can also be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facility of the MIAX Pearl Options' affiliate, MIAX, via a single, shared connection).

¹¹³ See Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR-PEARL-2022-60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR-MIAX-2022-48).

¹¹⁴ Currently, the Exchange maintains sufficient headroom to meet ongoing and future requests for 1Gb connectivity. Therefore, the Exchange did not propose to alter 1Gb connectivity and continues to provide 1Gb connectivity over a shared network.

¹¹⁵ See *supra* note 9.

elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAX, or chose to decrease or cease services in a manner that allows it to change.

Should the Commission Staff disapprove such fees, it would effectively dictate how an exchange manages its technology and would hamper the Exchange's ability to continue to invest in and fund access services in a manner that allows it to meet existing and anticipated access demands of market participants. Disapproval could also have the adverse effect of discouraging an exchange from optimizing its operations and deploying innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from covering its costs and monetizing its operational enhancements, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.*, to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of section 19(b)(1) under the Act,¹¹⁶ and Rule 19b-4 thereunder,¹¹⁷ with respect to the types of information exchanges should provide when filing fee changes, and

section 6(b) of the Act,¹¹⁸ which requires, among other things, that exchange fees be reasonable and equitably allocated,¹¹⁹ not designed to permit unfair discrimination,¹²⁰ and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹²¹ This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.¹²² The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at \$11,567,509 (or approximately \$963,959 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Full Service MEO Ports at \$1,644,132 (or approximately \$137,012 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members¹²³) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of \$13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for Full Service MEO Ports (Bulk) depending on the number of classes assigned or the percentage of national ADV, which is in line with how the Exchange's affiliates, MIAX and MIAX Emerald, assess fees for their comparable MEI Ports.

In 2019, the Exchange completed a study of its aggregate costs to produce

market data and connectivity (the "Cost Analysis").¹²⁴ The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.*, personnel), and certain general and administrative expenses ("cost drivers").

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a "bottom up" budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.*, price time or pro-rata, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,¹²⁵ storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.*, the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will

¹¹⁸ 15 U.S.C. 78f(b).

¹¹⁹ 15 U.S.C. 78f(b)(4).

¹²⁰ 15 U.S.C. 78f(b)(5).

¹²¹ 15 U.S.C. 78f(b)(8).

¹²² See Staff Guidance, *supra* note 27.

¹²³ Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access application sessions on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

¹²⁴ The Exchange frequently updates its Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

¹²⁵ For example, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, MIAX maintains 24 matching engines and MIAX Emerald maintains 12 matching engines.

¹¹⁶ 15 U.S.C. 78s(b)(1).

¹¹⁷ 17 CFR 240.19b-4.

cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.*, connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (*e.g.*, message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (60.6% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to Full Service MEO Ports (3.4%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (36%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process

described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, "in nature and closeness," directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Full Service MEO Port services, is \$1,106,971 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Full Service MEO Ports by 12 months, then adding both numbers together), as further detailed below.

Lastly, the Exchange notes that, based on: (i) the total expense amounts contained in this filing (which are 2023 projected expenses), and (ii) the total expense amounts contained in the related MIAX Pearl Equities filing (also 2023 projected expenses), MIAX PEARL, LLC's total costs have increased at a greater rate over the last three years than the total costs of MIAX PEARL, LLC's affiliated exchanges, MIAX and MIAX Emerald. This is also reflected in the total costs reported in MIAX PEARL, LLC's Form 1 filings over the last three years, when comparing MIAX PEARL, LLC to MIAX PEARL, LLC's affiliated exchanges, MIAX and MIAX Emerald. This is primarily because that MIAX PEARL, LLC operates two markets, one for options and one for equities, while MIAX and MIAX Emerald each operate only one market. This is also due to higher current expense for MIAX PEARL, LLC for 2022 and 2023, due to a hardware refresh (*i.e.*, replacing old hardware with new equipment) for MIAX Pearl Options, as well as higher costs associated with MIAX Pearl Equities due to greater development efforts to grow that newer marketplace.¹²⁶ The Exchange confirms

¹²⁶ See, *e.g.*, Securities Exchange Act Release Nos. 94301 (February 23, 2022), 87 FR 11739 (March 2, 2022) (SR-PEARL-2022-06) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 2617(b) To Adopt Two New Routing Options, and To Make Related Changes and

that there is no double counting of expenses between the options and equities platform of MIAX Pearl; the greater expense amounts of the MIAX PEARL, LLC (relative to its affiliated exchanges, MIAX and MIAX Emerald) is solely attributed to the unique factors of MIAX Pearl discussed above.

Costs Related To Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as

well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (e.g., as set forth below, the Exchange allocated approximately 26.9% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Allocated annual cost ^k	Allocated monthly cost ^l	% of all
Human Resources	\$3,675,098	\$306,258	26.3
Connectivity (external fees, cabling, switches, etc.)	70,163	5,847	60.6
Internet Services and External Market Data	322,388	26,866	73.3
Data Center	739,983	61,665	60.6
Hardware and Software Maintenance and Licenses	959,157	79,930	58.6
Depreciation	1,885,969	157,164	58.2
Allocated Shared Expenses	3,914,751	326,229	49.2
Total	11,567,509	963,959	40.5

^kThe Annual Cost includes figures rounded to the nearest dollar.

^lThe Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because MIAX Pearl Options' cost allocation methodology utilizes the actual projected costs of MIAX Pearl Options (which are specific to MIAX Pearl Options, and are independent of the costs projected and utilized by MIAX Pearl Options' affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. MIAX Pearl Options provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

The Exchange notes that it and its affiliated markets have 184 employees (excluding employees at non-options/equities exchange subsidiaries of Miami

International Holdings, Inc. ("MIH"), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market's individual Human Resources expense. Then, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most

of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange's parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 42.9% of each employee's time from the above group. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (i.e., only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 17%).

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations

Clarifications to Rules 2614(a)(2)(B) and 2617(b)(2); 94851 (May 4, 2022), 87 FR 28077 (May 10, 2022) (SR-PEARL-2022-15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Exchange Rule 532, Order Price Protection Mechanisms and Risk Controls); 95298 (July 15, 2022), 87 FR 43579 (July 21, 2022) (SR-PEARL-2022-29) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the Route to Primary Auction Routing Option Under Exchange Rule

2617(b)(5)(B)); 95679 (September 6, 2022), 87 FR 55866 (September 12, 2022) (SR-PEARL-2022-34) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2614, Orders and Order Instructions, To Adopt the Primary Peg Order Type); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR-PEARL-2022-43) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 2614, Orders and Order Instructions and Rule 2618, Risk Settings and Trading Risk Metrics To

Enhance Existing Risk Controls); 96905 (February 13, 2023), 88 FR 10391 (February 17, 2023) (SR-PEARL-2023-03) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2618 To Add Optional Risk Control Settings); 97236 (March 31, 2023), 88 FR 20597 (April 6, 2023) (SR-PEARL-2023-15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rules 2617 and 2626 Regarding Retail Orders Routed Pursuant to the Route to Primary Auction Routing Option).

were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 42.9% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, re-location, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades, vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breadth of functions those employees perform in support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, Etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology

used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority ("OPRA"). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (e.g., re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity

provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the Internet Services and External Market Data cost driver, even though, but for MIAX Emerald, the allocation percentages are generally consistent across markets (e.g., MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall Internet Services and External Market Data cost driver was allocated to MIAX Emerald and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) MIAX Emerald itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage MIAX Emerald allocated to the Internet Services and External Market Data cost driver is greater than the Exchange and its other affiliated

markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (60.6%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.¹²⁷ The

Exchange notes that this allocation is greater than MIAX and MIAX Emerald options exchanges by a significant amount as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, the Exchange is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees.

Depreciation

All physical assets, software and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 58.2% of

maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is less than that of MIAX by approximately \$35,000 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it having more hardware than software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Pearl Options maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Pearl Options' hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.¹²⁸ These general shared expenses are incurred by the Exchange's parent company, MIH, as

¹²⁷ This expense may be greater than the Exchange's affiliated markets, specifically MIAX and MIAX Emerald, because, unlike the MIAX and MIAX Emerald, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its Members' and Equity Members' access and connectivity needs. This added gateway contributes to the difference in allocations between MIAX Pearl, MIAX and MIAX Emerald. This expense also differs in dollar amount among the MIAX Pearl (options and equities markets), MIAX, and MIAX Emerald because each market may

¹²⁸ The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate its expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, *i.e.*, 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to 10Gb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of

allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

The Exchange notes that the 49.2% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Full Service MEO Ports. This is based on its allocation methodology that weighted costs attributable to each core service. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.*, Data Center, as described above), Full Service MEO Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb Connection per Month

After determining the approximate allocated monthly cost related to 10Gb

connectivity, the total monthly cost for 10Gb ULL connectivity of \$963,959 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (108), to arrive at a cost of approximately \$8,925 per month, per physical 10Gb ULL connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.*, actual number of 10Gb ULL connections.

* * * * *

Costs Related To Offering Full Service MEO Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Full Service MEO Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.*, as set forth below, the Exchange allocated approximately 8.3% of its overall Human Resources cost to offering Full Service MEO Ports).

Cost drivers	Allocated annual cost ^m	Allocated monthly cost ⁿ	% of all
Human Resources	\$1,159,831	\$96,653	8.3
Connectivity (external fees, cabling, switches, etc.)	1,589	132	1.4
Internet Services and External Market Data	6,033	503	1.4
Data Center	41,881	3,490	3.4
Hardware and Software Maintenance and Licenses	22,438	1,870	1.4
Depreciation	127,986	10,666	3.9
Allocated Shared Expenses	284,374	23,698	3.6
Total	1,644,132	137,012	5.8

^m See *supra* note k (describing rounding of Annual Costs).

ⁿ See *supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Full Service MEO Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange

and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

With respect to Full Service MEO Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Full Service MEO Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to

maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Full Service MEO Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Full Service MEO Ports and maintaining performance thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Full Service MEO Ports: Business Systems Development, Trading

Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Full Service MEO Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing Full Service MEO Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Full Service MEO Ports, the Exchange also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Full Service MEO Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (e.g., halted securities).¹²⁹ Thus, since market data from other exchanges is consumed at the Exchange's Full Service MEO Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Full Service MEO Ports.

The Exchange notes that the allocation for the Internet Services and External Market Data cost driver is lower than that of its affiliate, MIAX, as MIAX allocated 7.2% of its Internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Full Service MEO Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Full Service MEO Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is less than its affiliate, MIAX, as MIAX allocated 7.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX

Market Makers utilized 1,770 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Full Service MEO Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Full Service MEO Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.9% of all depreciation costs to providing Full Service MEO Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange to Full Service MEO Ports because such software is related to the provision of Full Service MEO Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Full Service MEO Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and

¹²⁹ The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

For example, the Exchange notes that the percentage it allocated to the depreciation cost driver for Full Service MEO Ports and the percentage its affiliate, MIAX, allocated to the depreciation cost driver for MIAX's Limited Service MEI Ports, differ by only 2.4%. However, MIAX's approximate dollar amount is greater than that of MIAX Pearl Options by approximately \$9,000 per month. This is due to two primary factors. First, MIAX has undergone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it having more hardware than software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Pearl Options maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Pearl Options' hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Full Service MEO Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 4.0% of the overall cost for directors was allocated to providing Full Service MEO Ports. The Exchange notes that the 3.6% allocation of general shared expenses for Full Service MEO Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Full Service MEO Ports have several

areas where certain tangible costs are heavily weighted towards providing such service (e.g., Data Centers, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is less than its affiliate, MIAX, as MIAX allocated 9.8% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For May 2023, MIAX Market Makers utilized 1,770 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,017 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for May 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.

* * * * *

Approximate Cost per Full Service MEO Port per Month

Based on May 2023 data, the total monthly cost allocated to Full Service MEO Ports of \$137,012 was divided by the number of chargeable Full Service MEO Ports the Exchange maintained at the time that proposed pricing was determined (25 total; 25 Full Service MEO Port, Bulk, and 0 Full Service MEO Port, Single), to arrive at a cost of approximately \$5,480 per month, per charged Full Service MEO Port.

* * * * *

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Full Service MEO Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this

proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.9%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 12.3% to Full Service MEO Ports and the remaining 44.8% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 16.9% for 10Gb ULL connectivity or 17.3% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (6.0% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Full Service MEO Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Full Service MEO Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 26.9% of its personnel costs to providing 10Gb ULL and 1Gb ULL connectivity and 8.3% of its personnel costs to providing Full Service MEO Ports, for a total allocation of 35.2% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 64.8% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Full Service MEO Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes

the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 62.1% of the Exchange's overall depreciation and amortization expense to connectivity services (58.2% attributed to 10Gb ULL physical connections and 3.9% to Full Service MEO Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 37.9%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Full Service MEO Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a

reasonable mark-up of such costs. Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (e.g., to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, we believe that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue ¹³⁰

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the

Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal \$11,567,509. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately \$17,496,000. The Exchange believes this represents a modest profit of 34% when compared to the cost of providing 10Gb ULL connectivity services, which could decrease over time.¹³¹ The Exchange's Cost Analysis estimates the annual cost to provide Full Service MEO Port services will equal \$1,644,132. Based on current Full Service MEO Port services usage, the Exchange would generate annual revenue of approximately \$1,644,000. The Exchange believes this would result in a small negative margin after calculating the cost of providing Full Service MEO Port services, which could decrease further over time.¹³²

Based on the above discussion, even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in excessive pricing that deviates from that of other exchanges or a supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Full Service MEO Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Full Service MEO Port services.

The Exchange also notes that this the resultant profit margin differs slightly

¹³¹ Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. See, e.g., <https://www.usinflationcalculator.com/inflation/current-inflation-rates/> (last visited August 4, 2023).

¹³² *Id.*

¹³⁰ For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used revenues for February 2023, the first full month for which it provided dedicated 10Gb ULL connectivity to MIAX Pearl Options and ceased operating a shared 10Gb ULL network with MIAX.

from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (e.g., the number of matching engines per exchange, *i.e.*, the Exchange maintains 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.*, start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection (\$13,500 per month for the Exchange vs. \$15,000 per month for Nasdaq).¹³³ NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees (\$13,500 for the Exchange vs. \$22,000 per month for NYSE American).¹³⁴ Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.*, more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2017.¹³⁵ This is

due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Full Service MEO Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Full Service MEO Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Full Service MEO Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Full Service MEO Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Full Service MEO Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the

information should be used solely to confirm that an Exchange is not earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC ("IEX") and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the

¹³³ See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

¹³⁴ See NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

¹³⁵ The Exchange has incurred a cumulative loss of \$83 million since its inception in 2017 through full year 2022. See Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, available at <https://www.sec.gov/Archives/edgar/vpr/2300/23007743.pdf>.

services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange

Act.¹³⁶ Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (e.g., storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Full Service MEO Ports

The tiered pricing structure for Full Service MEO Ports has been in effect since 2018.¹³⁷ The Exchange now proposes a pricing structure that is used by the Exchange's affiliates, MIAX and MIAX Emerald, except with lower pricing for each tier for Full Service MEO Ports (Bulk) and a flat fee for Full Service MEO Ports (Single). Members that are frequently in the highest tier for Full Service MEO Ports consume the most bandwidth and resources of the network. Specifically, as noted above for 10Gb ULL connectivity, Market Makers who reach the highest tier for Full Service MEO Ports (Bulk) account for greater than 84% of ADV on the Exchange, while Market Makers that are typically in the lowest Tier for Full Service MEO Ports, account for less than 14% of ADV on the Exchange. The remaining 1% is accounted for by Market Makers who are frequently in the middle Tier for Full Service MEO Ports (Bulk).

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers during anticipated peak market conditions. The need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the

Exchange Act.¹³⁸ Thus, as the number of connections a Market Maker has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

The Exchange further believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because, for the flat fee, the Exchange provides each Member two (2) Full Service MEO Ports for each matching engine to which that Member is connected. Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,¹³⁹ the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports per matching engine to which it connects. The Exchange currently has twelve (12) matching engines, which means Members may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on certain volume percentages. The Exchange currently assesses Members a fee of \$5,000 per month in the highest Full Service MEO Port—Bulk Tier, regardless of the number of Full Service MEO Ports allocated to the Member. Assuming a Member connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports per matching engine, this results in a cost of \$208.33 per Full Service MEO Port—Bulk (\$5,000 divided by 24) for the month. This fee has been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.¹⁴⁰ Members will continue to receive two (2) Full Service MEO Ports to each matching engine to which they are connected for the single flat monthly fee. Assuming a Member connects to all twelve (12) matching engines during the month, and achieves the highest Tier for that month, with two Full Service MEO Ports (Bulk) per matching engine, this would result in a cost of \$500 per Full Service MEO Port (\$12,000 divided by 24).

¹³⁶ 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

¹³⁹ See *supra* notes 101 to 109 and accompanying text.

¹⁴⁰ See Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR-PEARL-2018-07).

¹³⁶ 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

¹³⁷ See Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR-PEARL-2018-07).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Full Service MEO Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2017¹⁴¹ due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Full Service MEO Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Options Market Maker terminated their membership on January 1, 2023 as a direct result of the proposed fee changes.¹⁴² The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the

connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted and would not impose any burden on competition. This is a technology driven change designed to meet customer needs. The proposed fees would assist the Exchange in recovering costs related to providing dedicated 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX enables the Exchange to better compete with other

¹⁴² The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. See Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR-IEX-2022-02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. See, e.g., *supra* note 90. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

¹⁴¹ See *supra* note 135.

exchanges by ensuring it can continue to provide adequate connectivity to existing and new Members, which may increase in ability to compete for order flow and deepen its liquidity pool, improving the overall quality of its market. The proposed rates for 10Gb ULL connectivity are structured to enable the Exchange to bifurcate its 10Gb ULL network shared with MIAx so that it can continue to meet current and anticipated connectivity demands of all market participants.

Similarly, and also in connection with a technology change, Cboe Exchange, Inc. (“Cboe”) amended its access and connectivity fees, including port fees.¹⁴³ Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.*, orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports, tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.¹⁴⁴ Cboe justified its proposal by stating that, “. . . the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over-the-Counter (OTC) markets.”¹⁴⁵ The Exchange concurs with the following statement by Cboe,

The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the

exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no “*de facto*” or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.¹⁴⁶

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”),¹⁴⁷ wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.¹⁴⁸ Further, the Commission explicitly stated that “[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.”¹⁴⁹ Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.¹⁵⁰

Cboe also filed to establish a monthly fee for Certification Logical Ports of \$250 per Certification Logical Port.¹⁵¹

Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production environment, including live production trading on the Exchange.¹⁵²

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.¹⁵³ Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAx.¹⁵⁴ Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange’s certification environment.¹⁵⁵ Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,¹⁵⁶ BZX,¹⁵⁷ and Cboe EDGA Exchange, Inc.¹⁵⁸

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int’l Grp., LLC v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets’ filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange’s ability to make necessary technology driven

systems and applications (*i.e.*, “Certification Logical Ports”).

¹⁵² See Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR-Cboe-2022-011).

¹⁵³ *Id.* at 18426.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR-CboeBYX-2022-004).

¹⁵⁷ See Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR-CboeBZX-2022-021).

¹⁵⁸ See Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR-CboeEDGA-2022-004).

¹⁴³ See Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR-CBOE-2020-105). The Exchange notes that Cboe submitted this filing *after* the Staff Guidance and contained no cost based justification.

¹⁴⁴ *Id.* at 71676.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 71676.

¹⁴⁷ See Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7-13-19).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR-Cboe-2022-011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, DROP Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange’s certification environment to test proprietary

changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, and one comment letter on the Fourth Proposal, all from the same commenter.¹⁵⁹ In their letters, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has

attempted to raise new issues in its letters, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,¹⁶⁰ and Rule 19b-4(f)(2)¹⁶¹ thereunder. 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-PEARL-2023-35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-PEARL-2023-35. This file number should be included on the subject line if email is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PEARL-2023-35 and should be submitted on or before September 15, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-18302 Filed 8-24-23; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 18086 and # 18087; NEW JERSEY Disaster Number NJ-00075]

Administrative Disaster Declaration of a Rural Area for the State of New Jersey

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative disaster declaration of a rural area for the State of New Jersey dated 08/18/2023.

Incident: Severe Storm and Flooding.
Incident Period: 07/14/2023 through 07/15/2023.

DATES: Issued on 08/18/2023.

Physical Loan Application Deadline Date: 10/17/2023.

¹⁵⁹ See letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP ("SIG"), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, and letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023 and July 24, 2023.

¹⁶⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁶¹ 17 CFR 240.19b-4(f)(2).

¹⁶² 17 CFR 200.30-3(a)(12).

*Economic Injury (EIDL) Loan
Application Deadline Date: 05/20/2024.*

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration of a rural area, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Warren.

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Homeowners with Credit Available Elsewhere	5.000
Homeowners without Credit Available Elsewhere	2.500
Business with Credit Available Elsewhere	8.000
Business without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere ...	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
<i>For Economic Injury:</i>	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 18086 6 and for economic injury is 18087 0.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,
Administrator.

[FR Doc. 2023-18315 Filed 8-24-23; 8:45 am]

BILLING CODE 8026-09-P

SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #18088 and #18089;
Tennessee Disaster Number TN-00148]**

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Tennessee

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Tennessee (FEMA-4729-DR), dated 08/17/2023.

Incident: Severe Storms and Straight-Line Winds.

Incident Period: 06/25/2023 through 06/26/2023.

DATES: Issued on 08/17/2023.

Physical Loan Application Deadline Date: 10/16/2023.

*Economic Injury (EIDL) Loan
Application Deadline Date:* 05/17/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/17/2023, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Fayette, Shelby, Tipton.

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Non-Profit Organizations with Credit Available Elsewhere ...	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
<i>For Economic Injury:</i>	
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 18088 B and for economic injury is 18089 0.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,
Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023-18316 Filed 8-24-23; 8:45 am]

BILLING CODE 8026-09-P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA-2022-0066]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Bureau of the Fiscal Service, Department of the Treasury (Fiscal Service). Under this matching program, Fiscal Service will disclose ownership of Savings Securities data to SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of his or her financial status to determine eligibility for low-income subsidy assistance (Extra Help) in the Medicare Part D prescription drug benefit program established under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).

DATES: The deadline to submit comments on the proposed matching program is September 25, 2023.

The matching program will be applicable on October 2, 2023, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA-2022-0066 so that we may associate your comments with the correct docket.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal

eRulemaking portal at <https://www.regulations.gov>. Use the *Search* function to find docket number SSA–2022–0066 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax*: Fax comments to 1(833) 410–1613.

3. *Mail*: Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing Matthew.Ramsey@ssa.gov. Comments are also available for public viewing on the Federal eRulemaking portal at <https://www.regulations.gov> or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT:

Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to Cynthia.Scott@ssa.gov.

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies: SSA and Fiscal Service.

Authority for conducting the matching program: The legal authority for this matching agreement between SSA and Fiscal Service is Section 1860D–14 of the Social Security Act (Act) (42 U.S.C. 1395w–114), which requires SSA to verify the eligibility of individuals who seek to be considered as Extra Help eligible individuals under the Medicare Part D prescription drug benefit program and who self-certify their income, resources, and family size.

Fiscal Service and SSA execute this agreement in compliance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988, and the regulations and guidance promulgated thereunder.

Purpose(s): This agreement sets forth the terms, conditions, and safeguards under which Fiscal Service will disclose ownership of Savings Securities data to

SSA. This disclosure will provide SSA with information necessary to verify an individual's self-certification of his or her financial status to determine eligibility for low-income subsidy assistance (Extra Help) in the Medicare Part D prescription drug benefit program established under the MMA.¹

Categories of Individuals: The individuals whose information is involved in this matching program are those individuals who apply for low-income subsidy assistance in the Medicare Part D prescription drug benefit program established under the MMA.

Categories of records: SSA will disclose to Fiscal Service a finder file with the Social Security number (SSN) for each individual for whom SSA requests Savings Securities ownership information. When a match occurs on an SSN, Fiscal Service will disclose the following to SSA: the denomination of the security; the serial number; the series; the issue date of the security; the current redemption value; and the return date of the finder file.

SSA will disclose to Fiscal Service a finder file with the SSN for each individual for whom it requests Savings Securities registration information. Fiscal Service bases the query on the SSN associated with the account and reports any subsequent account holdings. When a match occurs on an SSN, Fiscal Service will disclose the following to SSA: the purchase amount; the account number and confirmation number; the series; the issue date of the security; the current redemption value; and the return date of the finder file.

System(s) of Records: SSA will disclose to Fiscal Service a finder file consisting of SSNs extracted from SSA's Medicare Database (MDB) File System, 60–0321, fully published at 71 FR 42159 (July 25, 2006), as amended at 72 FR 69723 (December 10, 2007) and 83 FR 54969 (November 1, 2018). The MDB File System is a repository of Medicare applicant and beneficiary information related to Medicare Part A, Part B, Medicare Advantage Part C, and Medicare Part D.

Fiscal Service will match the SSNs from SSA's finder file with the SSNs in Fiscal Service system of records notice .014 (United States Securities and Access), fully published at 85 FR 11776 (February 27, 2020). System of records notice .014 (United States Securities and Access) is derived from legacy BPD systems of records notices .002 (United States Savings-Type Securities), .003 (United States Securities (Other than Savings-Type Securities)), and .008

(Retail Treasury Securities Access Application).

[FR Doc. 2023–18318 Filed 8–24–23; 8:45 am]

BILLING CODE P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36707]

Washington, Idaho & Montana Railway LLC—Operation Exemption—BLPI RR LLC

Washington, Idaho & Montana Railway LLC (WIM), a noncarrier, has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to operate approximately 43.744 miles of rail line owned by the BLPI RR LLC (BLPI RR)¹ in the County of Latah, Idaho, from milepost 3.32 (Washington/Idaho state line) to milepost 47.06 at Bovill, Idaho (the Line).

According to the verified notice, WIM has entered into an operating agreement with BLPI RR. WIM further states that it will interchange with the Spokane, Spangle & Palouse Railway (SS&P) at SS&P's connection with the Line at the Washington/Idaho state line or at another location near Palouse, Wash., as WIM and SS&P may agree.

This transaction is related to a concurrently filed verified notice of exemption in *Howell—Continuance of Control Exemption—Washington, Idaho & Montana Railway*, Docket No. FD 36708, in which the John Howell seeks to continue in control of WIM upon WIM's becoming a Class III rail carrier.

WIM certifies that its annual projected revenues as a result of the transaction will not exceed those that would qualify it as a Class III carrier and will not exceed \$5 million. WIM also states that the operation agreement does not involve a provision or agreement that would limit future interchange with a third-party connecting carrier.

The effective date of this exemption is September 8, 2023 (30 days after the verified notice was filed).² WIM indicates in the verified notice that it and BLPI RR seek to commence service on the Line as soon as possible. The parties are reminded that WIM may not consummate the transaction described in this notice until after the effective date of the related continuance in

¹ See *BLPI RR L.L.C.—Acquis. & Operation Exemption—Palouse River & Coulee City R.R.*, FD 36706 (STB served July 7, 2023).

² WIM initially submitted its verified notice on August 4, 2023, but supplemented it by letter on August 9, 2023. The date of WIM's supplement will be considered the filing date for purposes of calculating the effective date of this exemption.

¹ Public Law 108–173.

control exemption in Docket No. FD 36708.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 1, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36707, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on WIM's representative, John K. Fiorilla, Dyer & Peterson, PC, 605 Main Street, Suite 104, Riverton, NJ 08077-1440.

According to WIM, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: August 21, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Kenyatta Clay,
Clearance Clerk.

[FR Doc. 2023-18270 Filed 8-24-23; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA-2022-1711]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) Monitoring, Reporting, and Verification (MRV) Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a renewed information collection. The **Federal Register** Notice with a 60-day comment period soliciting

comments on the following collection of information was published on January 25, 2023. FAA received two comments to this notice. The collection involves a request that airplane operators subject to the applicability of Annex 16, Volume IV of the Convention on Civil Aviation (hereinafter the "Chicago Convention") submit electronically an Emissions Monitoring Plan (EMP), an annual Emissions Report (ER), and an optional annual ER CORSIA Eligible Fuels Annex (CEFA) to the FAA. The information to be collected is necessary because FAA will use the information to fulfill the United States' responsibilities under the Chicago Convention.

DATES: Written comments should be submitted by September 25, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Kevin Partowazam by email at: Kevin.Partowazam@faa.gov; phone: 202-267-3563.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120-0790.

Title: CORSIA Monitoring, Reporting, and Verification (MRV) Program.

Form Numbers: 1. Emissions Monitoring Plan (EMP) Template; 2. Emissions Report (ER) Template; 3. ER CORSIA Eligible Fuels Annex (CEFA).

Type of Review: Clearance of a renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January 25, 2023 (88 FR 4878). FAA received two comments in response to this notice.

The CORSIA MRV Program is a voluntary program for certain U.S. air carriers and commercial operators (collectively referred hereinafter as "operators") to submit certain airplane CO₂ emissions data to the FAA to enable

the United States to establish uniformity with ICAO Standards And Recommended Practices (SARPs) for CORSIA, which were adopted in June 2018, as Annex 16, Volume IV to the Chicago Convention. The United States supported the decision to adopt the CORSIA SARPs based on the understanding that CORSIA is the exclusive market-based measure applying to international aviation, and that CORSIA will ensure fair and reciprocal commercial competition by avoiding a patchwork of country- or regionally-based regulatory measures that are inconsistently applied, bureaucratically costly, and economically damaging. Furthermore, continued U.S. support for CORSIA assumes a high level of participation by other countries, particularly by countries with significant aviation activity, as well as a final CORSIA package that is acceptable to, and implementable by, the United States.

Under CORSIA, all ICAO Member States whose airplane operators undertake international flights were required to develop an MRV system for CO₂ emissions from those international flights starting January 1, 2019. The FAA's CORSIA MRV Program is intended to be the United States' MRV system for monitoring, reporting, and verification of U.S. airplane operator CO₂ emissions from international flights. Operators that are subject to the applicability of CORSIA will submit their EMPs, ERs, and optional ER CFAs electronically.¹

Each document use Microsoft Excel-based templates and can be transmitted via email. EMPs that are submitted by operators will be used as a collaborative tool between the operator and FAA to document a given operator's chosen fuel use monitoring procedures. FAA will retain a copy of the EMP and will share with ICAO a list of operators that submit EMPs. FAA will not submit any specific EMPs from U.S. operators to ICAO. Large operators, *i.e.*, those emitting 500,000 metric tons or more of CO₂ per

¹ CORSIA applies to airplane operators that produce annual CO₂ emissions greater than 10,000 tonnes (*i.e.*, 10,000 metric tons) from international flights, excluding emissions from excluded flights. The following activities are excluded CORSIA:

- Domestic flights;
- Humanitarian, medical, and firefighting operations, including flight(s) preceding or following a humanitarian, medical, or firefighting flight provided such flight(s) were conducted with the same airplane, were required to accomplish the related humanitarian, medical, or firefighting activities or to reposition thereafter the airplane for its next activity;
- Operations using an airplane with a maximum certificated take-off mass equal to or less than 5,700 kg;
- Operations on behalf of the military.

year, will gather data through a “fuel use monitoring method.” Small operators, *i.e.*, those emitting less than 500,000 metric tons of CO₂ per year, can use a simplified monitoring method. Annual ERs that are submitted to FAA by operators and verifiers will be used to document each operators’ international emissions. FAA will use the ERs, and optional ER CEFA, to calculate aggregated emissions data for all U.S. operators. FAA will submit the aggregated emissions data to ICAO to demonstrate U.S. implementation of CORSIA.

Respondents: Respondents will be airplane operators subject to the applicability of Annex 16, Volume IV of the Chicago Convention. FAA expects between 42 and 50 operators to submit an EMP and ER. Some additional operators could submit an EMP and ER over time based on their international aviation activities.

Frequency: An EMP is a one-time submission. An ER and optional ER CEFA is an annual submission.

Estimated Average Burden per Response:

- For an EMP (one-time submission), FAA expects that filling and submitting an EMP could on average take approximately 28.6 hours.
- For an ER (annual submission), FAA expects that the reporting burden could be approximately 68 hours per operator using a Fuel Use Monitoring Method, inclusive of approximately 8 hours per operator that chooses to voluntarily submit an optional ER CEFA. FAA expects the reporting burden could be approximately 21.5 hours per operator for operators using a simplified Monitoring Method, inclusive of approximately 4 hours per operator that chooses to voluntarily submit an optional ER CEFA.

Estimated Total Annual Burden: Based on the above, FAA expects that the annual submission of an EMP and ER, including optional ER CEFA, could take approximately 37.5 to 115.5 hours for each of the 42–50 operators.

Issued in Washington, DC, on August 21, 2023.

Julie Marks,

Executive Director (Acting), Office of Environment and Energy.

[FR Doc. 2023–18319 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0185]

Commercial Driver’s License: State of Hawaii; Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from the state of Hawaii to exempt specified portions of the CDL skills test for drivers on the islands of Lanai and Molokai due to the lack of highway infrastructure to allow completion of the full skills test. Regulations require a CDL applicant to possess and demonstrate specific on-road safe driving skills, including the ability to choose a safe gap for changing lanes, passing other vehicles, and crossing or entering traffic and the ability to signal appropriately when changing direction in traffic. The state of Hawaii proposes to issue a restricted CDL to drivers who pass a limited CDL skills test in which the driver would not be required to demonstrate the ability to perform those on-road skills. FMCSA requests public comment on the applicant’s request for exemption.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA–2023–0185 by any of the following methods:

- **Federal eRulemaking Portal:** www.regulations.gov. See the Public Participation and Request for Comments section below for further information.
- **Mail:** Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001.
- **Hand Delivery or Courier:** West Building, Ground Floor, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- **Fax:** (202) 493–2251.

Each submission must include the Agency name and the docket number (FMCSA–2023–0185) for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or

comments, go to www.regulations.gov at any time or visit the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

Privacy Act: In accordance with 49 U.S.C. 31315(b), DOT solicits comments from the public to better inform its exemption 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 <https://www.transportation.gov/privacy>, the comments are searchable by the name of the submitter.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards, FMCSA, at (202) 366–2722 or richard.clemente@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0185), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to www.regulations.gov and put the docket number “FMCSA–2023–0185” in the keyword box, and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, click the “Comment” button, and type your comment into the text box on 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.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The Agency must publish its decision in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption and the regulatory provision from which the exemption is granted. The notice must specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Applicant's Request

The state of Hawaii seeks an exemption from the requirements in 49 CFR 383.113(c) that an applicant for a commercial driver's license (CDL) must demonstrate safe on-road driving skills, including the ability to choose a safe gap for changing lanes, passing other vehicles, crossing or entering traffic, and the ability to signal appropriately when changing direction in traffic (49 CFR 383.113(c)(2) and (4)). The state of Hawaii maintains that the islands of Lanai and Molokai do not have at least two miles of a straight section of urban business street and at least two miles of an expressway or highway section with multiple lanes going in each direction to allow the ability to legally change lanes. The state of Hawaii proposes to establish a new CDL restriction "R", limiting the CDL's validity to the islands of Lanai and Molokai only. These restricted CDLs would also have the "K"

(intrastate) restriction and would be applied to drivers who take an abbreviated CDL skills test.

A copy of the State of Hawaii's application for exemption, along with supplemental information provided by HDOT, is available for review in the docket for this notice.

IV. Request for Comments

In accordance with 49 U.S.C. 31315(b), FMCSA requests public comment from all interested persons on the state of Hawaii's application for an exemption from the CDL regulations in 49 CFR 383.113(c). All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023-18361 Filed 8-24-23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2023-0002-N-14]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) summarized below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

DATES: Interested persons are invited to submit comments on or before October 24, 2023.

ADDRESSES: Written comments and recommendations for the proposed ICR should be submitted on [regulations.gov](https://www.regulations.gov) to the docket, Docket No. FRA-2023-2002. All comments received will be posted without change to the docket, including any personal information provided. Please refer to the assigned OMB control number (2130-0602) in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice, made available to the public, and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Ms. Arlette Mussington, Information Collection Clearance Officer, at email: arlette.mussington@dot.gov or telephone: (571) 609-1285 or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: joanne.swafford@dot.gov or telephone: (757) 897-9908.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501-3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, comments received will advance three objectives: (1) reduce reporting burdens; (2) organize information collection requirements in a "user-friendly" format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce

information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Critical Incident Stress Plans.

OMB Control Number: 2130–0602.

Abstract: Under 49 CFR part 272, Class I, intercity passenger, and commuter railroads are required to develop, and submit to FRA for approval, a critical incident stress plan (CISP) that provides for appropriate support services to be offered to their employees who are affected by a critical incident as defined in 49 CFR 272.9. FRA uses the information collected to

ensure the minimum standards of part 272 are met.

In this 60-day notice, FRA adjusted the respondent universe from 41 railroads to 40 railroads to reflect the current number of Class I, intercity passenger, and commuter railroads required to comply with part 272 requirements. FRA adjusted the total estimated annual burden in the PRA table from 467 hours to 246 hours. Specifically, under § 272.103(e), FRA adjusted the burden from 24 hours to 12 hours because FRA anticipates that the annual submissions of modified and existing CISP plans will decrease from 4 plans to 2 plans. Additionally, under

§ 272.103(f), FRA adjusted the burden from 416 hours to 208 hours because FRA anticipates that railroads will increasingly provide their employees with electronic copies of the CISP's rather than hard copies.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses/Rail Labor Unions.

Form(s): N/A.

Respondent Universe: 40 railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C = A * B)	Total cost equivalent in U.S. dollar (D = C * wage rates) ¹
272.103(a)—Railroad submission of critical incident stress plan (CISP) to FRA for approval.	1 new railroad	1 plan	12 hours	12.00	\$1,031.16
—(b) Railroad CISP copy to 5 labor organizations	1 new railroad	5 plan copies	5 minutes	0.42	\$36.09
—(c)(1) Rail labor organization comment to FRA on CISP submission.	5 employee labor organizations.	5 comments	2 hours	10.00	859.30
—(c)(2) Rail labor affirmative statement to FRA that comment copy has been served on railroad.	5 employee labor organizations.	5 certifications	5 minutes	0.42	36.09
—(e) Railroad submission of updated/modified existing CISP to FRA for approval.	40 railroads	2 updated/modified plans.	6 hours	12.00	1,031.16
—(f) Copy to RR employees of updated/modified CISP.	40 railroads	2,500 copies	5 minutes	208.33	17,901.80
—(g) Railroads make copies of CISP available to FRA inspector upon request.	40 railroads	25 plan copies	5 minutes	2.08	178.73
272.105—Requirement to file CISP electronically	40 railroads	3 CISP electronic submissions.	8 minutes	0.40	34.37
Total ²	40 railroads; 5 employee labor organizations.	2,546 responses	N/A	246	21,109

Total Estimated Annual Responses: 2,546.

Total Estimated Annual Burden: 246.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: \$21,109.

FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Christopher S. Van Nostrand,

Acting Deputy Chief Counsel.

[FR Doc. 2023–18330 Filed 8–24–23; 8:45 am]

BILLING CODE 4910–06–P

¹ The dollar equivalent cost is derived from the 2022 Surface Transportation Board Full Year Wage A&B data series using employee group 200 (Professional & Administrative) hourly wage rate of \$49.10. The total burden wage rate (straight time plus 75%) used in the table is \$85.93 (\$49.10 × 1.75 = \$85.93).

² Totals may not add due to rounding.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0044; Notice 1]

Ricon Corporation and Navistar, Inc., Receipt of Petitions for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petitions.

SUMMARY: Ricon Corporation (Ricon) has determined that certain Ricon S-Series and K-Series platform lifts do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 403, *Platform Lift Systems for Motor Vehicles*. Based on Ricon's determination, Navistar, Inc., on behalf of IC Bus, LLC (Navistar), who installed the S-Series and K-Series platform lifts in their school and commercial buses, determined that model year (MY) 2013–

2022 IC buses do not comply with FMVSS No. 404, *Platform Lift Installation in Motor Vehicles*. Ricon and Navistar, collectively referred to as the “the petitioners,” filed the appropriate noncompliance reports and subsequently petitioned NHTSA for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces the receipt of the petitioner's petitions.

DATES: Send comments on or before September 25, 2023.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on the petitions. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

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

- **Hand Delivery:** Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.

- **Electronically:** Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

- Comments may also be faxed to (202) 493-2251.

Comments must be written in the English language and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to <https://www.regulations.gov/>, including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petitions are granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at <https://www.regulations.gov/> by following the online instructions for accessing the docket. The docket ID number for these petitions is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477-78).

FOR FURTHER INFORMATION CONTACT: Ahmad Barnes, Safety Compliance Engineer, NHTSA, Office of Vehicle Safety Compliance, (202) 366-7236.

SUPPLEMENTARY INFORMATION:

I. Overview

Ricon has determined that certain Ricon S-Series and K-Series platform lifts do not fully comply with the requirements of paragraphs S6.7.4, S6.7.8.2, S6.13.4.1, and S6.4.4.2 of FMVSS No. 403, *Platform Lift Systems for Motor Vehicles* (49 CFR 571.403). Ricon filed a noncompliance report dated April 30, 2021, and amended it on May 21, 2021, and July 16, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Ricon petitioned NHTSA on May 21, 2021, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that these noncompliances are inconsequential as they relate to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

Based on Ricon's determination, Navistar, who installed the S-Series and K-Series Classic wheelchair lifts in their school and commercial buses, determined that certain model year (MY) 2013–2022 IC buses do not comply with paragraph S4.1.4 of FMVSS No. 404, *Platform Lift Installation in Motor Vehicles* (49 CFR 571.404). Navistar filed two noncompliance reports, both dated June 16, 2021, and amended the reports on July 15, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Navistar subsequently petitioned NHTSA on July 12, 2021,¹ for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

This notice of receipt of Ricon and Navistar's petitions is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petitions.

II. Equipment and Vehicles Involved

Ricon submitted that approximately 35,652 Ricon S-Series and K-Series Platform Lifts, manufactured between October 2, 2012, and April 23, 2021, are potentially involved.

Navistar submitted that the noncompliant lifts were installed in approximately 2,908 school buses and

29 commercial buses. The following school buses are potentially involved:

- MY 2013–2019 IC CE
- MY 2022 IC CE
- MY 2013–2015 IC AE
- MY 2013–2015 IC BE
- MY 2013–2014 IC RE
- MY 2016–2017 IC RE
- MY 2019 IC RE

III. Noncompliances

Ricon explains that the noncompliances are that the subject wheelchair lifts demonstrate the following:

- The command system for the S&K Lifts allows simultaneous performance of more than one function and therefore does not fully meet the requirements in paragraph S6.7.4 of FMVSS No. 403. Specifically, when commanded to move up from ground to vehicle floor level by pressing the “UP” button, the simultaneous actuation of the “DOWN” and “UP” buttons will cause the lift platform to stop its upward motion and begin a normal downward motion. Additionally, while the unoccupied lift platform is commanded to stow from a vehicle floor level by pressing the “STOW” button, the simultaneous actuation of the “DEPLOY” and “STOW” buttons will cause the lift platform to revert to a normal deploy motion.

- The text on the Operating Instructions label that is affixed to the lifts near the controls, as required in paragraph S6.7.8, measures 0.08 inches instead of 0.1 inches, and, therefore, does not comply with the character height requirements stipulated in paragraph S6.7.8.2.

- Ricon's installation instructions for public use lifts do not include verbatim the statement required: “Public use vehicle manufacturers are responsible for complying with the lift lighting requirements in Federal Motor Vehicle Safety Standard No. 404, Platform Lift Installations in Motor Vehicles (49 CFR 571.404)”, and, therefore, do not comply with paragraph S6.13.4.1.

- When the platform is at the ground level loading position, the outer barrier slope for the portion of rise between 13 mm (0.5 in) and 75 mm (3 in) exceeds the 1:8 ratio (7.13°) specified in FMVSS No. 403 paragraph S6.4.4.2. The slope measured on the test lift is 1:6.5 (8.7°) when loaded, which exceeds the required slope by 1.57 degrees, and, therefore, does not comply with paragraph S6.4.4.2.

Navistar explains that due to the noncompliance with FMVSS No. 403 affecting the subject lifts, the subject buses are noncompliant with paragraph S4.1.4 of FMVSS No. 404.

¹ Navistar's petition is dated July 12, 2019, but was submitted on July 12, 2021.

IV. Rule Requirements

Paragraph S4.1.4 of FMVSS No. 404 and paragraphs S6.7.4, S6.7.8.2, S6.13.4.1, and S6.4.4.2 of FMVSS No. 403 include the requirements relevant to these petitions. S4.1.4 of FMVSS No. 404 requires that the platform lift, as installed, must continue to comply with all of the applicable requirements of FMVSS No. 403.

The relevant paragraphs of FMVSS No. 403 are described as follows:

- S6.7.4 requires that, except for the POWER function described in S6.7.2.1, the control system specified in S6.7.2, must prevent the simultaneous performance of more than one function. If an initial function is actuated, then one or more other functions are actuated while the initial function remains actuated, the platform must either continue in the direction dictated by the initial function or stop. Verification of this requirement is made throughout the lift operations specified in S7.9.3 through S7.9.8.

- S6.7.8.2 requires that simple instructions regarding the platform lift operating procedures, including backup operations as specified by S6.9, must have characters with a minimum height of 2.5 mm (0.1 in) and be written in English.”

- S6.13.4.1 requires that, in addition to meeting the requirements of S6.13.1 through S6.13.3, the installation instructions for public use lifts must include, on the front cover of the instructions, the statement “DOT-Public Use Lift.”

- S6.4.4.2 requires that when the platform lift is at the ground or vehicle level loading position, the slope of any surface over which a passenger may traverse to enter or exit the platform must have a rise to run not greater than 1:2 on the portion of the rise between 6.5 mm (0.25 in) and 13 mm (0.5 in), and 1:8 on the portion of the rise between 13 mm (0.5 in) and 75 mm (3 in). The rise of any sloped surface may not be greater than 75 mm (3 inches). When the lift is at the ground level loading position, measurements are made perpendicular to the ground. When the lift is at the vehicle level loading position, measurements are made perpendicular to the platform threshold area.”

V. Summary of the Petitioners’ Petitions

The following views and arguments presented in this section, “V. Summary of the Petitioners’ Petitions,” are the views and arguments provided by the petitioners. They have not been evaluated by the Agency and do not reflect the views of the Agency. The

petitioners describe the subject noncompliance and contend that the noncompliance is inconsequential as it relates to motor vehicle safety.

Ricon says that it has produced the subject lifts for over a decade and “has never received a claim or any information that suggests an incident or injury” as a result of the subject noncompliances. Although Ricon has found no indication of the subject noncompliances being consequential to motor vehicle safety, Ricon is working to ensure that future production is fully compliant with FMVSS No. 403.

Specifically, Ricon contends that “due to the geometry” of the pendant and buttons it is highly unlikely to simultaneously press the UP and DOWN buttons or the STOW and DEPLOY buttons. Ricon describes the spacing between the pendant and buttons, its composition, and measurements and explains that due to these characteristics, it would be difficult and unlikely for the user to activate multiple buttons simultaneously. Further, Ricon says that “the pendants use four individual push style buttons that utilize a momentary switch to cause the lift to move up/down or stow/deploy” and “a separate button must be pressed downwards for each function.” Overall, Ricon argues the function will not be activated merely by making contact with the button surface; force must be deliberately applied to the button to engage it.

In the event that the up/down or stow/deploy buttons were to be activated simultaneously, Ricon explains that “because of the momentary switch design, the lift can only be activated for as long as the operator holds down the button,” therefore, “[a]s soon as the two buttons are released, the lift immediately stops movement.” Additionally, according to Ricon, if the operator were to continue to simultaneously press the UP and DOWN “the lift would change direction from the upwards movement and instead begin a normal downwards motion” at a speed that falls within the maximum platform velocity, as required by paragraph S.6.2.1 of FMVSS No. 403. Further, Ricon states all occupants “must be secured in the platform by a safety belt which is a redundant safety feature.”

Ricon also goes on to explain that the “STOW” and “DEPLOY” functions can only be activated simultaneously “when the lift is located at vehicle floor left is being commanded to stow.” Ricon states that this does not impact safety “because the lift must be unoccupied” to stow.

Ricon then contends there is a minimal difference in the ratio of the slope in the subject lifts and the ratio required by FMVSS No. 403. Ricon states that the concern this requirement addresses “is not present” in the subject lifts because the outer barrier “to reach the platform is only 4.45 inches long.” Therefore, according to Ricon, the user would not notice the increase in slope. Ricon notes that it “is not aware of any complaints or reports from the field where a user has expressed difficulty or inability to access the platform portion of the lift when using a mobility aid (motorized or manually operated) or when unassisted” and suggests that the lack of reports supports their assertions that the noncompliant slope does not cause the user any difficulty when using the lift.

Ricon also found that the height of certain lowercase letters found on the Operating Instructions label affixed to the lift are 0.08 inches (2.0mm) when they are required to be at least 0.1 inches (2.5mm). Additionally, the installation instructions do not include the exact phrase required by S6.13.4.1 of FMVSS No 403, but rather a paraphrased statement that Ricon believes “conceptually delivers the same message to manufacturers of public use vehicles,” that it is the manufacturer’s responsibility to ensure “the lift lighting meets the requirements of the associated safety standard.” Ricon contends that the paraphrased statement would not cause any confusion because the vehicle manufacturer is required by paragraph S4.1.5 of FMVSS No. 404 to certify compliance with the lift lighting requirements described by the required statement found in S6.13.4.1 of FMVSS No. 403.

According to Ricon, NHTSA has previously granted petitions regarding noncompliances that are similar to the subject noncompliance. Ricon cites one petition from The Braun Corporation “where the lift handrails did not meet the values for deflection force.”² Ricon explains that although “the handrails collapsed when exposed to forces above the threshold requirement, the handrails did not collapse or fail catastrophically,” and summarizes that NHTSA’s concern in “instituting the deflection force requirement was the possibility of a catastrophic failure of the handrails which would expose the occupant to a risk of injury.” Therefore, Ricon says, NHTSA “recognized” that the noncompliance in that case was not

² See *The Braun Corporation, Grant of Petition for Decision of Inconsequential Noncompliance*, 72 FR 19754 (April 19, 2007).

a safety concern that was intended to be addressed by handrail requirements.

Ricon says that, like the noncompliance found in the Braun Corporation's petition, "there is little to no risk of harm or injury" caused by the subject noncompliances. Ricon then reiterates that it is unlikely an operator would simultaneously activate the buttons that control the lift functions and if simultaneous activation of the "STOW"/"DEPLOY" buttons or the "UP"/"DOWN," did occur, the lift does not respond in a way that would compromise the safety of the occupant. Likewise, Ricon claims, the noncompliant slope of the outer barrier "is not sufficiently different" from the required slope ratio that it would cause "a noticeable change to the user."

Last, Ricon states that "[i]t is not aware of any claims or injury involving the performance of the control pendant, outer barrier slope, or operator manual or label wording."

In its petition, Navistar explains that due to the FMVSS No. 403 noncompliances found in the subject lifts, the subject school and commercial buses manufactured by Navistar are noncompliant with paragraph S4.1.4 of FMVSS No. 404. Navistar says that the subject buses meet all other requirements found in FMVSS No. 404.

Navistar states that it "incorporates and adopts the information from Ricon's Petition" and also says it has not received any complaints or other notices nor is it aware of any accidents, injuries, or warranty claims related to the noncompliances occurring in the subject lifts.

Ricon and Navistar conclude their petitions by stating that the subject noncompliances are inconsequential as they relate to motor vehicle safety and that their petitions to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on these petitions only applies to the subject equipment and vehicles that the petitioners no longer controlled at the time they determined that the noncompliance existed. However, any decision on these petitions does not

relieve equipment and vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant equipment and vehicles under their control after Ricon and Navistar notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2023-18332 Filed 8-24-23; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Art Advisory Panel—Notice of Availability of Report of 2022 Closed Meetings

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice.

SUMMARY: A report summarizing the closed meeting activities of the Art Advisory Panel during Fiscal Year 2022 has been prepared. A copy of this report has been filed with the Assistant Secretary for Management of the Department of the Treasury.

DATES:

Applicable Date: This notice is applicable August 21, 2023.

ADDRESSES: The report is available at <https://www.irs.gov/compliance/appeals/art-appraisal-services>.

FOR FURTHER INFORMATION CONTACT:

Robin B. Lawhorn, AP:SPR:AAS, Internal Revenue Service/Independent Office of Appeals, 400 West Bay Street, Suite 252, Jacksonville, FL 32202, Telephone number (904) 661-3198 (not a toll free number).

SUPPLEMENTARY INFORMATION: It has been determined that this document is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis is, therefore, not required. Additionally, this document does not constitute a rule subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Authority: 5 U.S.C. 1009(d), of the Federal Advisory Committee Act, and 5 U.S.C. 552b, of the Government in the Sunshine Act.

Andrew J. Keyso Jr.,

Chief, Independent Office of Appeals.

[FR Doc. 2023-18293 Filed 8-24-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0883]

Agency Information Collection Activity: Per Diem to States for Care of Eligible Veterans in State Homes

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health

Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 24, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Grant Bennett, Office of Regulations, Appeals, and Policy (10BRAP), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to Grant.Bennett@va.gov. Please refer to "OMB Control No. 2900-0883" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Avenue NW, Washington, DC 20420, (202) 266-4688 or email maribel.aponte@va.gov. Please refer to "OMB Control No. 2900-0883" in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of

the burden 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 through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Per Diem to States for Care of Eligible Veterans in State Homes (VA Forms 10–0143, 10–0143A, 10–0144, 10–0144A, 10–0460a, and 10–3567).

OMB Control Number: 2900–0883.

Type of Review: Revision of a currently approved collection.

Abstract: Authority for this information collection is from Title 38 Code of Federal Regulations (CFR) part 51, Per Diem for Nursing Home, Domiciliary or Adult Day Health Care of Veterans in State Veterans Homes, requiring the VA to ensure that per diem payments are limited to facilities providing high quality care for Veterans. This collection of forms is approved under OMB Control Number 2900–0883.

These six forms (10–0143, 10–0143A, 10–0144, 10–0144A, 10–0460a, and 10–3567) are presented to and completed by State Veterans Homes (SVH) management under Subpart B of the CFR part 51 and then assessed for compliance to applicable regulations under Subparts D, E or F by VA contracted vendors during a VA survey at each State Veterans Home (SVH) across the U.S. as a regulatory action. This collection of forms falls under the auspices of The Office of Geriatrics and Extended Care in VA Central Office (12GEC). As per VHA Directive 1145.01, this collection of forms is part of the VA survey process. The legal requirements that necessitate this collection of information are found specifically at title 38 CFR parts 51.31, § 51.43 and § 51.210 for all three levels of care: nursing home, domiciliary, and adult day health care.

The information required at time of the VA survey includes the application and justification for medications for a basic rate Veteran; records and reports that SVH management must maintain regarding activities of residents or participants; information relating to whether the SVH meets standards

concerning residents' rights and responsibilities prior to admission or enrollment, during admission or enrollment, and upon discharge; the records and reports which SVH management and SVH health care professionals must maintain regarding residents or participants and employees; various types of documents pertaining to the management of the SVH; pharmaceutical records; and staffing documentation.

a. VA Form 10–0143—38 CFR 51.210(c)(9)—is used for the annual certification pursuant to the Drug-Free Workplace Act of 1988.

b. VA Form 10–0143A—38 CFR 51.210(c)(8)—is used for annual certification from the responsible State Agency showing compliance with section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112).

c. VA Form 10–0144—38 CFR 51.210(c)(10)—is used for annual certification regarding lobbying, in compliance with Public Law 101–121.

d. VA Form 10–0144A—38 CFR 51.210(c)(11)—is used for annual certification of compliance with Title VI of the Civil Rights Act of 1964, as incorporated in Title 38 CFR 18.1–18.3.

e. VA Form 10–0460a—38 CFR 51.43—As a condition for receiving drugs or medicine under this section or under § 17.96 of this chapter, the State Home will submit to the VA medical center of jurisdiction a monthly completed VA Form 10–0460a with the corresponding prescription(s) for each eligible Veteran.

f. VA Form 10–3567—38 CFR 51.31—is completed by SVH management during the annual VA survey and used to record and then assess the following: operating beds versus recognized beds, total FTEE authorized and vacancies, as well as resident census.

Total Annual Burden: 2,119 hours.

Total Annual Responses: 2,805.

VA Form 10–0143:

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13.75 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 165.

VA Form 10–0143A:

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13.75 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 165.

VA Form 10–0144:

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13.75 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 165.

VA Form 10–0144A:

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13.75 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 165.

VA Form 10–0460a:

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 1980 hours.

Estimated Average Burden per Respondent: 60 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 165.

VA Form 10–3567:

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 82.50 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 165.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt), Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–18312 Filed 8–24–23; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

Vol. 88

Friday,

No. 164

August 25, 2023

Part II

Environmental Protection Agency

40 CFR Part 60

New Source Performance Standards Review for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2002-0049; FRL-8150-01-OAR]

RIN 2060-AU96

New Source Performance Standards Review for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing amendments to the new source performance standards (NSPS) for electric arc furnaces (EAF) and argon-oxygen decarburization (AOD) vessels in the steel industry pursuant to the review required by the Clean Air Act.

DATES:

Effective date: This final rule is effective August 25, 2023. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of August 25, 2023.

Compliance dates: Affected sources that commence construction, reconstruction, or modification after May 16, 2022, must comply with all requirements of 40 CFR part 60, subpart AAb no later than August 25, 2023 or upon startup, whichever is later. The date for complying with the changes in the current rules, 40 CFR part 60, subparts AA and AAa is February 21, 2024 publication of the final rule. The date for complying with the ERT submission requirements is February 21, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2002-0049. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Donna Lee Jones, Sector Policies and Programs Division (D243-02), P.O. Box 12055, Office of Air Quality Planning and Standards, U.S. Environmental

Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5251; and email address: Jones.DonnaLee@epa.gov.

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. Throughout this document the use of “we,” “us,” or “our” is intended to refer to the EPA. 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:

A/C air-to-cloth
ANSI American National Standards Institute
AOD argon-oxygen decarburization
ASME American Society of Mechanical Engineers
BACT best available control technology
BID background information document
BLDS bag leak detection systems
BPT benefits per ton
BSER best system of emissions reduction
CAA Clean Air Act
CBI confidential business information
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CEMS continuous emission monitoring systems
CFR Code of Federal Regulations
CO carbon monoxide
COMS continuous opacity monitoring systems
DCOT digital camera opacity technique
DEC direct shell evacuation control
EAF electric arc furnace
EIA economic impact assessment
EJ environmental justice
E.O. executive order
EPA Environmental Protection Agency
ERT electronic reporting tool
FR Federal Register
FRED Federal Reserve Economic Data
GASP Group Against Smog and Pollution
gr grains
gr/dscf grans per dry standard cubic feet
HAP hazardous air pollutants
ICR information collection request
II&S integrated iron and steel industry
ISA Integrated Science Assessment for Particulate Matter
LAER Lowest Achievable Emission Rate
lb pounds
lb/ton pounds per ton
mg/dscm milligrams per dry standard cubic meters
NAICS North American Industry Classification System
NAPCTAC National Air Pollution Control Technical Advisory Committee
NO_x nitrogen oxides
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PDF portable document format
PM particulate matter
PM_{2.5} particulate matter less than 2.5 micrometers

PRA Paperwork Reduction Act
PS performance specification
RACT reasonably available control technology
RFA Regulatory Flexibility Act
RIN regulatory information number
SMA Steel Manufacturers Association
SSM startup, shutdown, and malfunction
tpy tons per year
UMRA Unfunded Mandates Reform Act of 1995
U.S. United States
U.S.C. United States Code
VCS voluntary consensus standard
VE visible emissions

Organization of this document. The information in this preamble is organized as follows:

- I. General Information
 - A. Does this action apply to me?
 - B. Where can I get a copy of this document and other related information?
 - C. Judicial Review and Administrative Review
- II. Background
 - A. What is the statutory authority for this final action?
 - B. How does the EPA perform the NSPS review?
 - C. What is the source category regulated in this final action?
 - D. What outreach and engagement did the EPA conduct?
- III. What changes did we propose for the steel plants: Electric Arc Furnaces (EAF) and argon-oxygen decarburization vessels NSPS?
 - A. Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed, Reconstructed, or Modified After May 16, 2022
 - B. Proposed Changes to Current NSPS, 40 CFR Part 60, Subparts AA and AAa
- IV. What actions are we finalizing, and what is our rationale for such decisions?
 - A. NSPS Requirements for PM Emissions From Control Devices for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022
 - B. NSPS Requirements for Opacity From Melt Shops for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022
 - C. NSPS Requirements for Opacity From Control Devices and Dust Handling for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022
 - D. Startup, Shutdown, Malfunctions Requirements for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Modified, Reconstructed, or Constructed After May 16, 2022
 - E. Testing and Monitoring Requirements for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels
 - F. Electronic Reporting
 - G. Effective Date and Compliance Dates
- V. Summary of Cost, Environmental, and Economic Impacts
 - A. What are the air quality impacts?
 - B. What are the secondary impacts?
 - C. What are the cost impacts?

- D. What are the economic impacts?
- E. What are the benefits?
- F. What analysis of environmental justice did we conduct?
- VI. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review
 - B. Paperwork Reduction Act (PRA)
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act (UMRA)
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
 - K. Congressional Review Act (CRA)

I. General Information

A. Does this action apply to me?

The source category that is the subject of this final action is composed of steel manufacturing facilities that operate electric arc furnaces (EAF) and argon-oxygen decarburization (AOD) vessels regulated under CAA section 111 New Source Performance Standards (NSPS). The 2022 North American Industry Classification System (NAICS) code for the source category is 331110 for “Iron and Steel Mills and Ferroalloy Manufacturing” processes. The NAICS code serves as a guide for readers outlining the type of entities that this final action is likely to affect. The NSPS codified in 40 CFR part 60, subpart AAB are directly applicable to affected facilities that begin construction, reconstruction, or modification after May 16, 2022. Final amendments to 40 CFR part 60, subpart AA are applicable to affected EAF and AOD facilities that begin construction, reconstruction, or modification after October 21, 1974, and on or before August 17, 1983. Final amendments to 40 CFR part 60, subpart AAa are applicable to affected EAF and AOD vessels facilities that begin construction, reconstruction, or modification after August 17, 1983, and on or before May 16, 2022. Federal, state, local and Tribal government entities would not be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, you should

carefully examine the applicability criteria found in 40 CFR part 60, subparts AA, AAa, and AAB, and consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble, your state air pollution control agency with delegated authority for NSPS, or your EPA Regional Office.

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 final action is available on the internet at <https://www.epa.gov/stationary-sources-air-pollution/electric-arc-furnaces-eafs-and-argon-oxygen-decarburization>. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final rule and key technical documents at this same website.

C. Judicial Review and Administrative Review

Under Clean Air Act (CAA) section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by October 24, 2023. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, “[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment, (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. Environmental Protection Agency, Room 3000, WJC West Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General

Counsel (Mail Code 2344A), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Background

A. What is the statutory authority for this final action?

The EPA’s authority for this final rule is CAA section 111, which governs the establishment of standards of performance for stationary sources. Section 111(b)(1)(A) of the CAA requires the EPA Administrator to list categories of stationary sources that in the Administrator’s judgment cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. The EPA must then issue performance standards for new (and modified or reconstructed) sources in each source category pursuant to CAA section 111(b)(1)(B). These standards are referred to as NSPS. The EPA has the authority to define the scope of the source categories, determine the pollutants for which standards should be developed, set the emission level of the standards, and distinguish among classes, types, and sizes within categories in establishing the standards.

CAA section 111(b)(1)(B) requires the EPA to “at least every 8 years review and, if appropriate, revise” NSPS. However, the Administrator need not review any such standard if the “Administrator determines that such review is not appropriate in light of readily available information on the efficacy” of the standard. When conducting a review of an existing performance standard, the EPA has the discretion and authority to add emission limits for pollutants or emission sources not currently regulated for that source category.

In setting or revising a performance standard, CAA section 111(a)(1) provides that performance standards are to reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” The term “standard of performance” in CAA section 111(a)(1) makes clear that the EPA is to determine both the best system of emission reduction (BSER) for the regulated sources in the source category and the degree of emission limitation achievable through application of the BSER. The EPA must then, under CAA section

111(b)(1)(B), promulgate standards of performance for new sources that reflect that level of stringency. CAA section 111(b)(5) generally precludes the EPA from prescribing a particular technological system that must be used to comply with a standard of performance. Rather, sources can select any measure or combination of measures that will achieve the standard. CAA section 111(h)(1) authorizes the Administrator to promulgate “a design, equipment, work practice, or operational standard, or combination thereof” if in his or her judgment, “it is not feasible to prescribe or enforce a standard of performance.” CAA section 111(h)(2) provides the circumstances under which prescribing or enforcing a standard of performance is “not feasible,” such as, when the pollutant cannot be emitted through a conveyance designed to emit or capture the pollutant, or when there is no practicable measurement methodology for the particular class of sources.

Pursuant to the definition of new source in CAA section 111(a)(2), standards of performance apply to facilities that begin construction, reconstruction, or modification after the date of publication of the proposed standards in the **Federal Register**. Under CAA section 111(a)(4), “modification” means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. Changes to an existing facility that do not result in an increase in emissions are not considered modifications. Under the provisions in 40 CFR 60.15, reconstruction means the replacement of components of an existing facility such that: (1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility; and (2) it is technologically and economically feasible to meet the applicable standards. Pursuant to CAA section 111(b)(1)(B), the standards of performance or revisions thereof shall become effective upon promulgation.

B. How does the EPA perform the NSPS review?

As noted in section II. A of this preamble, CAA section 111 requires the EPA to, at least every 8 years review and, if appropriate, revise the standards of performance applicable to new, modified, and reconstructed sources. If the EPA revises the standards of performance, they must reflect the

degree of emission limitation achievable through the application of the BSER considering the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements. CAA section 111(a)(1).

In reviewing an NSPS to determine whether it is “appropriate” to revise the standards of performance, the EPA evaluates the statutory factors, which may include consideration of the following information:

- Expected growth for the source category, including how many new facilities, reconstructions, and modifications may trigger NSPS in the future.
- Pollution control measures, including advances in control technologies, process operations, design or efficiency improvements, or other systems of emission reduction, that are “adequately demonstrated” in the regulated industry.
- Available information from the implementation and enforcement of current requirements indicates that emission limitations and percent reductions beyond those required by the current standards are achieved in practice.
- Costs (including capital and annual costs) associated with implementation of the available pollution control measures.
- The amount of emission reductions achievable through application of such pollution control measures.
- Any nonair quality health and environmental impact and energy requirements associated with those control measures.

In evaluating whether the cost of a particular system of emission reduction is reasonable, the EPA considers various costs associated with the particular air pollution control measure or a level of control, including capital costs and operating costs, and the emission reductions that the control measure or particular level of control can achieve. The Agency considers these costs in the context of the industry’s overall capital expenditures and revenues. The Agency also considers cost-effectiveness analysis as a useful metric, and a means of evaluating whether a given control achieves emission reduction at a reasonable cost. A cost-effectiveness analysis allows comparisons of relative costs and outcomes (effects) of 2 or more options. In general, cost effectiveness is a measure of the outcomes produced by resources spent. In the context of air pollution control options, cost effectiveness typically refers to the annualized cost of implementing an air pollution control option divided by the

amount of pollutant reductions realized annually.

After the EPA evaluates the statutory factors, the EPA compares the various systems of emission reductions and determines which system is “best,” and therefore represents the BSER. The EPA then establishes a standard of performance that reflects the degree of emission limitation achievable through the implementation of the BSER. In doing this analysis, the EPA can determine whether subcategorization is appropriate based on classes, types, and sizes of sources, and may identify a different BSER and establish different performance standards for each subcategory. The result of the analysis and BSER determination leads to standards of performance that apply to facilities that begin construction, reconstruction, or modification after the date of publication of the proposed standards in the **Federal Register**. Because the NSPS reflect the best system of emission reduction under conditions of proper operation and maintenance, in doing its review, the EPA also evaluates and determines the proper testing, monitoring, recordkeeping and reporting requirements needed to ensure compliance with the emission standards.

C. What is the source category regulated in this final action?

The EPA first promulgated NSPS under CAA section 111 for EAF at steel plants source category on September 23, 1975 (40 FR 43850). These standards of performance are codified in 40 CFR part 60, subpart AA and are applicable to sources that commence construction, modification, or reconstruction after October 21, 1974, and on or before August 17, 1983. These standards of performance regulate emissions of particulate matter (PM) from EAF capture systems and control devices with a PM concentration limit of 12 milligrams per dry standard cubic meter (mg/dscm) [0.0052 grains per dry standard cubic feet (gr/dscf)] and set opacity limits for using capture technology controlling EAF melt shop emissions, which include, but are not limited to, emissions via roof vents, doors, and cracks in walls of 6 percent opacity, with 20 percent and 40 percent opacity allowed during charging and tapping, respectively; control device exhaust at 3 percent opacity due to proper operation of control devices; and dust handling procedures due to proper handling of captured PM at 10 percent opacity.

In 1984, the NSPS rule, 40 CFR part 60, subpart AA (for EAF constructed

after October 21, 1974, and on or before August 17, 1983) was reviewed and revised as part of NSPS statutory review (49 FR 43838; October 31, 1984). The 1984 action amended 40 CFR part 60, subpart AA to include AOD and raise the melt shop opacity from 0 percent to 6 percent opacity, keeping the exceptions for charging (20 percent opacity) and tapping (40 percent opacity). The 1984 action also codified a new NSPS subpart, 40 CFR part 60, subpart AAa, to regulate EAF and AOD vessels that commenced construction after August 17, 1983 (49 FR 43843). The NSPS codified at 40 CFR part 60, subpart AAa set requirements for melt shop opacity at 6 percent with no exceptions. Finally, the 1984 action promulgated requirements to include EPA Method 5D (Appendix A to 40 CFR part 60) for the determination of PM emissions from positive-pressure fabric filters, which are common control devices for EAF and AOD vessels for both 40 CFR part 60, subparts AA and AAa.

On February 14, 1989, 40 CFR part 60, subparts AA and AAa (and Appendix A to 40 CFR part 60) were amended to consolidate the EPA test methods and delete repetitions of methods already referenced (54 FR 6672). Then, on May 17, 1989, minor clarifications and corrections were made to the February 1989 revisions (54 FR 21344). On March 2, 1999, as a result of recommendations made by the EPA's sector policy established in 1994,¹ called the "Common Sense Initiative," 40 CFR part 60, subparts AA and AAa were amended to add an option to monitor furnace static pressure instead of melt shop opacity and to monitor baghouse (fabric filter) fan amperage instead of baghouse flowrate (64 FR 10109). On October 17, 2000, amendments were made to 40 CFR part 60, subparts AA and AAa to promulgate Performance Specification (PS) 15 for certifying continuous emission monitoring systems (CEMS) with Fourier transform infrared spectroscopy (FTIR); to reformat various methods as per recommendations by the Environmental Monitoring Management Council; and to make miscellaneous clarifications and technical and editorial corrections (65 FR 61758). On February 22, 2005, 40 CFR part 60, subparts AA and AAa were amended in response to a petition by the American Iron and Steel Institute, Steel Manufacturers Association (SMA),

and Specialty Steel Industry of North America to add bag leak detection systems (BLDS) as an alternative monitoring method to the continuous opacity monitoring systems currently cited in the rules (70 FR 8523).

An EAF is a metallurgical furnace used to produce carbon and alloy steels. The input material to an EAF is typically almost 100 percent scrap steel. Cylindrical, refractory-lined EAF are equipped with carbon electrodes to be raised or lowered through the furnace roof. With electrodes retracted, the furnace roof can be rotated to permit charging scrap steel into the EAF by overhead crane. Alloying agents and fluxing materials usually are added through doors on the side of the furnace. Electric current is passed between the electrodes and through the scrap, producing an arc and generating enough heat to melt the scrap steel charge. After the melting and refining periods, impurities (in the form of slag²) and the refined steel are poured from the furnace, in a process called "tapping." If AOD vessels are present, they follow the EAF in the production sequence and are used to oxidize carbon, silicon, and impurities, such as sulfur. For these reasons, the AOD vessels reduce additions of alloying material compared to an EAF alone. Use of AOD vessels also reduce EAF heat times, improve quality control, and increase daily steel production. AOD vessels are primarily used in stainless steel making.

The production of steel in an EAF is a batch process. Cycles, also called heats, range from about 1.5 to 5 hours to produce carbon steel and from 5 to 10 hours to produce alloy steel. Scrap steel is charged to begin a cycle, with alloying agents and slag forming materials added later in the process for refining purposes. The stages of each cycle normally include charging, melting, refining (which also usually includes oxygen blowing), and tapping, all of which generate PM emissions.

Air emission control techniques typically involve an air emission capture system and a gas cleaning system. The air emission capture systems used in the EAF industry include direct shell evacuation control (DEC) systems, side draft hoods, combination hoods, canopy hoods, scavenger ducts, and furnace enclosures. The DEC system consists of ductwork attached to a separate opening, or "fourth hole," in the furnace roof (top) that draws emissions from the furnace to a gas cleaner and which

works only when the furnace is up-right and the roof is in place. Side draft hoods collect furnace exhaust gases from around the electrode holes and work doors after the gases leave the furnace. Combination hoods incorporate elements from the side draft and direct shell evacuation systems. Canopy hoods and scavenger ducts are used to address charging and tapping emissions. Baghouses, also called fabric filters, are typically used as gas cleaning systems (*i.e.*, emissions control devices).

There are approximately 88 EAF in the United States (U.S.), with most (>95 percent) EAF subject to one of the EAF NSPS subparts. Thirty-one states have one or more EAF facilities, with most of the EAF facilities east of the Mississippi River. Pennsylvania (15), Ohio (10), Alabama (7), and Indiana (7) have the most EAF facilities per state (approximate number of EAF facilities in each state).

The EPA proposed amendments to the NSPS subparts AA and AAa, and a new subpart AAb, based on the current review on May 16, 2022 (87 FR 29710). We received 11 comments from industry, environmental groups, state environmental agencies, and others during the comment period. A summary of the more significant comments we timely received regarding the proposed rule and our responses are provided in this preamble. A summary of all other public comments on the proposal and the EPA's responses to those comments is available in the document *Summary of Public Comments and Responses for Standards of Performance for Steel Plants: Electric Arc Furnaces Constructed After October 21, 1974, and On or Before August 17, 1983; and Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels*, Docket ID No. EPA-HQ-OAR-2002-0049 located in the docket for this rule. In this action, the EPA is finalizing decisions and revisions pursuant to CAA section 111(b)(1)(B) review for Steel Plants: Electric Arc Furnaces (EAF) and Argon-Oxygen Decarburization Vessels NSPS (40 CFR part 60, subpart AAa) after our considerations of all the comments received.

D. What outreach and engagement did the EPA conduct?

As part of this rulemaking, and pursuant to multiple Executive Orders addressing environmental justice, the EPA engaged and consulted with the public, including populations of overburdened communities and low-income populations, through interactions, such as a letter sent on

¹ See *Analysis and Evaluation of the EPA Common Sense Initiative*. Prepared by: Kerr Greiner, Andersen, and April, Inc. Funded by the U.S. Environmental Protection Agency under PO No. No. 9W-0753-NTSA. 1999. Available at <https://nepis.epa.gov>.

² Slag is the molten metal oxides and other impurities that float to the surface of the molten steel product.

May 17, 2022, to 40 leaders of Tribal nations (see Docket ID No. EPA-HQ-OAR-2002-0049). The EPA received comments from the following environmental groups during the comment period: Group Against Smog and Pollution (GASP), Fairfield Environmental Justice Action Coalition (FEJA), Sierra Club, California Communities Against Toxics, and Greater Birmingham Alliance to Stop Pollution, et al. These opportunities gave the EPA a chance to hear from the public, especially communities potentially impacted by this final action.

Some of the key issues raised by environmental justice stakeholders included a specific area of the country where there are PM problems and where there are 2 EAF facilities; and regulating other pollutants, such as sulfur dioxide (SO₂) and greenhouse gases (GHG). Section V of the preamble provides a description of how the Agency considered these comments in the context of regulatory development.

III. What changes did we propose for the Steel Plants: Electric Arc Furnaces (EAF) and Argon-Oxygen Decarburization Vessels NSPS?

On May 16, 2022, the EPA proposed the results of the review of the EAF and AOD source category standards of performance to determine if revisions were warranted pursuant to CAA section 111(b)(1)(B).

Pursuant to this review, we proposed to revise the NSPS for EAF and AOD vessels. We also proposed several clarifications and corrections to existing NSPS rules (40 CFR part 60, subparts AA and AAa). These proposed actions are discussed below in sections III.A and III.B. We also proposed: periodic compliance testing at least once every 5 years; results of the review of opacity from control device exhaust and from dust handling systems to keep same BSER and limits as in 40 CFR part 6, subpart AAa of 3 percent and 10 percent, respectively; that the emission limits would apply at all times; and electronic reporting.

A. Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed, Reconstructed, or Modified After May 16, 2022

1. Analyses To Determine BSER for Melt Shop Opacity and PM Emissions From Control Devices

The EPA proposed to determine that the use of a baghouse with a fabric filter is the BSER for EAF and AOD vessels. The EPA proposed that a limit of at 0.16

pounds (lb) PM emitted per ton steel produced (lb/ton) reflects the degree of emission limitation achievable through application of the BSER. The EPA also proposed to determine using a partial roof canopy to control visible fugitive emissions (VE) from EAF and AOD in the melt shop is BSER. The EPA proposed that a limit of 0 percent opacity during all phases of EAF operation reflects the degree of emission limitation achievable through application of the BSER.

The BSER and proposed standards of performance for PM emissions from capture systems and fabric filters, and for capture of emissions from melt shops was developed from an analysis of EAF PM test reports from 2005 through 2017 obtained by the EPA. The PM data contained in these reports reflected 33 facilities, 46 EAF, 5 AOD, and 54 baghouses in 154 emission and opacity tests (hereafter referred to as the “EAF dataset”). The EAF dataset showed a substantial improvement in EAF, AOD, and baghouse performance beyond the current NSPS PM standards (40 CFR part 60, subparts AA, AAa) for control devices as well as for melt shop opacity. The costs of control, emissions reductions, and other factors were used in the determination of BSER, as explained in next sections.

a. BSER for Melt Shop Opacity

From the EAF dataset described earlier in this preamble, the EPA identified 15 EAF facilities, approximately half of the EAF dataset, that reported 0 percent melt shop opacity. To determine BSER and its costs to reduce melt shop opacity at EAF facilities from 6 percent to 0 percent opacity, the costs for an addition of a partition roof canopy (above the crane rails) were estimated for the proposal. Canopy hoods are a common method of controlling fugitive EAF emissions. In the proposal cost analysis, we estimated that the annual costs would be \$800,000 (\$2020³) for a medium-sized steelmaking EAF with installation of a partition roof canopy (above the crane rails). With an estimated PM reduction of 730 tpy to achieve 0 percent melt shop opacity down from the current 6 percent opacity (in 40 CFR part 60, subparts AA, AAa), the cost effectiveness in 2020 was estimated to be \$1,100 per ton PM removed (\$2020). Similar results were obtained for both small and large EAF.

³ The cost analyses for the 2022 proposal used a 3.25 percent interest rate. Federal Reserve Economic Data (FRED). Bank Prime Loan Rate Changes: Historical Dates of Changes and Rates. Available at: <https://fred.stlouisfed.org/series/PRIME>. Accessed 11/6/2020.

Based on the BSER analysis as explained at proposal, the EPA proposed that BSER for melt shop is a partition roof canopy (above the crane rails) and proposed in 40 CFR part 60, subpart AAa to revise the opacity limit to 0 percent to limit visible emissions from EAF and AOD that exit from the melt shop during all phases of operation.

b. Capture System, Baghouse, and Facility-Wide Total PM Control Device Emission Limit

The EPA proposed as the BSER a capture system and fabric filter. For the standard, we proposed a facility-wide mass-based PM limit from all EAF and AOD capture systems and control devices of 0.16 lb total PM per ton steel instead of a PM concentration limit that applies to each capture system and control device, which is the format of the current standards in 40 CFR part 60, subparts AA, AAa. As explained in the proposal, the EPA proposed a facility-wide mass-based PM limit because this form of standard was thought to result in better overall PM control and provide greater assurance of limiting PM emissions from the facility. Most importantly, if EAF emissions can be divided up into separate baghouses, for practical purposes or otherwise, with each device falling under the same NSPS PM limit based on air flow in gr/dscf, there is no accounting for the total PM emissions from the facility. A facility-wide total control device PM emissions limit in units of lb PM/ton of steel produced was expected to eliminate the disparity in control device emissions between low- and high-PM concentration exhaust, such as that for control devices for primary emissions (*i.e.*, directly from the EAF or AOD) v. secondary emissions (*i.e.*, from fugitive emissions), as well as the disparity between well-operated v. inefficiently-operated control devices in the cases where both types of control devices operate below the current individual baghouse limit in 40 CFR part 60, subparts AA, AAa.

To evaluate the BSER to reduce emissions from EAF and AOD capture systems and control devices, the EPA evaluated the baghouse air-to-cloth (A/C) ratio, expressed in units of volume of air flow per unit bag area (*i.e.*, cloth), using EAF facility baghouse model plants developed from the EPA dataset describe earlier in this preamble (87 FR 29718–29720). This was done to evaluate BSER, of which cost is a factor. The A/C ratio is generally accepted as the most important design parameter between baghouses of different performance levels, where a low A/C

ratio is considered to be the best level of control (less air and more baghouse filter cloth) and a high A/C ratio is a low or poor level control (high air volume and low baghouse filter area).

Using model plants developed from the EAF dataset and the EPA cost-estimating procedures,⁴ an A/C ratio of 2.2 m/min (7.2 ft/min) leading to a value of 0.16 lb total PM per ton steel produced was determined to be cost effective (87 FR29710). For a medium-sized model plant consisting of an EAF and all its baghouses, *i.e.*, EAF facility, emitting 0.16 lb PM/ton steel produced, the cost effectiveness at this lb/ton level was approximately \$1,800 per ton PM removed \$2020, an acceptable cost effectiveness, with an incremental cost effectiveness compared to a model plant at the next higher level of control (A/C ratio of 4.9 ft/min) at \$8,500/ton \$2020, which was not considered reasonable. Similar results were obtained for small and large EAF. Therefore, a facility-wide total 0.16 lb PM/ton steel produced limit from capture systems and control devices was proposed to represent performance level for the BSER for EAF and AOD capture systems and fabric filters for 40 CFR part 60, subpart AAb.

2. Requirement for Compliance Testing Every Five Years

We proposed that sources complying with 40 CFR part 60, subpart AAb would be required to perform compliance testing every 5 years after the initial testing performed upon startup, as required under 40 CFR part 60.8. This requirement already is required in many of the permits for existing EAF in the EAF dataset and in the industry, and also is a standard requirement for testing for other sources of PM emissions for many other industrial sectors.

3. Review of EAF NSPS Standards for Opacity From EAF Control Devices and Dust Handling Systems

The current NSPS standards for EAF in 40 CFR part 60, subparts AA and AAa, require less than 3 percent opacity from control device (baghouse) exhaust and less than 10 percent for dust handling procedures. We proposed to retain these limits in 40 CFR part 60, subpart AAb. (87 FR 29720–29721). In reviewing the EAF dataset, the EPA based these limits on the fact that no

facilities reported lower levels of opacity for these sources, nor were lower levels required in any permits for these or any other EAF facilities. In addition, commensurate with determinations reported in the RACT/BACT/LAER Clearinghouse,⁵ the current levels for baghouse exhaust (9 facilities) and dust handling systems (3 facilities) in 40 CFR part 60, subparts AA, AAa were considered BACT. Therefore, we concluded in the proposal that the opacity standards for control device exhaust and dust handling systems would remain the same.

4. Startup, Shutdown, Malfunction Exemption Removal From 40 CFR Part 60, Subpart AAb

The NSPS general provisions (40 CFR 60.11(c)) currently exclude opacity requirements during periods of startup, shutdown and malfunction (SSM). We proposed that opacity limits in 40 CFR part 60, subpart AAb would apply at all times along with all other emissions limits and standards, as provided in 40 CFR 60.11(f), because we concluded in the proposal that there were no technical limitations known to prevent new, reconstructed, or modified facilities from meeting all standards at all times. The language overriding the general provisions SSM opacity exemption was proposed for 40 CFR part 60, subpart AAb at 40 CFR 60.272b(c).

In its 2008 decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the United States Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously. The EPA has determined the reasoning in the court's decision in *Sierra Club* applies equally to CAA section 111 because the

definition of emission or standard in CAA section 302(k), and the embedded requirement for continuous standards, also applies to the NSPS. Therefore, consistent with *Sierra Club*, we proposed the NSPS standards in the 40 CFR part 60, subpart AAb would apply at all times.

5. Electronic Reporting for 40 CFR Part 60, Subparts AA, AAa, and AAb

The EPA proposed the requirement that owners and operators of EAF and AOD subject to the current and new NSPS at 40 CFR part 60, subparts AA, AAa, and AAb submit electronic copies of required performance test reports and any semiannual excess emissions and continuous monitoring system performance and summary reports, through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). The proposed rule required that performance test/demonstration of compliance results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website⁶ at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test/demonstration of compliance results be submitted in portable document format (PDF) using the attachment module of the ERT.

For semiannual reports, the proposed rule required that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. The final versions of the templates for these reports are included in the docket for this action.⁷ Additionally, the EPA identified the circumstances in which electronic reporting extensions may be provided.

B. Proposed Changes to Current NSPS, 40 CFR Part 60, Subparts AA and AAa

We proposed the following amendments and requested comments on the existing NSPS rules for EAF, 40 CFR part 60, subpart AA, and EAF and AOD, 40 CFR part 60, subpart AAa, to update, correct, or clarify these rules to enhance compliance and enforcement.

- Amendments to clarify and refine the rule requirements in 40 CFR part 60, sections 60.271 and 60.271a "Definitions", 60.272 and 60.272a

⁶ <https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>.

⁷ See 40 CFR part 60, subpart AA, AAa, and AAb, *Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels*, 40 CFR part 60.276(g) Semiannual Compliance Report Spreadsheet Template, available at Docket ID No. EPA-HQ-OAR-2002-0049-0064.

⁴ *Cost Analyses to Determine BSER for PM Emissions and Opacity from EAF Facilities*. D.L. Jones, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, and G.E. Raymond, RTI International, Research Triangle Park, North Carolina. May 1, 2023 (Docket ID No. EPA-OAR-2002-0049).

⁵ See <https://www.epa.gov/catc/ractbactlaerclearinghouse-rblc-basic-information> for more information. RACT, or reasonably available control technology, is required on existing sources in areas that are not meeting national ambient air quality standards (*i.e.*, nonattainment areas); BACT, or best available control technology, is required on major new or modified sources in clean areas (*i.e.*, attainment areas); and LAER, or lowest achievable emission rate, is required on major new or modified sources in nonattainment areas. See the RACT/BACT/LAER determinations made for EAF in the cost memorandum prepared for proposal (03–01–22); Docket ID No. EPA-HQ-OAR-2002-0049-0060.

“Standard for particulate matter”, 60.273 and 60.273a “Emission monitoring”, 60.274a “Monitoring of operations”, 60.275a “Test methods and procedures”, and 60.276a “Recordkeeping and reporting requirements”.

- Minor revisions to clarify the rule and enhance compliance and enforcement.
- Solicited comments, data, and other information on whether the EPA should change the time to both find and fix the cause of a BLDS alarm from 3 hours to a longer timeframe (e.g., 24 hours as in other rules), or some other duration.
- Requirement that owners and operators of EAF facilities submit electronic copies of required performance test/demonstration of compliance reports and semiannual reports through the EPA’s CDX using the CEDRI and ERT.
- Requirement that performance test/demonstration of compliance results collected using test methods that are supported by the EPA’s ERT as listed on the ERT website⁸ at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test/demonstration of compliance results be submitted in PDF using the attachment module of the ERT.
- For semiannual reports, requirement that owners and operators use the appropriate spreadsheet template to submit information to CEDRI.

IV. What actions are we finalizing, and what is our rationale for such decisions?

The EPA is finalizing revisions to the NSPS for EAF and AOD at steel plants pursuant the CAA section 111(b)(1)(B) review. The EPA is promulgating the NSPS revisions in a new subpart, 40 CFR part 60, subpart AAb that are applicable to affected facilities constructed, modified, or reconstructed after May 16, 2022. The new subpart reflects a BSER for a PM capture system and fabric filter, and a total facility limit for PM from control devices in units of lb PM/ton steel produced, and a canopy hood to capture melt shop VE, and a 0 percent opacity limit during melting and refining.

We also are finalizing results of the review of opacity from control device exhaust and from dust handling systems to keep same BSER and limits as in 40 CFR part 60, subpart AAa of 3 percent

and 10 percent, respectively; that the emission limits would apply at all times; periodic compliance testing at least once every 5 years; and electronic reporting.

The facility-wide PM limit of 0.16 lb/ton as finalized will apply to all EAF and AOD control devices subject to 40 CFR part 60, subpart AAb and also all the air pollution control equipment used to remove particulate matter from the effluent gas stream generated by the EAF and AOD. The melt shop opacity standard of 0 percent as finalized will apply during the melting and refining period, and a 6 percent opacity limit will apply during the charging period and during the tapping period, with daily opacity or VE testing required during all 3 periods. We are finalizing that the PM limit of 0.16 lb/ton standard apply at all times, including during SSM, and that an opacity limit will also apply at all times (i.e., 6 percent opacity during charging and tapping and 0 percent opacity at all other times). We are finalizing the requirement to submit the required compliance test reports through CDX using CEDRI and the ERT.

We also are finalizing clarifications and corrections to the 2 existing EAF rules: 40 CFR 60 subpart AA, Standards of Performance for Steel Plants: Electric Arc Furnaces Constructed After 10/21/74 & On or Before 8/17/83; and 40 CFR 60 subpart AAa, Standards of Performance for Steel Plants: Electric Arc Furnaces & Argon-Oxygen Decarburization Constructed After 8/17/83 and On or Before May 16, 2022. For these rules, we are finalizing amendments to certain parts of the current NSPS standards and to allow 24 hours for owners and operators a find and fix the cause of a BLDS alarm.

A. NSPS Requirements for PM Emissions From Control Devices for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022

1. What did we propose as the BSER determination and standard of performance for PM emissions from EAF control devices?

We proposed that BSER for new, modified, and reconstructed EAF and AOD sources is a capture system and fabric filter. We proposed that the PM limit that reflects BSER is a total facility emission rate of 0.16 lb PM/ton of steel from control devices at an affected facility. The EPA proposed a facility-wide mass-based PM limit from all EAF and AOD control devices per ton of steel produced instead of a PM concentration limit based on mass of PM per control device air flow that applies to each

control device, which is the format of the standards in 40 CFR part 60, subparts AA, AAa.

2. What significant comments did we receive and what are our responses?

Comment: One commenter asserted that the form of the standard should not be changed from the original form of the standard in NSPS subpart AAa. The commenter stated for the NSPS subpart AAa rulemaking, the EPA rejected a production-based (or mass-based) standard in favor of a concentration-based limit in a NSPS proposed rule that was published on August 17, 1983. The commenter notes that, in that 1983 FR document, the EPA stated:

“A process weight format is based on a direct relationship between the quantity of pollutant emitted and the amount of input material consumed or product produced. Because of wide differences between EAF and AOD shops in operating procedures, such as the length of the steel production cycle, grade of steel produced, control technologies, vessel capacities, and other operating parameters, a simple direct relationship between mass emissions and steel production does not exist. Therefore, a process weight format was not selected for control devices regulated by the proposed standards.”

“Methodology to measure the concentration of emissions discharged to the atmosphere from control devices is readily available and well demonstrated. Concentration measurements are obtained directly from the stack emission test data. A concentration standard can be met equally well by a large or a small shop and by carbon and specialty steel shops. Consequently, a concentration format (i.e., mass emissions per unit volume of gas) was selected for control devices regulated by the proposed standards to ensure control of captured process and fugitive emissions.” (48 FR 37347)

The commenter continued that the EPA provides no explanation for the change in its position and fails to address the rationale the Agency provided in 1983 for adopting the current grain-loading standards in NSPS subpart AA and NSPS subpart AAa.

Another commenter added that the EPA’s failure to justify this “depart[ure] from a prior policy” would render abandonment of the current concentration-based standard “arbitrary and capricious,” citing to *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

EPA Response: The EPA disagrees with the comment that the EPA did not provide an adequate explanation for changing the form of the standard from

⁸ <https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>.

concentration-based to a production-based limit. The new format of the EAF NSPS subpart AAB, in units of lb/ton, ensures compliance as well as ensures that every facility is accountable for the total PM contribution from its EAF to the environment in the nearby community for every unit of steel produced. The EPA fully explained its justification for use of lb/ton format in the 2022 proposal, as follows here.

In the 2022 proposal, we explained that the emissions, and, hence, collected PM, from baghouses that control only secondary emissions can be much lower than the other two types of baghouses, as seen in the EAF dataset where the baghouse with the lowest PM emissions controlled only secondary emissions (87 FR 29715). We also explained that because of the inherent lower baghouse PM input (loading), secondary baghouses can be operated inefficiently without exceeding the current NSPS limit, which is expressed in the units of mass PM per unit of control device exhaust air. In addition, where there is a standard in terms of mass PM per unit of total exhaust air, baghouse dilution air (added to EAF exhaust air) can be

increased with the effect of lowering measured baghouse PM emission concentration and disguising the true performance of the baghouse.

Further, at 87 FR 29715, the EPA proposed to set a facility-wide PM limit instead of a limit that applies to each control device (the format of the current standard) because we think this form of standard will result in better control and provide greater assurance of compliance. Most importantly, if EAF emissions can be divided up into separate baghouses, for practical purposes or otherwise, with each device falling under the same NSPS PM limit, there is no accounting for the total PM emissions from the facility. A facility-wide total control device PM emissions limit in units of lb of PM per ton of steel produced also would alleviate the potential disparity in control device emissions between low- and high-loading control devices, such as that for control devices for primary v. secondary emissions, as well as for well-operated v. inefficiently-operated control devices that both operate below the individual baghouse limit (87 FR 29715). Therefore, we did adequately explain

our change in position at the proposal and also explained why we now think a facility-wide limit is more protective than a concentration-based limit, thereby satisfying the standard in *Fox Television*. See 556 U.S. at 515–16 (when the Agency acknowledges change in position, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the Agency believes it to be better, which the conscious change of course adequately indicates”).

The commenter did not include any current data showing the lack of a direct relationship between mass emissions and steel production. The graphs in Figure 1 from the memorandum titled *Particulate Matter Emissions from Electric Arc Furnace Facilities*,⁹ hereafter called the “Emissions Memorandum,” show a similar curve shape when data for the total EAF facility average concentration of PM in gr/dscf from the 2010 EPA/EAF data set¹⁰ are plotted compared to the same PM data expressed as lb/ton PM emissions.

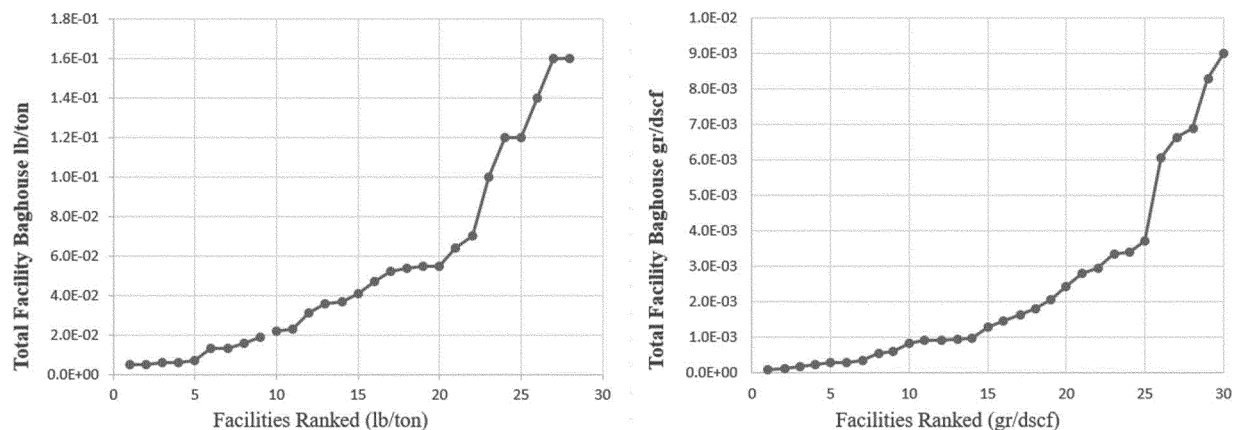


Figure 1. Curves of PM in gr/dscf and lb/ton for All 30 EAF Facilities in EPA EAF Dataset

In 1973, the EPA originally presented a NSPS standard in units of lb/hr-ton during the National Air Pollution Control Technical Advisory Committee (NAPTAC) meeting when the EAF NSPS was first being developed, as described in the 1974 *Background Information for*

*Standards of Performance*¹¹ (BID). On February 22, 1973, the Agency presented to the National Air Pollution Control Techniques Advisory Committee (NAPTAC) a draft standard PM limitation of 0.06 lb/hr-ton. However, this standard was ultimately

not used by the EPA for the NSPS because of the industry objections with the lb/ton format and interest in the concentration-based limit.

It should be noted that the first promulgated NSPS limit, at 0.0052 gr/dscf, was based on test data from only

⁹ *Particulate Matter Emissions from Electric Arc Furnace Facilities*. D.L. Jones, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, and G.E. Raymond, RTI International, Research Triangle Park, North Carolina. May 1, 2023. (Docket ID No. EPA-OAR-2002-0049-0061).

¹⁰ In 2010, the EPA acquired EAF data from approximately 30 EAF facilities via a CAA section 114 test and information request. These data are located in the docket for the EAF NESHAP, 40 CFR part 63, subpart YYYYY at <https://www.regulations.gov/docket/EPA-HQ-OAR-2004-0083> and incorporated by reference into the docket for the EAF NSPS at <https://www.regulations.gov/docket/EPA-HQ-OAR-2002-0049>.

¹¹ *Background Information for Standards of Performance: Electric Arc Furnaces in the Steel Industry, Volume 1: Proposed Standards*. Publication No. EPA-450/2-74-017a. U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina (October 1974).

one facility, as described in the 1974 BID¹² for EAF under 40 CFR part 60, subpart AA, the original EAF NSPS.

Preliminary investigations for the NSPS identified 30 plants from a review of the literature and contacts with industry, as described in the 1974 BID, discussed earlier in this section. From these 30 plants, 11 plants were identified that reportedly were well-controlled for PM emissions. Ten of the 11 facilities were visited, their visible emissions evaluated, and information obtained on the process and control equipment. Although many of the 11 plants practiced good control techniques, the facilities at only 3 plants (Plants A, I and J) were amenable to testing with EPA Method 5. Other facilities were not suitable for emission measurements because they use positive pressure baghouses, which have no stacks. Although development work was in progress, sampling methodology for this type of installation had not been standardized. These 3 plants were nearly identical except for size. They all produced alloy steels and controlled PM emissions with a building evacuation system. Each had a fabric filter control device that exhausted through multiple stacks. Rather than spread the test program effort over 3 tests at nearly identical plants, it was decided a more comprehensive test of one plant would provide more information. The middle-sized plant offered the best possibilities for this comprehensive test. Its size was typical of the mid-range for the industry, and the fabric filter did not have an inordinately large number of exhaust stacks.

To show that a mass-based limit has been considered by the EPA previously, the chronological history of the EAF NSPS subpart AA and AAa standards for PM from control devices, as taken from the 1974 BID, discussed earlier in this section, is as follows:

- In 1972, 299 EAF's in the United States were operated by 99 companies at 121 locations. On February 22, 1973, the Agency presented to the NAPCTAC a draft standard PM limitation of 0.06 pound per hour-ton (lb/hr-ton). Steel industry representatives attending the meeting suggested that the PM standard should be 0.244 lb/hr-ton.

- On May 30 and 31, 1973, at another NAPCTAC meeting, the EPA presented

a revised draft technical report and standard. The PM standard presented by the EPA was changed from 0.06 lb/hr-ton to 0.10 lb/hr-ton. The industry representatives at the meeting suggested that the standard be expressed on a concentration basis and be set at 0.008 grains per dry standard cubic feet (gr/dscf) for a dry collector (*e.g.*, baghouse or fabric filter) and 0.02 gr/dscf for a wet collector (scrubber).

- At the January 9, 1974, NAPCTAC meeting, available emission data indicated that a 0.0039 gr/dscf PM standard could be easily achieved. These data were supported by a vendor guarantee of 0.004 gr/dscf on fabric filters at 3 building evacuation systems at 3 similar shops. These shops, owned by one company at one location, produced alloy steel. Another vendor also signed a statement that they would guarantee 0.004 gr/dscf on a system planned for the capture of charging and tapping emissions at a plant which produced carbon steel. Two other vendors stated that although 0.004 gr/dscf was achievable for fabric filters designed to treat large volumes of exhaust gas with low concentrations of PM, it could not be guaranteed, but 0.004 gr/actual cubic feet (acf), approximately equivalent to 0.005 gr/dscf, could be guaranteed. Further, industry representatives at the meeting commented that the 0.0039 gr/dscf level was too stringent for the industry to meet at all times. Therefore, the industry representatives suggested the limitation be 0.008 gr/dscf.

- After the January 9, 1974, NAPCTAC meeting, a vendor stated that, for a fabric filter controlling a direct shell evacuation (DEC) system with a relatively high inlet concentration of PM, 0.005 gr/dscf was a reasonable level to guarantee.

- In the October 21, 1974 proposal (39 FR 37466), the Agency proposed a PM standard to be no more than 0.0052 gr/dscf of PM from the control device, which relaxed the previous presented value of 0.0039 gr/dscf for the limit for the PM concentration emitted from an EAF control device.

In summary, this history of discussions around the first PM limit for EAF control devices in the NSPS is as follows: the EPA originally put forward an EAF control device standard in the form of lb/hr-ton in 1973. The following year, industry suggested a PM limit of 0.008 gr/dscf and vendors presented a guaranteed fabric filter limit of 0.005 gr/dscf. Subsequently, in 1974, the EPA proposed a standard of 0.0039 gr/dscf, which was based on "available emission data" from one facility, as noted in the 1974 BID. However, after NAPCTAC

discussions with industry and vendors, a limit of 0.0052 gr/dscf was promulgated by the EPA in 1975 in the EAF NSPS subpart AA and confirmed again in 1984 in the EAF NSPS subpart AAa.

Regardless of the EPA's discussions during prior rulemakings, as detailed in the proposed rule and in this final action, we now have a strong basis to find a direct relationship between mass emissions and steel production that justifies our facility-wide PM limit in units of lb/ton. We show in our analyses of 2010 data from 30 facilities discussed in this preamble (see Figure 1), as well as in data from more facilities from 2005, as discussed in another EPA response in this preamble section, that there is a direct relationship. As explained earlier in section IV.A.1 and in other comments in this section, and in the proposal, the EPA analyzed the total facility PM mass emissions versus production at a number of EAF facilities and found that a correlation exists, and that promulgating a PM standard for NSPS subpart AAb in this form would enhance compliance and may reduce emissions. As noted earlier in this EPA response, the new format of the EAF NSPS subpart AAb, in units of lb/ton ensures that every facility is accountable for the total PM contribution from its EAF and AOD to the environment in the nearby community for every unit of steel produced. As an example of similar thoughts on the value of EAF standards in lb/ton, we note a 2017 facility construction permit for prevention of significant deterioration that included a lb/ton PM limit (0.19 lb/ton), as well as a "no visible emissions" limit for the EAF.¹³

Comment: The commenter asserted that the EPA conducted evaluation on a concentration basis and not in the form of the proposed standard (lb/ton). A commenter stated the EPA in its proposal performed cost analyses based upon the air flowrates to the air pollution control device, and rather than establishing a standard of performance for the air pollution control device (baghouse), the EPA proposed the PM emissions standard in terms of lb/ton steel produced on a facility-wide basis. The EPA analyzed the performance of emissions controls from EAF on a concentration basis (milligram per dry standard cubic meters (mg/

¹² Background Information for Standards of Performance: Electric Arc Furnaces in the Steel Industry, Volume 1: Proposed Standards. Chapter V. Summary of the Procedure For Developing Standards, Section D, Plant Inspections. Publication No. EPA-450/2-74-017a. U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina (October 1974. pg. 63 (pdf pg. 88)).

¹³ Finkl & Sons Co. DBA Finkl Steel—Chicago. 1355 East 93rd Street, Chicago, Illinois 60619. State of Illinois Clean Air Act Permit Program (CAAPP) Permit. ID No. 031600GUC. Permit No. 14030029. Permitting Authority, Illinois Environmental Protection Agency Bureau of Air, Permit Section 217/785-1705. Final issue date July 5, 2018. pp. 21 and 23 of 129.

dscm)—grain per dry standard cubic feet (gr/dscf)—and not in the form of the proposed standard. The EPA must be consistent with the basis of its evaluation and establish a standard measuring compliance as a concentration exiting the control device.

EPA Response: The commenter correctly notes that, rather than establishing a concentration standard of performance for each individual air pollution control device (baghouse), the EPA in 2022 proposed to set the PM emissions standard in terms of lb/ton steel produced on a facility-wide basis from all control devices at the EAF facility. However, the EPA disagrees that we analyzed the performance of emissions controls from EAF on a concentration basis (gr/dscf)—and not in the form of the proposed standard. The EPA's analysis in the "Emissions Memorandum" discussed earlier in this section clearly demonstrates that the EPA evaluated costs and emission reductions on a facility-wide basis in lb/ton format. [See figures and tables in the "Emissions Memorandum" discussed earlier in this section: Figure 3 (EAF baghouse data in mass PM per mass of steel produced (lb/ton)); Figure 4 (EAF facility total baghouse mass PM per mass of steel produced (lb/ton)); Table 3 (EAF Baghouse Information and Average PM Emissions (lb/ton)); and Table 5 (Facility Total EAF Baghouse Average PM Emissions (lb/ton))]. Further, the EPA outlined in multiple locations in the proposal that the performance of emissions controls from EAF were done on a facility-wide basis.

For example, at 87 FR 29716, the EPA described the PM and opacity test data that was used in the BSER analysis. At 87 FR 29715–29716, the EPA explained how the opacity limit was developed considering facility-wide emissions. To determine the PM limit for control device PM emissions under the BSER, the EPA only used data from EAF facilities with 0 percent melt shop opacity. This was because facilities that control their melt shop opacity to 0 percent are collecting more PM (specifically from the melt shop) than facilities that have a nonzero melt shop opacity and, as a result, are sending more PM to their control devices. Consequently, EAF facilities with 0 percent melt shop opacity are expected to have a slightly higher control device PM emission rate on average compared to EAF facilities with greater than 0 percent melt shop opacity, as evidenced by the EAF dataset of 33 EAF facilities. As a corollary, at EAF facilities with 6 percent melt shop opacity, some of the PM generated by the EAF is not captured, avoids the control device, and

can exit through the melt shop roof, thus raising the melt shop opacity to above 0 percent. In turn, facilities with 6 percent melt shop opacity collect less PM and, therefore, less PM is sent to control device, which results in (slightly) lower PM emissions in the control device exhaust.

Overall, because of the large amount of PM emission differential between 6 percent and 0 percent melt shop opacity, much less PM is emitted to the environment with 0 percent melt shop opacity than with 6 percent opacity, despite the higher level of control device emissions with 0 percent melt shop opacity. This effect is described quantitatively in the proposal preamble (87 FR 29720). Of the 15 EAF facilities in the EPA dataset with 0 percent melt shop opacity, control device PM emissions data and steel production values needed to develop an emission standard in mass of PM per mass of steel production were available for 13 of the 15 facilities; these data included 51 individual tests from 23 baghouses and 21 EAF. The 13 EAF facilities and their PM emissions were used to demonstrate that 0 percent melt shop opacity is BSER and to develop a facility-wide total PM control device emission standard in lb/ton under the BSER for new, modified, and reconstructed EAF or AOD.

As explained earlier in section IV.A.1 and other comments in this section, and in the proposal, the EPA analyzed the total facility PM mass emissions versus production at a number of EAF facilities and found that a correlation exists, and that promulgating a PM standard for NSPS subpart AAb in this form would enhance compliance and may reduce emissions. As noted earlier in this EPA response, the new format of the EAF NSPS subpart AAb, in units of pound per ton (lb/ton), ensures that every facility is accountable for the total PM contribution from its EAF to the environment in the nearby community for every unit of steel produced.

Comment: A commenter asserted that a lb/ton steel limit does not consider the different types of EAF mills. A commenter stated the EPA does not acknowledge nor address the fundamental fact that a "facility-wide lb/ton" production, or mass-based standard, ignores the substantial differences among EAF steel mills that directly bear on the PM emissions per ton of steel produced. The commenter claims it is both unfair and inconsistent with the BSER to hold a small specialty steel EAF facility, with low tonnages and more time-intensive steel refining requirements, to the same production-based standard as a facility that

produces 10-times or more steel with much shorter heat times (*i.e.*, 2 facilities with vastly different production rates).

The commenter stated a compliance method based on PM per ton of steel produced does not take into consideration the various subcategories of EAF operations, differences in steel products, and variation in heat times and tonnages produced, which vary considerably depending on the product grade of steel and the mix of such products at various mills. Some carbon EAF mills produce high tonnages in relatively short heat times, while specialty EAF steel facilities produce much smaller tonnages over heat times that can be 2 to 3 times as long.

The commenter continued, as the EPA noted in developing the NSPS subpart AAb standards in 1984, the production of steel in an EAF is a batch process where 'heats' or cycles range from 1 to 5 hours, depending upon the size and quality of the charge, the power input to the furnace, and the desired quality of the steel produced. The commenter added, the EPA's statement in the proposal that "[t]he production of steel in an EAF is a batch process" (87 FR 29713), is not accurate and fails to acknowledge "Endless Charging Systems" and Consteel® continuous feed systems (*i.e.*, continuous charging systems). The commenter added that, to determine appropriate standards of performance, the EPA should conduct a comprehensive evaluation of the different types of EAF mills (such as bar, sheet, and plate) and consider establishing different limitations and requirements for each subcategory. Another commenter encourages the EPA to evaluate current designs and applications of baghouses for the control of PM.

EPA Response: We disagree with the commenter on the relevance of lb/ton standard to the variation in EAF operations. The lb/ton limit being promulgated (0.16 lb/ton) reflects the highest emitting facility in the EPA dataset, which is a stainless steel facility. Therefore, we expect both EAF carbon and stainless steel facilities, continuous or batch, that modify or reconstruct and then are subject to the NSPS subpart AAb will be able to meet the new PM limit. Moreover, future new, reconstructed, and modified facilities will be in an even better position to meet this limit because they can plan their construction, reconstruction, or modification accordingly. For these reasons, and because the facility which represents the PM limit, at 0.16 lb/ton total facility PM control device emissions, is the highest emitting facility in the dataset

(and 1 of only a total of 4 steel facilities in the industry that produce only stainless steel), we do not think a subcategory is warranted.

The commenter is correct that the lb/ton limit does not take into account the different types of EAF mills, but the various types of steel and production have all been meeting the single concentration standard in subpart AAa (and AA) without issue in the many years since this limit was first set in 1975. Therefore, meeting a lb/ton standard based on the emissions of one third of the facilities in the industry that also are meeting the current standard will not be a problem. Whether a mill is batch or continuous, slow or fast, will not affect the total amount of PM emitted per amount of steel produced for each facility. When a batch process stops producing steel (*i.e.*, stops tapping steel), it typically also will stop emitting PM from the EAF. If PM emissions continue after the EAF has stopped processing scrap, or steel has stopped being tapped in a batch process, any “trailing” PM emitted is still a result of the steel that has just been produced. Therefore, this “trailing” PM should be included in the total PM catch for the test run.

Similarly, a continuous EAF process will emit PM as it continues to produce steel. And a relatively large amount of steel produced in a short time will also produce a relatively large amount of PM in a short period. The effect of dividing

the PM emitted by the tons of steel produced normalizes the different processes to a common lb/ton term.

Comment: Air-to-cloth (A/C) ratios from integrated iron and steel (II&S) industry were used instead of EAF data. The commenter asserted that the EPA offers no explanation why using II&S baghouse data was relevant to EAF baghouse controls in the first place or why the EPA presumed that relative rank placement of 5 facilities along a ranking of II&S baghouse A/C ratios allowed the EPA to presume those facilities’ PM emissions were based on control through a baghouse with the same A/C ratios. Moreover, the commenter asserts that the use of II&S data is inexplicable because the EPA has in its possession the A/C ratios for many plants with EAF. This information was available to the EPA in the rulemaking docket for the 40 CFR part 63, subpart YYYYY NESHAP for EAF, and the EPA even summarized the A/C ratios for the EAF baghouses that were operated during these performance tests.

The commenter continued to assert that the EPA’s derived average, median, minimum, and maximum A/C ratios are all incorrect. The derived A/C ratios misstate the actual A/C ratios reported by the 3 model facilities for which the EPA had actual performance test data (Model Plants A, B, and E). For instance, Model Plant E is the North American Stainless facility in Ghent, Kentucky (NAS-KY), which operates 4 baghouses.

For those 4 baghouses, the facility reported to the EPA A/C ratios of 4.1, 4.5, 4.5, and 5.0 ft/min—none of which are close to the EPA’s erroneously derived A/C ratio of 7.2 ft/min.

EPA Response: The EPA disagrees with the commenter’s assertion that the use of II&S data in lieu of the A/C ratios for plants with EAF is inappropriate. The EPA stated in the EAF NSPS proposal (87 FR 29718) that the reason for using more recent 2011 II&S baghouse data was because no A/C ratio data were available in the EAF PM test reports from 2010. Therefore, values for A/C ratios from CAA section 114 responses submitted in 2011 by the II&S industry for the risk and technology review for 40 CFR part 63, subpart FFFFF (85 FR 42074) were used in the EAF BSER PM cost analysis. The baghouses used for emissions from furnaces in the II&S industry are expected to be similar in operation as the baghouses used at EAF/AOD for the purposes of this analysis.

The baghouse A/C ratios from in the NSPS proposal based on II&S data submitted in 2011 for a CAA section 114 request were similar to those submitted in 2005 for another CAA section 114 request for the EAF NESHAP (40 CFR part 63, subpart YYYYY),¹⁴ as shown in Table 1. A quantitative comparison of the A/C ratios from the 2005 EAF NESHAP data to the II&S 2011 data is also shown in Table 1.

TABLE 1—COMPARING A/C RATIOS FOR 2011 II&S DATA V. 2005 EAF NESHAP

Model plant	A/C ratio (ft/min)		Comparing 2011 II&S A/C data to 2005 NESHAP data	
	2011 II&S	2005 EAF NESHAP		
A	1.3	1.4	– 7 percent	II&S lower.
B	2.9	2.2	32 percent	II&S higher.
C	4.0	3.0	33 percent	II&S higher.
D	4.9	4.5	9 percent	II&S higher.
E	7.2	6	20 percent	II&S higher.
Average			17 percent	II&S higher.

As the commenter points out, the 2005 EAF data does not include all of the facilities from the 2010 dataset. In addition, the 2005 data did not have A/C data for all the facilities’ baghouses, where there were multiple baghouses, and for some facilities the number of baghouses for each facility changed from 2005 to 2010.

In response to this comment, for the final rule, we re-examined the BSER analysis of total facility PM lb/ton steel from capture systems and fabric filters

using A/C ratios from the EAF 2005 CAA section 114 request that ranged from 1.4 to 6.0 ft/min. For Model Plant A, corresponding to Timken-Faircrest-OH, the A/C ratio in the 2005 CAA section 114 request (3.4 A/C) was higher than the 2011 II&S data point (at 1.3 A/C), but the A/C ratio derived using a regression analysis that produced the line of best fit from the 2005 CAA section 114 request data (at 1.4 A/C), is very similar to the II&S datapoint (1.3 A/C).

For Model Plant B, based on Timken-Harrison-OH, the A/C ratio from the 2005 CAA section 114 request (at 2.7 A/C) is very similar to the II&S data point (2.9 A/C) and also from a regression analysis that produced the line of best fit from 2005 (2.7 A/C).

For Model Plant E, based on NAS-KY, an average A/C ratio of 4.5 ft/min A/C was derived from the data reported to the EPA in 2010 (and also provided by the commenter). However, the A/C ratio of 6.0 assigned to the same emissions as

¹⁴ Docket ID No. EPA–HQ–OAR–2004–0083.

NAS-KY (0.16 lb/ton) derived from the curve of 2005 CAA section 114 data is

not much different than what was used in the EAF proposal (at 7.2 A/C) based

on II&S data. These values are shown in Table 2.

TABLE 2—COMPARING A/C RATIO DATA BETWEEN 2005 AND 2010 EAF DATA AND 2011 II&S DATA

Facility	Comparing 2005 to 2010 data	Model plant	A/C ratio (ft/min)			
			2011 II&S data	2005 EPA data	2010 EPA data	Curve using 2005 data
Timken-Faircrest-OH	Different baghouses	A	1.3	3.4	NA	1.4
Timken-Harrison-OH	Same baghouses	B	2.9	2.7	NA	2.2
NAS-Ghent-KY	Same baghouses	E	7.2	NA	4.5	6.0

In addition, the EPA used the data from the 2005 CAA section 114 request for the EAF NESHAP to add to the 2010 CAA section 114 request data used for the lb/ton BSER PM limit analyses for capture systems and fabric filters reported in the proposal in order to re-evaluate the proposed lb/ton BSER standard for capture system and fabric filter PM emissions. The 2005 EAF

emission data that was able to be converted to lb/ton values and also had A/C ratio data were used along with 2010 CAA 114 request data used to develop BSER for the proposal. A similar trend in PM lb/ton data was seen in the 2005 data as compared to 2010 data, as shown in Figure 2 below, with a lower maximum PM lb/ton value in the 2005 data.

The 2010 CAA section 114 request data used to develop the PM lb/ton standard for the proposal were matched to the A/C ratios in the 2005 CAA section 114 data for the NAS-Ghent-KY facility, to provide a total of 18 facilities in the dataset for PM lb/ton standard for capture systems and fabric filters for the final rule. See the memorandum titled *Cost Analyses to*

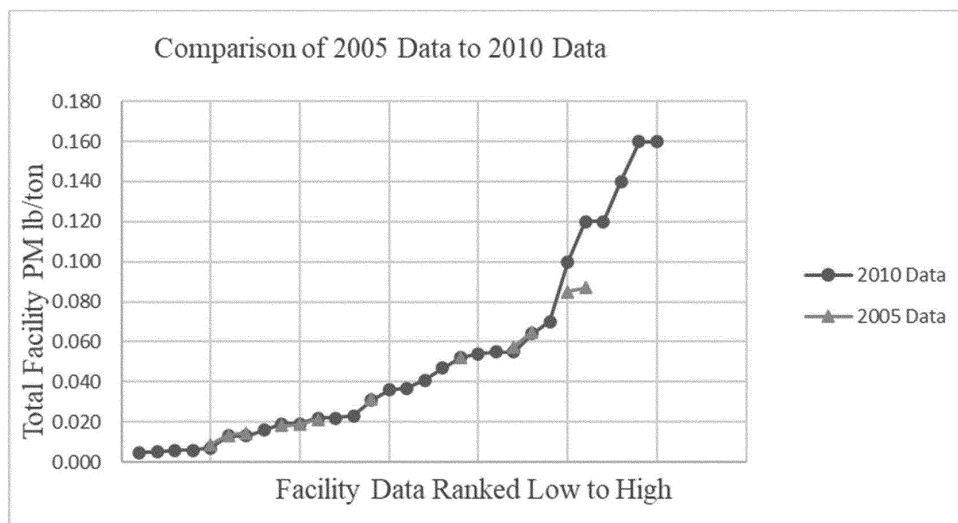


Figure 2. Comparison of 2005 and 2010 CAA Section 114 Request For Data for Total Facility Baghouse PM Emissions Per Mass of Steel Produced (lb/ton)

Determine BSER for PM Emissions and Opacity from EAF Facilities,¹⁵ as updated for the final rule, hereafter referred to as the “Cost Memorandum,” located in the docket for this rule. The results of the analyses of a PM limit that reflects BSER were similar between proposal and final producing the same PM 0.16 lb/ton limit for the BSER

¹⁵ *Cost Analyses to Determine BSER for PM Emissions and Opacity from EAF Facilities*. D.L. Jones, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, and G.E. Raymond, RTI International, Research Triangle Park, North Carolina. May 1, 2023; Docket ID No. EPA-OAR-2002-0049-0061.

capture system and fabric filter. See Table 3 for the combined 2005 and 2011 lb/ton data set using EAF A/C ratios and both 2005 and 2011 EAF submitted emissions data. Table 4 shows the results from the model plant analyses comparing the results for the 2 approaches. Note Model Plants E and F are both the highest emitting model plant in the proposal (using 2011 II&S A/C ratios) and final rule (Using 2005 EAF A/C ratios) analyses, respectively. Because Model Plants E and F are the highest emitting model plants, the EPA does not have a baseline with which to compare the costs and emission

reductions in order to develop average cost effectiveness values. However, the EPA’s determination of the BSER in this review is consistent with its determination of the BSER in the prior 40 CFR 60, subpart AAa rulemaking. And as noted elsewhere in this preamble, a third of the industry is already achieving the PM 0.16 lb/ton limit through application of that BSER, which demonstrates that the costs of meeting that limit are reasonable, and not exorbitant or excessive. See *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999) (“EPA’s choice will be sustained unless the environmental

or economic costs of using the technology are exorbitant.”); *Sierra Club v. Costle*, 657 F.2d 298, 343 (D.C. Cir. 1981) (the court is not inclined to “quarrel” with the EPA’s judgment that “forecasted cost was not excessive and did not make the cost of compliance with the standard unreasonable”); *Portland Cement Association v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975) (the inquiry is whether the costs of the standard are “greater than the industry could bear and survive”). Moreover, the

capital costs and annual costs associated with compliance with the PM 0.16 lb/ton limit are similar to, and in some cases lower than, the costs that the EPA found to be reasonable for implementing the BSER to meet the final opacity standard, discussed in section IV.B. See the “Cost Memorandum,” discussed earlier in this section, for details of both the canopy costs for the opacity limit and fabric filter costs for the PM limit. This further demonstrates that the costs of meeting the PM 0.16 lb/ton limit are

also reasonable for this industry, for all facility sizes. However, as shown in Table 4, the EPA does not find the incremental costs of achieving the more stringent standards evaluated through application of the BSER to be cost effective for any facility size. Accordingly, the EPA concludes that PM 0.16 lb/ton limit reflects the degree of emission limitation achievable through application of the BSER.

TABLE 3—COMBINED 2005 AND 2010 lb/ton EAF DATASETS WITH 2005 EAF A/C RATIOS

Count	2010 Zero opacity facilities	2010 lb/ton	2005 facility A/C (weighted average)
1	Timken-Faircrest-OH	1.3E-02	3.4
2	Nucor-Crawfordsville-IN	1.6E-02	3.2
3	Gerdau-Charlotte-NC	2.3E-02	2.2
4	Timken-Harrison-OH	3.6E-02	2.6
5	Nucor-Huger-SC	5.2E-02	2.6
6	CMC-Birmingham-AL	5.5E-02	3.7
7	CMC-Cayce-SC	6.4E-02	3.3
8	NAS-Ghent-KY	1.6E-01	4.5 (2010)
Count	2005 Facilities with P/S Baghouses	2005 lb/ton	2005 Facility A/C (weighted average)
1	Nucor-Norfolk-NE	8.7E-03	2.8
2	Nucor-Cofield-NC	1.3E-02	3.0
3	Nucor-Blytheville-AR	1.4E-02	3.0
4	Nucor Bar Mill-Plymouth-UT	1.8E-02	2.1
5	North Star Steel-St. Paul-MN	1.9E-02	2.0
6	Nucor Berkeley-Huger-SC	2.2E-02	2.6
7	IPSCO Steel-Axis-AL	3.2E-02	2.6
8	SMI Steel-Cayce-SC	5.8E-02	3.3
9	CMC/Struct Metals/SMI-Sequin-TX	8.5E-02	6.0
10	IPSCO Steel-Muscataine-IA	8.7E-02	5.1

TABLE 4—COMPARISON OF BSER MODEL PLANTS FOR SMALL, MEDIUM, AND LARGE EAF FACILITIES USING TWO DATASETS: 2005 EAF A/C RATIOS AND 2010 II&S A/C RATIOS, BOTH WITH 2010 EAF lb/ton DATA

Model plant ^a	Total controlled EAF PM emissions	EAF facility average production	A/C ratio (ft/min)		Cost for new baghouse		Incremental cost effectiveness compared to next lower-emitting model plant ^b
	lb/ton	tpy	Value	Basis	Capital \$	Annual costs \$/yr	
							delta\$/ton PM
Small Facility							
E	0.16	50,000	7.2	2011 II&S	\$796,912	\$341,981	\$13,340
F	0.16	50,000	8.0	2005 EAF	767,439	338,610	7,196
Medium Facility							
E	0.16	775,000	7.2	2011 II&S	4,778,920	2,045,443	12,197
F	0.16	775,000	8.0	2005 EAF	4,361,224	1,997,701	6,575
Large Facility							
E	0.16	3,450,000	7.2	2011 II&S	21,929,003	8,598,613	13,708
F	0.16	3,450,000	8.0	2005 EAF	19,839,154	8,359,718	7,390

^a Model Plants E and F are both the highest emitting model plants in the two datasets, where the A/C data for Model E is from II&S A/C data and for Model F the 2005 CAA section 114 responses are used for A/C data. Cost analysis values for Model E are the same as from proposal, with updates to reflect \$2022 for the final rule v. \$2020 that were used for the proposed rule.

^b The incremental cost effectiveness from Model Plant E to D in \$2022, at \$12,200/ton for medium-sized facility, is higher than the same comparison of the same model plants in \$2020, at \$8,500/ton, because of the increase in the values used in the cost estimate as a result of inflation and increase in interest rate from 3.5 percent to 7.5 percent from 2020 to 2022.

Comment: The commenter asserted that the change from a concentration to lb/ton limit complicates compliance and does not result in better control or greater assurance of compliance. The commenter stated the EPA's assertion that switching to a lb/ton standard will "result in better control and greater assurance of compliance" is incorrect. Under the current standards in NSPS subparts AA and AAa, compliance is readily demonstrated through EPA Method 5 monitoring of the stack on the primary control device/baghouse. This is a direct measurement of the filtering ability of the baghouse and evidence of compliance with concentration limits without all of the unnecessary variables the new rule introduces which are not directly related to emissions. Under the proposal, facilities subject to NSPS subpart AAb would be required to track tonnages produced during stack tests and match those to emissions data.

EPA Response: The commenter is correct that with a lb/ton standard, facilities subject to NSPS subpart AAb will be required to track tonnages produced during stack tests and match those to emissions data. However, this is already required in the current EAF NSPS (compare 40 CFR 60.274(i)(1), 60.274a(h)(1) with proposed and final 40 CFR 60.274b(h)(1)). The 31 facilities in the 2010 EPA/EAF data set were able to report steel produced during the testing. Therefore, we expect the entire industry to be able to do so.

The baghouse PM emission data in gr/dscf do not address the total emissions generated by a facility. The gr/dscf data can be influenced by increasing dilution air to the baghouse and is not directly related to steel production as PM emissions logically should be. Using concentration in gr/dscf to assess the filtering ability of baghouses can still be done at any time but it doesn't necessarily reflect the contribution of PM by the facility's steel production to the environment. In order to assess a facility's impact to the local environment, the general public would need to know the exhaust rates of every baghouse at a facility to determine the facility's PM emissions, whereas from lb/ton facility-wide data, the maximum amount of PM being emitted can be easily ascertained with only one steel production value and one facility-wide PM limit.

Comment: The commenter asserted that the lb/ton limit does not consider vendor guarantees on control systems. The commenter stated it is critical to obtain vendor guarantees from suppliers when constructing new facilities or EAF and associated control systems, to ensure that the purchased equipment

can comply with applicable standards. Vendors can guarantee that the filters/control device have a specific removal rate (*i.e.*, vendors can only guarantee the difference between the clean and dirty side of the bag). Obtaining such guarantees is what gives facilities comfort that the equipment they purchase will perform such that compliance is assured. The commenter stated that such comfort is not possible with the Agency's proposed "facility-wide" PM limit, because vendors do not offer lb/ton guarantees for specific equipment and certainly not on a facility-wide basis. This is understandable given a supplier's ability to design equipment to a given concentration or control specification, but lack of ability to control the many factors that influence lb/ton efficiency, especially where a vendor may not be the sole facility-wide designer. Vendors have no control over the tonnage of steel produced or how the steel tonnage estimate comports with the duration of the PM measurement. The commenter concluded the EPA should take this into account by setting a concentration-based emission standard and noted that the EPA has previously acknowledged the importance of being able to obtain vendor guarantees when setting the NSPS subpart AAa limits in 1984 (49 FR 43840). The commenter stated that it would thus be arbitrary and impermissible for the EPA to ignore that consideration here.

EPA Response: Vendors can continue to use gr/dscf to assess the filtering ability of a baghouse, especially since the NESHAP for EAF (40 CFR part 63, subpart YYYYY) still requires gr/dscf determinations. In addition, the calculation of PM concentration in gr/PM/dscf is an intermediate step in the calculation of lb PM/ton steel emission rate: concentration (gr/dscf) * flow rate (dscf) = emission rate, as PM in lb/hr; then divide by tons per hour steel for lb PM/ton steel format. Moreover, evaluating the impact of a new facility (or reconstructed or modified facility) under the NSPS subpart AAb, in terms of PM emissions on the surrounding communities, is more easily determined from a lb/ton limit and overall facility steel production. With a lb/ton limit, not only must a new facility determine that their baghouses are working properly, but they must also determine whether the facility is being efficient in its generation of PM at the desired production level compared to the best facilities operating at the same production level.

Comment: A commenter noted that EAF National Emission Standards for Hazardous Air Pollutants (NESHAP) 40

CFR part 63 subpart YYYYY requires concentration limits. The commenter stated the maximum achievable control technology (MACT) standard in the NESHAP for EAF (40 CFR part 63, subpart YYYYY) independently limits PM emissions from each EAF to 0.0052 gr/dscf. The proposed NSPS would thus have the result of subjecting facilities to both a lb/ton limit (via NSPS) and a concentration limit (via NESHAP). Since facilities will still have to track gr/dscf anyway to comply with NESHAP limits, it would be inefficient and unreasonable to also require a lb/ton limit.

EPA Response: The applicability between the NSPS and NESHAP are different. All existing EAF facilities will continue to meet the gr/dscf PM limit in the NESHAP. Only new, reconstructed, or modified EAF or AOD units and their control devices need to meet both the lb/ton PM total facility limit that is being finalized in NSPS subpart AAb along with the NESHAP's individual baghouse limit. As discussed in previous responses to comments in this section, the data needed to show compliance with both standards are obtained in the same test. The combination of the two standards results in the public and regulators being able to more accurately evaluate EAF operation and the potential impact of new facilities on surrounding communities because the rules together limit total facility PM emissions impacts while checking individual control device operation. Facilities subject to the NSPS subpart AAb, and their vendors can continue use the gr/dscf limit to troubleshoot baghouse operation just as facilities have done in the past.

For facilities that modify or reconstruct after May 16, 2022, only the EAF(s) or AOD(s) and the air pollution control equipment that were modified or reconstructed after May 16, 2022, must comply with NSPS subpart AAb. This provision has been added to the rule at in 40 CFR 60.271b under the definition of "Electric arc furnace facility." If there are capture systems and control devices that capture PM emissions from sources subject to NSPS subparts AA or AAa at the same site where there are also sources subject to NSPS subpart AAb, the procedures described in the rule at 40 CFR 60.275b(b) include any one of the following options (see also 40 CFR 60.276b(l) to determine compliance: use the combined emissions; use a method that is acceptable to the Administrator or delegated authority and that compensates for the emissions from the facilities not subject to the provisions of

this subpart; or any combination of the above methods.

3. What is the rationale for the final BSER determination and what is the final standard of performance?

The EPA is finalizing the proposed determination that the BSER for EAF and AOD is capture and control of PM with a fabric filter. The EPA is further finalizing the proposed determination that limit based on the BSER at 0.16 lb/ton total facility PM is achievable for any new, modified, or reconstructed facility because it is based on the EPA's data from approximately one third of the industry. The format of the limit based on BSER (total facility lb PM/ton steel produced from all affected capture systems and fabric filters) provides complete information on the performance of the facility and their EAF rather than that of just the individual baghouse(s) and individual EAF via a concentration based standard, and enables the public and regulators to know the total pollutant impact of the facility's EAF operation on the surrounding community. The current concentration-based limit in NSPS subparts AA and AAa is influenced by the amount of dilution air in the exhaust going through the baghouse, which can be adjusted to some extent by the facility without significant detriment to baghouse operation. Evaluating the impact of PM emissions from a new EAF facility (or reconstructed or modified facility) on the surrounding communities is more easily determined from a facility-wide lb/ton limit. With a lb/ton limit, not only must a new facility determine that their baghouses are working properly, but they must also determine whether the facility is being efficient in its generation of PM at the desired production level compared to the best facilities operating at the same production level. In addition, the total facility lb/ton PM limit provides an overall assessment of emissions from the facility in a format that scales emissions to production, which is based on fundamental engineering principles. The current concentration-based limits in NSPS subparts AA and AAa do not limit the air flow or the number of baghouses that could be used to comply with the standard.

Based on data from 31 EAF facilities (more than one third of the industry), all 31 facilities' baghouse emissions are 40 percent or lower than the current concentration-based limit in 40 CFR part 60, subparts AA, AAa. Therefore, the 0.16 lb/ton production-based limit based on these same data is a significant improvement in emissions control compared to the current standard.

Moreover, because the lb/ton limit is the highest level in the EPA data set that includes one third of the industry, the standard that the EPA has determined to reflect the application of the BSER technology is achievable.

Lastly, we used both 2005 EAF PM data with EAF 2005 A/C data, and 2010 EAF PM data with 2005 EAF A/C data for the cost analysis to determine BSER for the EAF lb/ton PM standard, and reached the same conclusion as we did for proposal with 2010 EAF PM data and 2010 II&S A/C data. Therefore, in this final rule, the use of a capture system and fabric filter was determined as the BSER. The PM limit based on BSER of 0.16 lb PM/ton steel facility-wide was derived from the data available to the EPA, which comprised approximately one third of the industry, and also where the EPA considered costs, nonair quality health and environmental impacts, and energy requirements (described below in sections V.A and V.B).

4. Are there any relevant energy impacts or nonair quality health and environmental impacts of the selection of the final BSER and, if so, how were the final emission limitations based on BSER affected?

The EPA did not identify any relevant energy impacts or nonair quality health and environmental impacts of the proposed or final standards for PM emissions from EAF and AOD control devices (baghouses). See sections V.A and V.B. of this preamble for details. No comments were received on these issues.

B. NSPS Requirements for Opacity From Melt Shops for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022

1. What did we propose as the BSER determination and standard of performance?

We proposed that VE from EAF and AOD that exit from the melt shop would be limited to an opacity of 0 percent during all phases of operation, based on the determination of BSER as the addition of a partial roof canopy to capture and control melt shop fugitive emissions.

2. What significant comments did we receive and what are our responses?

Comment: One commenter asserted that the proposed 0 percent melt shop opacity limit disregards workers' safety by requiring the closure of roof and buildings. Specifically, the commenter stated the proposed 0 percent melt shop opacity limit disregarded workers'

safety related to heat stress and material handling activities and that, therefore, the EPA should reconsider the 0 percent opacity limit. The commenter stated the proposal did not include an analysis of impacts for closure of building openings. A review of the impacts on worker heat stress would be necessary and that the EPA had provided no justification for requiring melt shops to close all openings.

The commenter noted the current proposed rule did not address heat stress concerns, which was in conflict with OSHA's current Heat Stress Initiative and National Enforcement Program that identified "iron and steel mills" specifically as a high hazard industry for heat stress. The commenter stated that safe melt shop operation requires air flow to minimize potential heat stress on workers and equipment. The commenter claimed that negative pressure alone was not sufficient to maintain proper airflow through the melt shop and that cross drafts were necessary and doors and other access points needed to be open. The commenter also had significant concerns about employee health impacts from the proposed totally enclosed melt shop, particularly for its Mobile, Alabama facility, which is located in an extreme climate area, as the proposed changes could cause greater heat stress on employees and would necessitate design and structural changes that the EPA failed to consider in its proposal. The commenter stated that 100 percent capture and 0 percent opacity may not be safe. The commenter noted when evaluating 2 different control systems, the EPA may not simply choose the most cost-effective air pollution control system if it potentially has adverse impacts on the health and safety of workers within the melt shop. The commenter stated that facilities need to allow air changes to protect worker health and safety.

The commenter referenced the 1984 amendments, which dismissed the option for a closed roof configuration to achieve 0 percent opacity due to the impacts of heat stress on worker safety and equipment functioning. A commenter said that statements made by the EPA in the 1984 40 CFR part 60, subpart AAa rulemaking (49 FR 43841) that "the visible emission limits were selected-based on the performance of the capture and control technologies that served as the basis for Regulatory Alternative B (partially open roof monitor)" and that "Regulatory Alternative C (closed roof) was not considered suitable as the basis for national standards of performance because it is based on a closed roof

configuration which may aggravate worker and equipment heat stress problems.”

EPA Response: The proposed rule 40 CFR part 60, subpart AAb did not require a closed roof nor a totally enclosed melt shop. In addition, the 0 percent shop opacity limit does not restrict air flow from exiting or entering the shop. Rather, the 0 percent opacity limit merely necessitates that no visible particles be emitted from the shop (as reflected by either no VE observations via EPA Method 22 or opacity of 0 percent using EPA Method 9 or the DCOT method). Canopy hoods have the benefit of being able to collect a large volume of emissions, especially those during charging and tapping and route the PM to control devices. Therefore, the basis for the addition of a partial roof canopy with a canopy hood used in the proposed and final cost estimates is to ensure facilities clean the air of particles before allowing the air to exit the shop opening(s). We believe a capture device such as a canopy hood, as opposed to a closed roof, can be used to meet the opacity limit based on BSER and does not endanger worker safety.

Comment: The commenter asserted that the EPA used a limited data set that was not indicative of continuous long-term performance and did not support a finding that 0 percent opacity was adequately demonstrated. The commenter stated the EPA’s dataset for EAF steel mills is selective and not representative of the full scope of operations at these facilities. The commenter stated that the EPA purported to have based the proposed 40 CFR part 60, subpart AAb shop opacity limit on individual performance testing reports from a total of 13 of 31

EAF steel mills, which was less than half. The commenter noted that most facilities (16 out of 31) were unable to maintain 0 percent shop opacity throughout the duration of the performance tests. Thus, as the majority of facilities in the EPA’s database did not maintain 0 percent opacity, the short duration of performance testing plainly demonstrated that 0 percent shop opacity was not adequately demonstrated.

Another commenter stated the EPA’s proposal of 0 percent opacity from the melt shop was based on limited information from opacity tests conducted at 31 facilities, of which less than half achieved the 0 percent melt shop opacity requirement. The commenter stated that the short-term observations conducted during a stack test were taken for a few hours under a specific set of conditions and were not representative of long-term compliance capability and, as such, could not account for routine operating variability and the full range of operating conditions that may affect opacity. The commenter stated that the subset of data the EPA relied upon did not include longer-term operating performance of the identified mills; yet NSPS, as defined by BSER, must account for what was achievable and adequately demonstrated by a wide variety of facilities operating under a wide variety of conditions, not simply show that the standard was achieved at a model plant for a short period of time. The commenter also noted that the data collected by the EPA generally showed that the more years of opacity data reviewed for a given facility, the higher the maximum melt shop opacity.

EPA Response: Thirteen facilities out of the 31 EAF facilities in the EPA data set had 0.00 percent shop opacity during the tests which were reported to the EPA. Two additional facilities in the EPA data set achieved 0.00 percent shop opacity as shown in the submitted test reports and another 4 facilities achieved 0.0 percent as shown in the submitted test reports, for a total of 19 facilities appearing to already be complying with a 0 percent shop standard (1 significant figure) based on tests in the submitted reports, and which were performed using the same test method that would be required to show compliance with the NSPS. Out of the total 31 facilities in the EPA EAF data, only 1 facility had shop opacity greater than 1 percent as an average of all runs in the test, with the overall average among the 31 facilities in the EPA data set at 0.14 percent opacity. See the list of 31 EAF facilities and the opacity test results from reports submitted to the EPA in the 2010 EPA/EAF data set, as shown in Table 5. None of the opacity data submitted to the EPA in 2010 should be construed as being from a “model plant.” The opacity data was taken from facilities responding to the CAA section 114 information request with the primary purposes to obtain mercury emissions data and were real facilities, comprising a third of the industry. Data for PM and opacity were collected as part of the CAA section 114 information request only for purposes of showing that the reported mercury data were taken during the time the facility was complying with both the NESHAP (40 CFR part 63, subpart YYYYY) and NSPS (40 CFR part 60, subparts AA and AAa).

TABLE 5—RANGE OF MELT SHOP OPACITY IN 31 EAF TEST REPORTS (2005–2011) FROM THE 2010 CAA SECTION 114 REQUEST
[2010 EPA/EAF Data Set]

Count	Facility ID	Melt shop opacity (percent)
1	AKS-Butler-PA	0.000
2	AKS-Mansfield-OH	0.000
3	CMC-Birmingham-AL	0.000
4	CMC-Cayce-SC	0.000
5	CMC-Mesa-AZ	0.000
6	Ger-Charlotte-NC	0.000
7	Ger-Jackson-MI	0.000
8	NAS-Ghent-KY	0.000
9	Nuc-Crawfordsville-IN	0.000
10	Nuc-Huger-SC	0.000
11	Nuc-Jewett-TX	0.000
12	Nuc-Marion-OH	0.000
13	SSAB-Axis-AL	0.000
14	Tim-Faircrest-OH	0.000
15	Tim-Harrison-OH	0.000
16	Nuc-Darlington-SC	0.001
17	Ger-Knoxville-TN	0.01
18	Ger-StPaul-MN	0.02

TABLE 5—RANGE OF MELT SHOP OPACITY IN 31 EAF TEST REPORTS (2005–2011) FROM THE 2010 CAA SECTION 114 REQUEST—Continued
[2010 EPA/EAF Data Set]

Count	Facility ID	Melt shop opacity (percent)
19	Nuc-Plymouth-UT	0.05
20	CMC-Seguín-TX	0.10
21	Ger-Wilton-IA	0.10
22	Ger-Jacksonville-FL	0.10
23	Ger-Jackson-TN	0.20
24	Alle-Brackenridge-PA	0.20
25	Nuc-Cofield-NC	0.20
26	Alle-Latrobe-PA	0.30
27	Nuc-Blytheville-AR	0.30
28	Nuc-Norfolk-NE	0.30
29	Ger-Beaumont-TX	0.50
30	Ger-Cartersville-GA	0.80
31	Ster-Sterling-IL	1.2
	Overall average	0.14

It would be exorbitantly expensive to the industry (as well as the EPA) for the EPA to request and analyze round-the-clock opacity testing throughout the course of years at a number of facilities in order to obtain data during a “wide variety of conditions and wide variety of facilities.” None of the opacity requirements in previously promulgated rules (40 CFR part 60, subparts AA and AAa) have differentiated conditions or facility types for the opacity requirements in those rules. The commenter does not provide any information showing that the need for these data is justified, except for alluding to the fact that facilities improved their control of opacity in more recent years.

The goal of determining BSER is that it is the “best” system of emission reduction (considering costs and other factors), not the system used by the majority of the industry nor the top facilities when ranked or any other ranking method. However, the EPA acknowledges that the data obtained through CAA section 114 requests consisted of data collected during melting and refining, which is the time period required to test opacity in the current EAF NSPS rules in 40 CFR part 60, subparts AA, AAa. Therefore, in light of comments provided by the industry that reducing opacity during charging and tapping is difficult to achieve because of the physical structure of equipment and because of the much higher PM emissions during charging and tapping than during melting and refining, in the final rule for 40 FCR part 60, subpart AAb we are maintaining the current rule limit in 40 CFR part 60, subparts AA, AAa of 6 percent opacity to apply during charging and tapping, and retaining the

proposed 0 percent melt shop opacity for melting and refining. We estimate that the period of charging and tapping is approximately 15 percent of the total EAF operating time period.

Comment: The commenter asserted that the EPA’s limited data set is not representative of performance during “charging and tapping”; 0 percent opacity should not apply to charging and tapping. The commenter stated the EPA’s opacity data set did not adequately demonstrate that a 0 percent opacity limit could be consistently achievable across the full spectrum of expected operating conditions. The commenter said the vast majority of the opacity measurements in the data set were based on measurements taken during the melting and refining stage of production (as required under 40 CFR part 60, subpart AAa), and thus did not demonstrate that 0 percent opacity had been consistently achieved during charging or tapping, which was the established period with the greatest potential for uncaptured emissions to escape the melt shop. The commenter noted that most EAF steel mills were designed such that the primary emission controls (DEC) could not be engaged while the furnace roof was off during charging and tapping.

A commenter referenced previous rulemaking to corroborate their statements that the EPA did not consider its own historical information. One commenter referred to background documents for earlier NSPS rulings stating that in those documents, the EPA concluded that facilities utilizing DEC were likely to have a visible plume during charging and tapping and could not meet 0 percent opacity on a continuous basis. One commenter referenced the 1983 rulemaking docket

stating it included only 7 hours of shop opacity data from some portion of the charging and tapping phase, and that such limited data from 4 decades ago was not representative of, or sufficient to, characterize current melt shop operations. The commenter said these previous findings by the EPA contradict the current proposal that 0 percent opacity was achievable on a continuous basis.

A commenter provided confidential summaries of long-term shop opacity data from the 13 facilities identified by the EPA as achieving the 0 percent standard, and noted that most of the opacity data was collected only during melting and refining, and not during charging and tapping. The commenter stated their summaries demonstrated that 0 percent melt shop opacity was not continuously achieved by the 13 mills cited as exemplars. The commenter noted in a reference that they would readily provide the confidential data to the EPA upon request.

A commenter stated that the current design at their facilities included DEC and a baghouse with a canopy, which under the proposed rule was considered the optimal design, yet it appeared the EPA did not include opacity data from their facilities in the limited data set. The commenter noted they fully complied with current limits in 40 CFR part 60, subparts AA, AAa, including opacity; but their facility data showed that compliance with a 0 percent opacity limit at all times per the proposed standard could not be met continuously due to the production process variability and the raw material inputs. The commenter stated it was possible for the melt shop to experience an opacity greater than 0 percent during charging and tapping when the DEC

system was disengaged, and there were other sources of opacity from concurrent operations (e.g., vacuum tank degasser operations, the LMF, and the Caster).

A commenter said the EPA in the proposed rule stated 0 percent opacity could be achieved utilizing a canopy

over the furnace with an open roof monitor elsewhere. The commenter operated its facilities under such a configuration and did not meet 0 percent opacity on a continuous basis; thus, the EPA's data set was flawed and

not representative of the steel manufacturing operation.

EPA Response: The EPA reviewed the summary data provided by the commenter, where for three facilities, the opacity summary data shown in Table 6 were provided.

TABLE 6—SMA DATA ON OPACITY FROM THREE FACILITIES

SMA facility No.	Number readings >0 percent opacity	Total number opacity readings	Percent >0 percent out of all readings	Year of data
1	3	349	0.9	2021
	0	296	None	2020
	11	294	3.7	2019
2	21	1,482	1.4	2021–2022
3	61	2,488	2.5	2021–2022

Although the commenter presented these data attempting to contradict 0 percent opacity as BSER, the data actually support the preponderance of opacity data at 0 percent, since the number of readings greater than 0 percent were low, ranging from none (i.e., no readings greater than 0 percent) to a high of 3.7 percent, out of a total number of readings ranging from 300 to 2,500.

The EPA's evaluation of the degree of emission limitation achievable with the BSER is not based on an average of all facility data nor an average of the best facilities. Rather, the BSER is the *best* system of control that the EPA determines is adequately demonstrated for EAF in the industry, and the EPA's charge under CAA 111(a)(1) and (b)(1)(B) is to establish a standard of performance that reflects the degree of emission limitation achievable by application of that BSER.

The EPA EAF data, taken mostly from the 2010 CAA section 114 request, required "an aggregate total of 180 minutes of opacity observation concurrent with PM and/or PM less than 2.5 micrometers (PM_{2.5}) testing of EAF primary control devices." The commenter stated that charging time is less than 1 minute to 3 minutes per charge, and tapping is 4 to 6 minutes, so it is not surprising that most of the time opacity was measured during melting and refining.

However, we agree with the commenter that because the current EAF NSPS rules in 40 CFR part 60, subparts AA and AAa only require opacity measurements during melting and refining, the data obtained by the EPA can be assumed to reflect only operation during melting and refining. Therefore, while we are retaining 0 percent opacity during melting and refining in the final rule as in the

proposal, we are reverting back to the opacity limit of 6 percent opacity for charging and tapping as in the current rules in 40 CFR part 60, subparts AA, AAa.

Additionally, opacity testing during charging, tapping, and melting, and refining periods is required in the final rule. Opacity tests during tapping, and melting and refining periods should be able to meet the minimum 6 minutes of total opacity testing required under EPA Method 9 in 24 consecutive tests for 15 seconds each. However, we are allowing a modification of EPA Method 9 for testing during charging because of the potentially shorter time period that charging occurs. In the final rule, we are allowing the EPA Method 9 testing during charging to be determined from the average of 12 consecutive observations recorded at 15-second intervals for a total of 3 minutes of opacity testing.

Comment: The commenter asserted that the EPA did not properly evaluate the cost of compliance with 0 percent opacity for a source as a result of modification.

EPA Response: The commenter was not specific as to what type of modification needed to be evaluated for its costs to comply with the proposed opacity standards. A modification that triggers applicability of an NSPS is a modification that increases emissions and meets the requirements in 40 CFR 60.14. Without knowing which type of modification is in question, it is difficult to compare the costs of compliance and address the commenter's concern. A facility may be adding another baghouse to accommodate increased production of the EAF. In this case, the modification (additional baghouse) is outside of the melt shop and, therefore, is not affected by the melt shop standard. If a facility is modifying an

EAF to increase production, pursuant to 40 CFR 60.14 (e), an increase in production rate of the existing EAF is not considered a modification if that increase can be accomplished without a capital expenditure on that facility. The partial roof canopy determined to be BSER for the melt shop is a type of capture device that can be added to any melt shop. However, the final rule does not require that a partial roof canopy be installed to be in compliance with the opacity standard. Affected sources can seek other methods to achieve the melt shop opacity.

Comment: In regard to canopy hood control costs, a commenter stated the EPA did not examine advances in control technologies, process operations, design or efficiency improvements, or other systems of emission reduction, that are "adequately demonstrated." Rather, the EPA looked to a decades-old BID, concluded that "[c]anopy hoods are a common method of controlling fugitive EAF emissions," and assessed costs for: adding a partial roof canopy (segmented canopy hood, closed roof over furnace, open roof monitor elsewhere) to collect PM emissions that might otherwise escape through the shops to achieve complete control of melt shop fugitives.

The commenter stated the EPA did not analyze whether canopy hoods were used by the 19 facilities that recorded 0 percent opacity during performance testing or were absent from the 9 facilities that recorded the highest opacity during performance tests. The commenter claims that this information was available to the EPA in the docket for the 40 CFR part 63, subpart YYYYY NESHAP for EAF—the same docket that supplied the majority of the performance test data the EPA used in this rule. The commenter further asserted that the EPA's own review of

the survey responses in the 40 CFR part 60, subpart YYYYYY docket in June 2005 shows that the EPA knows that canopy hoods were used to capture fugitive emissions from 32 of the 38 EAF described in the CAA section 114 survey responses, and that the presence or absence of a partial roof canopy did not determine whether the facilities responding to the survey could achieve 0 percent opacity. Therefore, the EPA has no basis to now conclude for purposes of demonstrating achievability and cost effectiveness that the singular act of installing a partial roof canopy will “achieve complete control of melt shop fugitives.”

A commenter stated the EPA’s conclusion is also contradicted within the Agency’s cost analysis. In order to estimate how much PM is emitted from a facility that emits 6 percent opacity, the EPA used the 1982 BID [*Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels in Steel Industry—Background Information for Proposed Standards. Preliminary Draft.* June 1982, Table 3–7 at 3–37; and the 1983 BID (*Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels in Steel Industry—Background Information for Proposed Standards.* (EPA–450/3–82–020a) July 1983; Table 3–7 at 3–37] to estimate that EAF emit an average of 29 lb/ton of uncontrolled PM emissions. The EPA then relied on the 1982 [and 1983] BID again to estimate that facilities emitting 6 percent opacity captured 90 percent of those emissions using a “segmented canopy hood, closed roof over furnace, open roof monitor elsewhere.” This is the exact fugitive emission capture technology that the EPA’s Cost Analysis presumes facilities with greater than 0 percent opacity can install to achieve 0 percent opacity. In other words, the EPA’s *Cost Analysis* assumes that facilities with a “segmented canopy hood, closed roof over furnace, open roof monitor elsewhere” are emitting 6 percent opacity and if those facilities install a “segmented canopy hood, closed roof over furnace, open roof monitor elsewhere” they will achieve 0 percent opacity. Commenter stated because it is arbitrary and unreasonable to assume that facilities will be able to achieve 0 percent opacity by doing nothing more than install the same systems that facilities already have installed without reaching 0 percent opacity, the EPA has failed to provide a cost estimate rationally related to reduction of opacity from 6 percent to 0 percent.

EPA Response: Canopy hoods have been in use for many years in many industries and are still in use today. The

costs to install a partial roof canopy to enhance control of EAF melt shop fugitives was taken from relatively recent rulemakings (2011 through 2018¹⁶) for the Ferroalloys industry, which also uses EAF. The 1984 EAF BID was used only to estimate uncontrolled EAF shop emissions in the proposal because there is no estimate available of uncontrolled emissions due to the fact that most, if not all, EAF facilities, especially those subject to the EAF NSPS subparts AA and AAa, have some type of control of shop emissions, *e.g.*, DEC systems; canopy hoods, side draft hoods, and tapping hoods; partial or total enclosures; scavenger duct systems; and building evacuation systems (72 FR 53818). Even if a total uncontrolled melt shop could be found, it is not a typical source test to measure emissions from a large opening such as a roof vent or an industrial door, nor does the EPA generally have the resources to perform such a test.

If some EAF facilities with canopy hoods are not achieving 0 percent opacity, as the commenter alleges, it is likely because both the NESHAP (40 CFR part 63, subpart YYYYYY) and NSPS standards (40 CFR part 60, subparts AA, AAa) currently only require 6 percent opacity limits for EAF and AOD, and because the standard is higher, they are only being designed to meet that standard. Regardless of the fact that some EAF and AOD facilities may have been designed this way, they still can be designed or modified to achieve 100 percent capture to ensure 0 percent opacity. The fact that some hoods have not been achieving 100 percent capture at some facilities is not proof that canopy hoods cannot be used to do so for new, modified, or reconstructed sources. The commenter fails to provide a technical basis for why canopy hoods cannot be designed to achieve 0 percent melt shop opacity.

Out of 31 EAF facilities in the EPA EAF dataset with opacity data, 13 facilities achieved 0.000 percent shop opacity. Two additional facilities achieved 0.00 percent shop opacity, and another 4 facilities achieved 0.0 percent, for a total of 19 facilities able to comply with a 0 percent shop standard. Out of the total 31 facilities in the EPA EAF data, only 1 facility had shop opacity greater than 1 percent as an average of all runs in the test, with the average of all 31 facilities at 0.14 percent opacity (a value that would round down to 0 percent under the NSPS). See the

¹⁶ See <https://www.epa.gov/stationary-sources-air-pollution/ferromanganese-and-silicomanganese-production-national-emission-for-information-regarding-Ferroalloys-rules>.

“Emissions Memorandum,” discussed earlier in this section, for more information about these data.

The addition of a canopy hood or alteration of existing hoods to achieve slightly better capture is within reach by a facility achieving less than 1 percent opacity but greater than 0 percent. The scenario of installation of a canopy hood in the melt shop is used in the cost analysis to represent one method that is lower in cost and can be used to achieve the standard of performance if an existing source that is not currently achieving 0 percent melt shop opacity were to modify or reconstruct and become an affected facility under 40 CFR 60, subpart AAB.

Comment: A commenter stated melt shop partitions of the size necessary to meaningfully contain EAF emissions within the melt shop are not feasible in many mills given other equipment and shop design, including cranes. In particular, sizable partition walls are not feasible at many EAF steel mills because they will interfere with overhead cranes that transport scrap metal to the furnace. Similarly, transfer ladles that are carried by crane to and from the furnace for tapping molten metal would be blocked by partition walls.

The commenter said for existing facilities that may trigger an NSPS modification in the future, achieving 0 percent shop opacity would require extensive re-engineering that would be costly and introduce practical and worker safety concerns as well. For example, one [trade] association member stated that 0 percent shop opacity could only be achieved, if at all, with near total enclosure of the EAF and doubling the flow rate of the emission control system. The commenter stated that only very short (and therefore marginally effective) partition walls could be installed above the crane because of the lack of space between the crane and the roof. They also noted that such short partitions deteriorated quickly due to the heat and other elements. Thus, to increase the size and collection efficiency to meet a 0 percent opacity requirement, the facility would have to raise the roof of the structure at an undetermined cost (a cost that likely would trigger a “major modification”), and potentially enclose the entire monovent, which would likely create worker safety and heat stress issues.

The commenter added, facilities would have to increase the number and volume of fans to the baghouse, as well as require new or additional fans in the shop and additional baghouses because the facility’s current baghouses are operating at close to maximum capacity. Moreover, for servicing, cranes have to

be moved to a different part of the melt shop due to the partitions being so close to the top of the cranes. To achieve compliance, existing facilities such as these also would have to enclose the large openings in the casting area to prevent winds from blowing through the shop or wall off the EAF operations. Neither option is feasible; melt shops are typically long buildings with EAF, LMS, and casting in the same structure.

EPA Response: The cost analysis for new, modified, or reconstructed EAF to achieve 0 percent opacity is based on a “partial” canopy hood and not “partition walls,” as the commenter suggests, that would interfere with overhead cranes. In regard to the comment that “costly and impractical re-engineering to achieve 0 percent shop opacity that could only be achieved, if at all, with near total enclosure of the EAF that doubles the flow rate of the emission control system,” there are 19 EAF facilities in the EPA EAF dataset that demonstrated with data from 2010 that they were capable of complying with a 0 percent melt shop opacity standard (which we assumed was during melting and refining) and, therefore, belie this concern. And because only 1 facility among the 31 facilities in the EPA EAF dataset had shop opacity greater than 1 percent as an average of all runs in the test, the addition of a canopy hood may be unnecessary and only alteration of the operation of existing hoods may be needed to achieve slightly better capture to achieve 0 percent melt shop opacity during melting and refining. This shows that meeting a new NSPS standard of 0 percent melt shop opacity during melting and refining is within reach by most if not all existing EAF facilities, so is even more likely achievable in any new facility.

In actuality, it is not likely that all current EAF facilities in the industry will need to comply with 40 CFR part 60, subpart AAb, which would only be applicable to new EAF facilities or, for existing facilities, if the result of any future modifications or reconstruction increased emissions and met the provisions in 40 CFR 60.14 for modifications and 40 CFR 60.15 for reconstruction, respectively.¹⁷ Whether or not the modification or reconstruction planned at the facility would also trigger permitting requirements because it is a “major”

modification under the permitting regulations is not relevant to the EPA’s determination of the BSER. Moreover, the EPA does not agree that it is likely that the construction of the canopy will itself be considered a major modification that triggers permitting requirements. The issue here is whether to meet the revised limit an existing source that modifies needs to raise the roof structure to install equipment to meet the standard. The EPA response to this issue is that it is not required to raise the roof structure so as to be able to install equipment, and we have no knowledge (and the commenter has not provided information showing) that raising the melt shop roof has ever having been done to meet a lower opacity, such as 0 percent.

3. What is the rationale for the final BSER determination and what is the final standard of performance?

We established in the proposal (87 FR 29717–29718) that the use of a canopy hood above the crane rails, while not required to achieve 0 percent melt shop opacity during melting and refining, is a cost-effective method that can be used to do so, with cost effectiveness estimated at \$1,700 per ton PM removed in 2022 for a medium-sized facility, annual costs of the canopy, at \$1.1 million per year, and with PM reduction of 684 tpy at a medium facility achieving 0 percent melt shop opacity during melting and refining and 6 percent during charging and tapping, as compared to 6 percent opacity at all times. Analyses performed for small and large EAF melt shops produced similar cost-effectiveness values, at \$1,800 per ton PM removed and \$1,700 per ton PM removed, respectively. The values of \$1,800 per ton or less are considered cost effective and, therefore, the use of additional canopy hoods above the crane rails is considered BSER for melt shop opacity for new EAF/AOD using this approach. (See section III.A.1.a of this preamble).

The performance data obtained by the EPA for 31 facilities show that 13 facilities achieved 0 percent opacity during melting and refining and the other 17 achieved very low values of opacity so that the overall average melt shop opacity from all 31 facilities was 0.14 percent. Therefore, considering that the costs are achievable even without the addition of a canopy hood, we conclude the 0 percent opacity is the standard of performance that reflects the degree of emission limitation achievable with application of the BSER for melting and refining.

We also concluded that full enclosure is not needed to achieve 0 percent melt

shop opacity during melting and refining. The EPA acknowledges that facilities need sufficient capture ventilation to collect melt shop PM emitted as fugitives, but this does not necessarily require a fully enclosed melt shop, as seen in the data from EAF facilities in 2010 test reports obtained by the EPA where 0 percent opacity was achieved.

Because we do not have sufficient data to show that 0 percent melt shop opacity is achievable during charging and tapping to refute industry’s assertion that 0 percent melt shop opacity is not achievable during charging and tapping, nor are these data likely available anywhere else, the final rule retains the current 6 percent NSPS limit for charging and tapping in 40 CFR part 60, subparts AA, AAa, and adds to the final rule for 40 CFR part 60, subpart AAb a testing requirement during these periods along with the requirement to test during melting and refining that is already required for facilities in operation on or before May 16, 2022. Note that the test method protocol for measuring opacity during charging has been modified for the final rule, as discussed in section V.B.1 of this preamble.

4. Are there any relevant energy impacts or nonair quality health and environmental impacts of the selection of the final BSER for melt shop opacity and, if so, how were the final emission limitations based on the BSER affected?

There are no relevant energy impacts or nonair quality health and significant environmental impacts of the final BSER for melt shop opacity. These issues are discussed in detail in sections V.A and V.B of this preamble. No comments were received on these issues.

C. NSPS Requirements for Opacity From Control Devices and Dust Handling for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022

We proposed to retain the BSER determinations for proper operation of control devices and proper dust handling procedures from NSPS subpart AAa in NSPS subpart AAb as well as the limitations of 3 percent and 10 percent opacity limits from control devices and dust handling, respectively. No comments were received on this subject. Similarly, we are finalizing the requirement for opacity from control devices and dust handling in NSPS subpart AAb, as proposed.

¹⁷ Note that modifications pursuant to CAA section 111 need not be “major” to trigger application of the NSPS. Rather, a modification under CAA section 111(a)(4) is defined as a physical change in, or change in the method of operation of, a stationary source which results in any increase in emissions. See also 40 CFR 60.14.

D. Startup, Shutdown, Malfunction Requirements for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Modified, Reconstructed, or Constructed After May 16, 2022

Consistent with *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the EPA has established standards in 40 CFR 60 subpart AAb that apply at all times. We also are finalizing in 40 CFR 60 subpart AAb specific requirements at 40 CFR 60.272b(c) that override the general provisions for SSM requirements. In finalizing the standards in this rule, the EPA has taken into account startup and shutdown periods and, for the reasons explained in section IV.D.2 of this preamble has not finalized alternate standards for those periods.

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 (40 CFR 60.2). The EPA interprets CAA section 111 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 111 standards. Nothing in CAA section 111 or in case law requires that the EPA consider malfunctions when determining what standards of performance reflect the degree of emission limitation achievable through "the application of the best system of emission reduction" that the EPA determines is adequately demonstrated. While the EPA accounts for variability in setting emissions standards, nothing in CAA section 111 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction 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 111 standards of performance. The EPA's approach to malfunctions in the analogous circumstances (setting "achievable" standards under CAA section 112) has been upheld as reasonable by the D.C. Circuit in *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 606–610 (2016).

1. What did we propose as the BSER determination and standard of performance?

Consistent with *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the EPA

proposed that the PM and opacity standards in 40 CFR subpart AAb apply at all times. We also proposed in 40 CFR part 60, subpart AAb specific requirements at 40 CFR 60.272b(c) that override the general provisions exemptions during SSM periods.

2. What significant comments did we receive and what are our responses?

Comment: A commenter asserted that the EPA must provide work practice standards if the EPA removes SSM exemptions. Subjecting SSM periods to the same limit as those during normal operations was not adequately demonstrated as required per CAA section 111(a)(1) and was not provided in the docket prior to promulgation as per CAA section 307(d). The dataset of stack tests from 33 facilities did not include adequate testing to demonstrate that SSM periods consistently met the limits proposed in 40 CFR part 60, subpart AAb. These stack tests were not conducted during SSM periods, and as such could not provide a basis for concluding that emissions during shutdown and startup could comply with the proposed limits. The commenter asserts that, if the EPA cannot show that compliance with a numerical limit was adequately demonstrated during periods of SSM, and provide that data in the record, then the EPA does not have the legal authority under CAA section 111 to subject those emissions to such a standard.

EPA Response: Consistent with *Sierra Club v. EPA*, this action will ensure that the PM and opacity standards in EAF NSPS 40 CFR 60, subpart AAb apply at all times, including during periods of startup and shutdown. Because *Sierra Club v. EPA* established that emissions standards or limitations must be continuous in nature, the EPA must determine what standard will apply during periods of SSM. Moreover, CAA section 111(h)(1) provides that the EPA may only provide for work practice standards when the Administrator determines that it is not feasible to prescribe or enforce a numerical work practice standard. We have determined that the numerical standards in EAF NSPS 40 CFR 60 subpart AAb are appropriate as EAF and AOD facilities can comply with the standards during startup and shutdown because the control devices are the same during startup and shutdown as in normal operation and would provide the same protection to PM emissions, both for PM from the control devices as well as opacity from melt shop, control devices, and dust handling. In regard to the 0 percent melt shop opacity standard, this

standard in 40 CFR part 60, subpart AAb only applies during melting and refining; startup or shutdown does not fall under the operational description of melting and refining. A opacity standard of 6 percent would apply at all other times.

While commenters argue that the EPA must provide work practice standards, the commenters have not provided information showing that compliance with the numerical emission limitations is not possible during startup and shutdown events and that, therefore, the EPA's determination to apply the PM and opacity standards at all times would be inappropriate. In addition to the standards applying at all times, sources will need to comply with the CAA section 111 general provisions, which include "general duty" requirements in 40 CFR 60.11(d) to operate "in a manner consistent with good air pollution control practice for minimizing emissions." These provisions apply at all times, including during startup and shutdown, as well as during malfunctions.

Comment: A commenter stated if a 0 percent opacity standard for melt shop emissions at all times was implemented, the EPA must exclude periods of malfunctions and upset conditions. The commenter explained that malfunctions have occurred during the melting and casting operations that required extraordinary measures for corrective action, such as a "breakout." In an extremely dangerous situation, breakouts occurred when molten steel escaped from one or more mold strands at the caster or during casting. The commenter stated after a breakout and subsequent corrective action, emissions were generated and may exit the melt shop, and those emissions should not be considered in determining compliance with the 0 percent opacity melt shop requirement. The commenter said the EPA's proposed approach lacked an understanding of the significant dangers, risks, and related emissions associated with "breakouts" and other malfunction events that occur during the steelmaking processes, and the EPA should reconsider the 0 percent melt shop opacity standard.

EPA Response: The EPA disagrees with the commenter that emissions during a malfunction are not appropriately subject to the standard. Malfunctions that cause exceedances of any part of a rule are considered a violation under the NSPS and are a compliance issue that is relegated to the EPA's enforcement office. Facilities should document the circumstances of the malfunction so as to be able to discuss the special circumstances of the

event with the EPA's enforcement officer. It is not the purpose of the BSER to take into account unpredictable, sudden, infrequent events such as what is described by the commenter. We also note that casting is not part of the EAF NSPS source category.

E. Testing and Monitoring Requirements for Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels

1. What did we propose for testing and monitoring?

From the EPA review of the current NSPS's testing and monitoring requirements in 40 CFR part 60, subpart AAa, we evaluated and determined the testing, monitoring, recordkeeping and reporting requirements needed to be clarified and revised" to ensure compliance with the emission standards, considering that the NSPS reflect BSER under conditions of proper operation and maintenance. Consequently, we proposed changes to testing and monitoring in 40 CFR part 60, subparts AA and AAa, and also incorporated some of these requirements along with additional requirements into new 40 CFR part 60, subpart AAb.

Specifically, we proposed amendments to clarify, correct, or refine the rule requirements to enhance compliance and enforcement with 40 CFR part 60, sections 60.271 and 60.271a "Definitions", 60.272 and 60.272a "Standard for particulate matter", 60.273 and 60.273a "Emission monitoring", 60.274a "Monitoring of operations", 60.275a "Test methods and procedures", and 60.276a "Recordkeeping and reporting requirements."

In addition, we proposed that sources complying with 40 CFR part 60, subpart AAb would be required to perform compliance testing every 5 years after the initial testing performed upon startup, as required under 40 CFR 60.8. This requirement for periodic testing already is required in many of the permits for existing EAF in both the EPA's EAF dataset and in the industry, and is a standard requirement for testing of other sources of PM emissions in many other industrial sectors.

We also solicited in the proposal for comments or data and other relevant information on whether the EPA should change the allotted time to both find and fix the cause of a BLDS alarm from 3 hours to a longer timeframe (e.g., 24 hours as in other rules), or some other duration.

2. What significant comments did we receive on testing and monitoring and what are our responses?

Comment: The commenter said facilities should be allowed 24 hours to respond to BLDS alarms and to complete the response as soon as practical in 40 CFR part 60, subparts AA, AAa, and AAb. The commenter disagreed with the proposed 40 CFR part 60, subpart AAb provisions that would require facilities to determine the cause of all BLDS alarms within 1 hour and alleviate the cause of the alarm within 3 hours by taking the necessary response action. The commenter recommended the EPA adopt a 24-hour timeframe to initiate corrective action and to require that response actions be completed as soon as practicable. This approach would recognize the practical realities in identifying and responding to BLDS alarms. The commenter added that this approach is the same as that used in the Integrated Iron and Steel NESHAP, and is consistent with 40 CFR part 63, subparts X (NESHAP for Secondary Lead Smelting), DDD (NESHAP for Mineral Wool Production), EEE (NESHAP from Hazardous Waste Combustors), MMM (NESHAP for Pesticide Active Ingredient Production), RRR (NESHAP for Secondary Aluminum Production), and TTT (NESHAP for Primary Lead Smelting). The commenter said there was no justification for the proposal to be different from other existing rules. The commenter added that the proposed 3-hour time period was arbitrary and ignored the numerous scenarios in which it can take longer than 3 hours to identify and fix the cause of an alarm. Allowing facilities 24 hours to identify the cause and requiring facilities to alleviate the cause of the alarm "as soon as practicable" is more practical, particularly where many baghouse compartments must be inspected to determine the cause of an alarm.

The commenter noted that there are situations in which more than 3 hours is needed to respond to a BLDS alarm and address its cause. Because many mills calibrate their BLDS to be very sensitive, the likelihood that a BLDS alarm will be falsely triggered is increased. The commenter included the following examples of situations in which false alarms can occur:

- *Weather.* BLDS alarms will occasionally trigger during a heavy downpour or when there are significant changes in temperature or humidity.
- *Bag Cleaning Cycle.* BLDS alarm may trigger at the end of the baghouse cleaning cycle due to the temporary absence of dust in the bags.

- *New Bag Start.* BLDS alarms can be triggered following a replacement of some or all of the bags in the baghouse.

- *Systems Checks/Testing.* Some facilities may run systems checks on their BLDS that cause the system to alarm. For example, a facility may check the sensitivity of a BLDS by introducing a handful of flour into a port upstream from the probe. Facilities also evaluate and optimize their BLDS performance through drift checks, response tests, calibration exercises, and other quality assurance procedures. Some of these procedures require the alarm to be triggered in order to test performance, but in other instances the BLDS alarm may be inadvertently triggered during testing.

- *Electrical Malfunctions.* As BLDS detection is based on contact electrification, alarms can be triggered due to electrical surges impacting the sensors, processing electronics, or the connections between the sensor and processing electronics. These surges can either be environmental (lightning) or from variations/malfunctions in the BLDS system, its software, or its power source. Additionally, the abrasive environment in the baghouse duct can deteriorate the BLDS probe, probe housing, and housing insulation, which can cause an increase in malfunctions. BLDS alarms may be triggered during temporary power lapses or brief connectivity issues between the sensor and the processing electronics, or between the processing electronics and the system output/alarm. The BLDS can experience brief mechanical or software glitches/errors, including with respect to the sensor's signal amplification or with the configuration of the processing electronics.

- *Repair/Maintenance.* Some baghouse repair and maintenance activities may be conducted while the baghouse is in operation. In some of these cases, proper inspection and repair requires the baghouse to be operating in order to observe and repair malfunctions/maintenance issues. Often these activities are coordinated with a baghouse operator observing the BLDS readout in real time in order to identify the cause of an earlier alarm or to proactively identify maintenance or performance issues. Baghouse repair and maintenance activities sometimes must be conducted when the baghouse is operating because the repair/maintenance is urgently needed, and it is infeasible to quickly shut down the baghouse. These activities will cause BLDS alarms to trigger. Work on baghouse compartments and conveyances can introduce particulates into the system or dislodge caked or

accumulated dust which triggers alarms. Sounding of BLDS alarms also can be caused by maintenance and repair activities conducted when the baghouse is not operating. These activities can introduce foreign material or dislodge accumulations of material from ducts, conveyances, access panels, joints, and other components of the system upstream from the probe. Then when the baghouse is restarted, the newly introduced or dislodged material can cause the BLDS alarm to be triggered.

The commenter pointed out that it is possible for a baghouse to operate within its emission and opacity limits even if the cause of a BLDS alarm is not identified and corrective measures taken. For example, if a broken bag in a compartment causes an alarm, the compartment can be isolated and shut down without affecting the rest of the baghouse. The commenter noted that determining the cause of the alarm often requires operators to undertake a multi-step troubleshooting process of elimination requiring multiple rounds of physical inspections and diagnostic efforts. This process of elimination often requires more than 3 hours to complete. The process can be very time-consuming, particularly when the BLDS alarm lasts only a short time. Identifying the cause of a brief BLDS alarm, the commenter said, can be very difficult and sometimes proves impossible. Some baghouses in the EAF industry have 25 or more compartments housing 5,000 or more individual bags. Some mills do not have BLDS with detection capability in each separate compartment because the baghouse design does not allow for such monitoring (e.g., multiple compartments sharing common exit plenum). In these instances, mills must continue running and sequentially isolate compartments to determine which compartment may have caused the BLDS alarm. Facilities must then physically examine the compartment(s), which may contain 150 or more individual bags. If a bag has a significant rupture or has been dislodged, the cause of the alarm will likely be readily apparent. However, some alarms can be triggered by extremely small holes in bags and, in these cases, finding the leak by physical inspection can take a long time.

The commenter said that EAF mills can have difficulty responding to multiple, intermittent alarms of short duration. The commenter noted that EAF facilities record the alarm as resolved where investigation shows no evidence of a bag leak. While the facility may be able to respond to each separate alarm in under 3 hours, the commenter said they are aware of one instance in which an enforcement authority

determined the company was in violation of the 3-hour response requirement because the total time the facility spent responding to each of the separate intermittent alarms exceeded 3 hours. The commenter said the enforcement authority misinterpreted the 3-hour response requirement. This example was provided to show how a 3-hour response requirement presents a compliance risk even when individual responses are completed within the 3-hour window. The commenter recommended the following additions be made to 40 CFR 60.273(f) in all three rules in regard to the leak monitors to clarify false alarm situations.

The commenter recommended adding to the requirements in 40 CFR 60.273(f), 60.273a(f), and 60.273b(f) that begin with: “Establishing to the extent acceptable by the delegated authority that the alarm was a false alarm and not caused by a bag leak or other malfunction that could reasonably result in excess PM emissions,” the phrase “in which case alarms due to the monitor malfunctioning are not subject to the [24-hour] response action requirement, as long as the [leak] monitor malfunction is timely corrected.”

The commenter recommended adding to the requirements in 40 CFR 60.273(f), 60.273a(f), and 60.273b(f) that begin with: “Shutting down the process producing the PM emissions,” the phrase “provided that shutting down the process unit is not required if an operator reasonably believes repetitive alarms are the result of a [leak] monitor malfunction, and the monitor malfunction is timely repaired.”

EPA Response: We appreciate the details provided by the commenters to explain the reasons why a 24-hour response to BLDS alarms is warranted based on technical issues that EAF facility operators face and also why a 24-hour response is justified based on other similar rules that allow a 24-hour response. In light of the rationale provided, we are including the 24-hour response in the revisions to 40 CFR part 60, subparts AA, AAa, and AAb, effective upon promulgation.

In regard to the specific language the commenter suggests including in the rules in 40 CFR 60.273(f), 60.273a(f), and 60.273b(f), the list of potential response actions are not to be taken as exclusive, i.e., the responses listed have the caveat that “response actions may include, but are not limited to, the following, etc.” The commenter’s suggested changes for 40 CFR 60.273(f) in all 3 rules are redundant within the existing and proposed rules because the

phrase “not caused by . . . other malfunction that could reasonably result in excess PM emissions” already covers leak monitor malfunction. This is the same issue for 40 CFR 60.273(f) in all 3 rules, where a shutdown is just one option for a response action and not a required action. In all 3 rules in 40 CFR 60.273(f), fixing the leak monitor is the appropriate response action if that is determined to be the cause of the alarm. However, along with changing the response time to 24 hours, we have added a specific item in all three EAF rules in 40 CFR 60.273(f) to make it clear that leak monitor malfunction could be the cause, as follows:

“Establishing to the extent acceptable by the delegated authority that the alarm was a false alarm caused by a malfunctioning monitor and not caused by excess PM emissions.”

Comment: A commenter asserted that the current compliance demonstration requirements using the fan amperage and damper position monitoring in 40 CFR part 60, subparts AA, AAa are the best methods for assuring compliance with the melt shop NSPS standards. A commenter asserted that the existing fan amperage and damper position monitoring in combination with opacity observations are the best methods of assuring compliance with the NSPS standards for the melt shop. The commenter opposed the proposed new monitoring requirements for 40 CFR part 60, subparts AA and AAa that included:

- Installation of BLDS on all baghouses, including multi-stack baghouses;
- Monitoring and operational restriction for furnace static pressure monitoring based on 15-minute averages on all EAF;
- Monitoring and operational restriction for volumetric flow rate or static pressure at each separately-ducted hood, based on 15-minute averages on all EAF;
- Removal of the option for monitoring and operational restriction for fan amps;
- Adding inspections and maintenance requirements for holes or other openings in the melt shop building; and
- Mandate for shop opacity observations to be made during charging and tapping or during the period of the heat cycle that generates the greatest uncaptured emissions.

The commenter considered these new monitoring requirements to be unnecessary, expensive, and, in some cases, impractical. The commenter said the existing monitoring requirements in 40 CFR part 60, subparts AA and AAa

are adequate for demonstrating compliance with the standards. The commenter stated that the existing fan amperage and damper position monitoring have worked efficiently and effectively for many years and the proposed new monitoring would be less effective and would impose “. . . extreme technical and engineering complications” on EAF plants.

Similarly, the commenter urged the EPA to keep the current requirement in 40 CFR part 60, subparts AA, AAa for monitoring fan amperage in place, because they said this parameter directly correlates to the air flow to the control device, via the fan curve, unique to each site.

EPA Response: The responses to BLDS monitoring requirements, damper position, fan amperage, furnace static pressure, melt shop inspection, melt shop opacity, and volumetric flow and static pressure follow here.

• **BLDS Response.** We proposed the BLDS monitoring requirement for all baghouses in 40 CFR part 60, subparts AA, AAa, and AAb because BLDS provides better information about EAF baghouse operation and compliance assurance for the PM emission and stack opacity limits than what is currently required in 40 CFR part 60, subparts AA and AAa, and because BLDS monitoring at all baghouses is technically feasible. Currently, as an alternative to COMs, single-stack baghouses are required to install a BLDS and perform EPA Method 9 visible emissions at the stack, whereas modular, multi-stack, negative-pressure or positive-pressure fabric filters are only required to conduct EPA Method 9 visible emissions monitoring. We agree with the commenter that the proposed change to require all types of baghouses to have BLDS should not be made as a correction in 40 CFR part 60, subparts AA and AAa, nor included in 40 CFR part 60, subpart AAb for all types of baghouses. Therefore, because using BLDS at all baghouses would involve the purchase of equipment not currently installed at facilities not using single-stack baghouses, this requirement is not included in the final rules for 40 CFR part 60, subparts AA and AAa. For 40 CFR part 60, subpart AAb, because for existing facilities that modify or reconstruct, requiring BLDS at baghouses other than those with single stacks would involve the purchase of equipment not currently installed at these facilities, the BLDS requirement is included in the final rule for 40 CFR part 60, subpart AAb only for single stack baghouses.

because using BLDS on multi-stack baghouses is not demonstrated in the EAF industry due to the high capital cost. Multi-stack baghouses in the EAF industry have vents rather than stacks, are operated at positive pressure, and not amenable to leak detection systems.

• **Damper Position Response.** We proposed changes to the monitoring frequency of damper position in 40 CFR part 60, subparts AA and AAa, and included these proposed changes in 40 CFR part 60, subpart AAb, because of the variability of this parameter during a furnace cycle. As damper position is expected to change during the heat cycle, a once-per-shift monitoring and recordkeeping event fails to provide both the facility and regulatory agencies with the ability to determine if the emissions capture system is being properly operated. Damper position records are intended to be used as a way to evaluate how the total flow (using amperage as surrogate for flow) is partitioned between the separately ducted hoods. Therefore, increasing the recording of damper position provides a more accurate assessment of the capture system throughout a heat cycle. Facilities are already required to record all damper positions during performance testing to demonstrate compliance pursuant to 40 CFR 60.274(c) and 60.274a(c). We disagree with the commenter that this change should not be made as a correction. Therefore, for the reasons explained at proposal, the final rules for 40 CFR part 60, subparts AA, AAa, and AAb include the requirement for damper position recording and frequency during operation in a manner and frequency consistent with damper position records during the initial or most recent performance test demonstrating compliance with applicable PM standards; and for 40 CFR part 60, subpart AAb, only if damper position data were recorded throughout a complete heat cycle. See 40 CFR 60.274(c)(1) and (i)(5), 60.274a(c)(1) and (h)(5), and 60.274b(c)(1) and (h)(5). Compliance with this clarified aspect of the rule is required 180 days from the effective date of the final rule amendments for facilities complying with 40 CFR part 60, subparts AA and AAa, the same as the requirement for electronic reporting; and no later than the effective date of the final rule or upon startup, whichever is later, for facilities subject to 40 CFR part 60, subpart AAb.

• **Fan Amperage Response.** The EPA proposed deleting the monitoring of fan amps on a once-per-shift basis as a surrogate for volumetric flow from at 40 CFR 60.274(b)/60.274a(b) for 40 CFR

part 60, subparts AA and AAa due to the increased use of variable speed fans in the industry. Based on comments provided in response to the proposed change, the EPA agrees with the commenter that fan amperage monitoring should be able to be used as a surrogate for volumetric flow. However, the EPA believes this surrogate can only be allowed under some conditions. To maintain consistency with the original intent of the requirement to record fan amperage in 40 CFR part 60, subpart AAa, in the final rules for 40 CFR part 60, subparts AA, AAa, and AAb, fan amperage monitoring can be used as a surrogate for volumetric flow when recorded on a more frequent basis than once-per-shift. The EPA is promulgating for 40 CFR part 60, subparts AA, AAa, and AAb, the requirement for monitoring and recording of fan amperage as frequently as damper position measurement, *i.e.*, in a manner and frequency consistent with damper position records during the initial or most recent performance test demonstrating compliance with applicable PM standards so that the amperage data provide information that is proportional to volumetric flow in 40 CFR 60.274(c)(1) and (i)(5); 60.274(c)(1) and (h)(5); and 60.274b(c)(1)(h)(5). Compliance with this clarified aspect of the rule is required 180 days from the effective date of the final rule amendments for facilities complying with 40 CFR part 60, subparts AA and AAa, the same as the requirement for electronic reporting and no later than the effective date of the final rule or upon startup, whichever is later, for facilities subject to 40 CFR part 60, subpart AAb.

• **Furnace Static Pressure Response.** We proposed the requirement for monitoring and operational restriction for furnace static pressure monitoring for 40 CFR part 60, subparts AA, AAa, and AAb based on 15-minute averages on all EAF because it provides better information about emissions capture at the EAF and compliance assurance with melt shop opacity requirements at 40 CFR 60.272(a)(3), 60.272a(a)(3), and 40 CFR 60.272b(a)(3) than what is currently required in 40 CFR part 60, subparts AA and AAa. Currently, a furnace static pressure monitoring device is not required if the facility conducts daily shop opacity readings. If a facility elects to use furnace static pressure monitoring for compliance, furnace static pressure is only monitored once per shift in 40 CFR part 60, subparts AA and AAa (see 40 CFR 60.273(d)/60.273a(d) and 40 CFR 60.273(d)/60.274a(b)). The EPA proposed

requiring continuous monitoring of furnace static pressure because it would provide information about capture at the EAF on a more frequent basis and because many facilities already use this equipment. Because using this monitoring method/compliance option would involve the purchase of equipment not currently available or installed at all subject facilities, we agree with the commenter that this change should not be made as a correction nor included in 40 CFR part 60, subparts AA, AAa, and AAb. Therefore, this requirement for 40 CFR part 60, subparts AA, AAa, and AAb is not included in the final rules.

In response to comments regarding proposed averaging periods of 15 minutes for furnace static pressure, the EPA has modified the averaging period language in the final rule for 40 CFR part 60, subparts AA, AAa, and AAb (40 CFR 60.274(f), 60.274a(f), and 60.274b(f)) to be “no greater than 15 minutes.” This modification allows greater flexibility for establishing monitoring setpoints to capture the variability during short periods that are much less than 15 minutes.

• *Melt Shop Inspection Response.* We proposed a clarification that the melt shop be inspected for holes or other openings that would allow particulate matter to escape for 40 CFR part 60, subparts AA, AAa, and included in 40 CFR part 60, AAb, because this procedure provides compliance assurance with melt shop opacity requirements, and is better than what is currently required at 40 CFR 60.272(a)(3)/60.272a(a)(3). Currently, inspections are required for equipment important to the performance of the capture system at 40 CFR 60.274(e)/60.274a(d), which specifies that inspections must include observations of physical appearance of the equipment. We disagree with the commenter that changes to 40 CFR part 60, subparts AA and AAa, should not be made as a correction because we understand that the melt shop building itself acts as a portion of the capture system particularly during charging and tapping. Since this inspection would not involve the purchase of equipment not currently available or installed at the facility and arguably is already addressed under the current requirement for inspections, the clarification that inspection for holes or other openings in the melt shop building is part of the capture system inspection is included in the final rules for 40 CFR part 60, subparts AA, AAa, and AAb. Compliance with this clarified aspect of the rule is required 180 days from the effective date of the final rule

amendments for facilities complying with 40 CFR part 60, subparts AA and AAa, the same as the requirement for electronic reporting and no later than the effective date of the final rule or upon startup, whichever is later, for facilities subject to 40 CFR part 60, subpart AAb.

• *Melt Shop Opacity Response.* We proposed the clarification that melt shop opacity observations for 40 CFR part 60, subparts AA and AAa must be made during charging and tapping or during the period of the heat cycle that generates the greatest uncaptured emissions for 40 CFR part 60, subparts AA and AAa because this requirement provides better information about EAF and AOD capture system performance and compliance assurance with melt shop opacity requirements at 40 CFR 60.272(a)(3)/60.272a(a)(3) beyond what is currently required. The NSPS at 40 CFR part 60, subpart AA has a 6 percent opacity limit at the melt shop except for during periods of charging and tapping, for which 20 percent and 40 percent are allowed, respectively (see 40 CFR 60.272(a)(3)). When 40 CFR part 60, subpart AAa was promulgated in 1984, the exceptions for periods of charging and tapping were removed, and, instead, the opacity limit for the EAF melt shop was set at 6 percent at all times (see 40 CFR 60.272a(a)(3)). In 40 CFR part 60, subpart AA, the EPA had allowed a higher opacity limit during charging and tapping because those periods had greater potential for uncaptured emissions than during melting and refining. Therefore, we agree with the commenter that the clarification in the proposal that opacity should be tested at the site with the greatest uncaptured emissions should not be made for 40 CFR part 60, subpart AA. However, we disagree with the commenter that the changes to 40 CFR part 60, subpart AAa should not be made as clarifications or corrections because the proposed rule edits clarify that the 6 percent opacity applies at all times in all locations of the melt shop, as explained below. In 40 CFR part 60, subpart, AAa, it was required that sources constructed, modified, or reconstructed after 1983 achieve a greater level of capture performance during charging and tapping than previously required, and the exceptions during charging and tapping that were in 40 CFR part 60, subpart AA were removed. Therefore, the EPA is including in the final rule for 40 CFR part 60, subpart AAa the proposed clarification to the opacity testing option in 40 CFR 60.273a(d)(2), when a facility chooses to forgo using a furnace

static pressure monitoring device on an EAF equipped with a DEC system, to test opacity no less than once per week from the tap of one EAF heat cycle to the tap of the following heat cycle. This clarification along with the test method and procedure requirements in 40 CFR 60.275a(e), make it clear that the facility is required to demonstrate compliance with melt shop opacity at all times, including the period of the furnace cycle that provides the greatest challenge to the capture system, which was originally intended when creating 40 CFR part 60, subpart AAa. In addition, the proposed clarification in 40 CFR 60.272a(a)(3) is being finalized in this rulemaking for 40 CFR part 60, subpart AAa, that where it is possible to determine that a number of visible emission sites relate to only 1 incident of visible emissions, only 1 observation of shop opacity is required, at the site of highest opacity that directly relates to the cause (or location) of visible emissions observed during the single incident. The comments concerning the requirement in the proposed changes to 40 CFR part 60, subpart AAb, for shop opacity observations to be made during charging and tapping or during the period of the heat cycle that generates the greatest uncaptured emissions, are no longer relevant due to changes made to the proposed 40 CFR part 60, subpart AAb for the final rule, to allow 6 percent opacity during charging and tapping and to require testing during all phases of operation, *i.e.*, melting and refining, charging, and tapping. Because monitoring opacity is already required in 40 CFR part 60, subpart AAa in the various parts of the rule discussed in the preceding paragraphs, the clarifications of measuring melt shop opacity do not involve the purchase of equipment not currently used at the facility and, therefore, are included in this final rule. Compliance with these rule clarifications of 40 CFR part 60, subpart AAa are required 180 days from the effective date of the final rule amendments, the same as the requirement for electronic reporting.

• *Volumetric Flow and Static Pressure Response.* We proposed the requirement to continuously monitor and have operational restrictions for either volumetric flow rate or static pressure at each separately ducted hood for 40 CFR part 60, subpart AA, AAa, and AAb because it provides better information about emissions capture at the EAF and AOD and compliance assurance with melt shop opacity requirements at 40 CFR 60.272(a)(3), 60.272a(a)(3), and 60.272b(a)(3) than what is currently required in 40 CFR

part 60, subparts AA and AAa. In 40 CFR part 60, subpart AA, AAa, and AAb, there are multiple options for monitoring operations at a facility (40 CFR 60.274(b), 60.274a(b), and 60.274b(b)), which may include monitoring of volumetric flow and static pressure at each separately ducted hood. Continuous monitoring of volumetric flow rate or static pressure at each separately ducted hood would provide better information about capture at each separately ducted hood and a more direct measure of capture at each separately ducted hood. However, we agree with the commenter that this change should not be made as a correction because using this monitoring method/compliance option would involve the purchase of equipment not currently available or installed at facilities. Therefore, this requirement is not included in the final rule for 40 CFR part 60, subparts AA, AAa, and AAb.

Comment: A commenter asserted that the CAA limits the EPA's NSPS revision authority to only new sources. Commenter stated there is no denying that the proposed monitoring and associated revisions to 40 CFR part 60, subpart AA and AAa are materially substantive and are not error corrections, clarifications, or clerical adjustments. These changes far exceed the EPA's legal authority to revise a NSPS applicable to existing sources. The commenter continued, the EPA's legal authority under the CAA is very limited as it relates to revisions to existing NSPSs. The 40 CFR part 60, subpart AA and AAa proposed revisions (BLDS, furnace static pressure monitoring, volumetric flow monitoring, etc.) all constitute an "emission limitation" as defined by the CAA and, therefore, constitute a "standard of performance." The EPA has no authority under the CAA to make any such revisions to a "standard of performance" unless those revisions are expressly applicable to "new sources." The commenter said the proposed changes to the melt shop monitoring requirements were arbitrary and violate the basic premise of NSPS that revisions apply only to facilities that qualify as new, modified, or reconstructed after proposal of the NSPS requirements.

The commenter also said the EPA does not have the authority to add new monitoring requirements for charging and tapping operations. The existing shop opacity monitoring in 40 CFR part 60, subpart AAa verifies efficiency of the DEC during normal operations. By expanding monitoring requirements to cover tapping and charging (a time period the furnace roof is rolled back,

and the DEC control is not engaged), the EPA was creating new monitoring requirements designed to monitor a standard that was not included in the original rule. The proposed monitoring during charging and tapping cannot evaluate DEC capture efficiency, as the shop opacity observations were originally designed to do. Hence, the addition of the new monitoring, the commenter said, represents an unlawful revision to the existing NSPS standard.

The commenter was concerned the EPA was adding entirely new installation, monitoring, and maintenance requirement for charging and tapping furnace modes, including requirements for operators to install, calibrate, and maintain monitoring devices that continuously record the capture system damper position(s) and either the volumetric flow rate through each separately ducted hood or the rolling 15-minute average static pressure at each separately ducted hood. The commenter said these requirements are unnecessary and that they ignore the 1999 rulemaking that provided alternative monitoring methods. The commenter also argued the EPA failed to provide a reasonable explanation for these changes, had not explained why the additional monitoring is needed, had not explained the EPA's change in position from prior EAF steel NSPS rulemakings, and had neglected to account for any costs associated with the monitoring requirements.

EPA Response: General Monitoring Response: We proposed various monitoring changes in 40 CFR part 60, subparts AA and AAa for purposes of providing better information about EAF baghouse operation and compliance assurance for the PM emission limit at 40 CFR 60.272(a)(1)/60.272a(a)(1), and EAF capture system performance and compliance assurance with melt shop opacity requirements at 40 CFR 60.272(a)(3) and 60.272a(a)(3) than what is currently required.

We learned through public comments that some of the monitoring changes would require significant capital investment through equipment purchases; therefore, the changes requiring purchases of equipment are not included in the final rule for 40 CFR part 60, subparts AA and AAa. The requirements that we are finalizing do not make the standards more stringent; therefore, these changes do not implicate the commenter's concern that we have improperly revised the NSPS applicable to existing sources. For these other monitoring changes that are included in the final rule, either as proposed or with modification of proposed requirement, the compliance

date is 180 days from the effective date of the final rule amendments for facilities complying with 40 CFR part 60, subparts AA and AAa, which is the same as the requirement for electronic reporting. This time period is to allow facilities to prepare for any changes to reporting and recordkeeping.

The 4 proposed monitoring requirements that are not included in the final rule are for BLDS for multi-stack baghouses for 40 CFR part 60, subparts AA, AAa, and AAb; melt shop opacity for 40 CFR part 60, subpart AA only; furnace static pressure monitoring and operation for 40 CFR part 60, subparts AA, AAa, and AAb; and volumetric flow and static pressure monitoring and operation for 40 CFR part 60, subparts AA, AAa, and AAb. The 2 proposed monitoring requirements that have been retained in the final rule, as proposed, are melt shop inspection (for 40 CFR part 60, subparts AA, AAa, and AAb) and melt shop opacity (for 40 CFR part 60, subparts AAa and AAb). The 2 proposed monitoring requirements that have been retained with modification are for damper position and for fan amperage (for 40 CFR part 60, subparts AA, AAa, and AAb), where we are finalizing the requirement for facilities to record damper positions and fan amperage in a manner and frequency consistent with records made during the initial or most recent performance test demonstrating compliance with applicable PM standards. For additional explanation and rationale behind the 7 proposed requirements and their disposition in the final rule, refer to the discussions in this preamble under the following section headings (listed alphabetically): BLDS Response; Damper Position Response; Fan Amperage Response; Furnace Static Pressure Response; Melt Shop Inspection Response; Melt Shop Opacity Response; and Volumetric Flow and Static Pressure Response.

Comment: A commenter asserted that the current compliance demonstration requirements using the fan amperage and damper position monitoring in 40 CFR part 60, subparts AA, AAa are the best methods for assuring compliance with the melt shop NSPS standards and, therefore, the commenter opposes the proposed new monitoring requirements for 40 CFR part 60 subpart AAb.

The commenter opposed the following proposed new monitoring requirements for 40 CFR part 60 subpart AAb:

- Installation of bag leak detection monitoring systems on all baghouses, including multi-stack baghouses;
- Monitoring and operational restriction for furnace static pressure

monitoring based on 15-minute averages on all EAF;

- Monitoring and operational restriction for volumetric flow rate or static pressure at each separately-ducted hood, based on 15-minute averages on all EAF;

- Removal of the option for monitoring and operational restriction for fan amps;

- Adding inspections and maintenance requirements for holes or other openings in the melt shop building; and

- Mandate for shop opacity observations to be made during charging and tapping or during the period of the heat cycle that generates the greatest uncaptured emissions.

The commenter considered these new monitoring requirements to be unnecessary, expensive, and, in some cases, impractical. The commenter said the existing monitoring requirements (in 40 CFR part 60, subparts AA and AAa) are adequate for demonstrating compliance with the standards. The commenter stated that the existing fan amperage and damper position monitoring have worked efficiently and effectively for many years and the proposed new monitoring would be less effective and would impose extreme technical and engineering complications on EAF plants. Similarly, a commenter urged the EPA to keep the current requirement for monitoring fan amperage in place, because they said this parameter directly correlates to the air flow to the control device, via the fan curve, which is unique to each site.

A commenter stated the EPA should clarify how the proposed new monitoring requirements improve compliance demonstration. The commenter said it was unclear how the additional monitoring requirements in the proposed [40 CFR part 60, subpart AAb] rule will improve data or accuracy in demonstrating compliance with applicable requirements. The proposed NSPS 40 CFR part 60, subpart AAb requires monitoring of parameters that are not required to be monitored under the existing NSPS 40 CFR part 60, subparts AA and AAa standards. The commenter recommended the EPA explain the benefits of new monitoring techniques and additional monitoring parameters. The monitoring requirements should provide enough data to accurately demonstrate compliance with applicable requirements. The commenter added that the EPA must consider the cost to air agencies and facilities and associated benefits to compliance before requiring additional monitoring. Additional monitoring with no clear benefit is

burdensome for both regulated facilities and delegated authorities due to additional equipment, maintenance, and operator costs.

EPA Response: We considered the comments submitted by the commenter and have modified the final rule for 40 CFR part 60, subpart AAb for certain proposed requirements to reflect this and other comments received, and removed other requirements entirely. We included some monitoring requirements in the final rules, as proposed. Our response to each issue listed by the commenter are described in this section in the EPA responses to the comments, as follows: BLDS Response; Damper Position Response; Fan Amperage Response; Furnace Static Pressure Response; Melt Shop Inspection Response (as well as the EPA's response to the proposed requirements in 40 CFR 60.274b(d) for 40 CFR part 60, subpart AAb in regard to allowing operators discretion in an inspection as to what issues "materially impact" the capture system performance); Melt Shop Opacity Response; Volumetric Flow and Static Pressure Response; and General Monitoring Response.

The comment concerning a proposed requirement in 40 CFR part 60, subpart AAb for shop opacity observations to be made during charging and tapping or during the period of the heat cycle that generates the greatest uncaptured emissions is no longer relevant due to changes made to the proposed 40 CFR part 60, subpart AAb for the final rule, to allow 6 percent opacity during charging and tapping and to require testing during all phases of operation, *i.e.*, melting and refining, charging, and tapping.

Comment: A commenter asserted that the EPA should define the term "material impact" (40 CFR 60.274e, 60.274a(d), and 60.274b(d)) in terms of opacity limits and only require repairs when holes result in noncompliance with the opacity standards.

A commenter recommended the EPA better define a "material impact" on the capture system because they said the phrase was too vague. Any airflow changes, they said, may theoretically impact capture efficiency to some extent, but fluctuations that do not affect the compliance of the facility with the substantive emission and opacity standards should not be prohibited. The EPA should define material impacts in terms of opacity limits by revising 40 CFR part 60, subparts AA, AAa, and AAb to only require repairs to openings that lead to noncompliance with the opacity standards.

EPA Response: The Melt Shop Inspection Response earlier in this section provides part of the EPA response to this comment concerning proposed requirements for 40 CFR part 60, subpart AAb (40 CFR 60.274b(d)), which is the same as the EPA response for the proposed clarifications in 40 CFR part 60, subparts AA and AAa (40 CFR 60.274(e) and 60.274a(d)) and explains why we disagree with the commenter and are including the requirement to inspect for holes or other openings in the melt shop in the final rules to ensure compliance with the opacity standards in 40 CFR part 60, subparts AA, AAa, and AAb.

In addition, for 40 CFR part 60, subpart AAb, we proposed the requirement for monthly inspections to include the language to address issues that are "determined by the operator to materially impact the efficacy of the capture system" in 40 CFR 60.274b(d). This allows for a determination by the operator as to whether an identified issue is to be considered a true deficiency that is expected to impact capture system performance, as opposed to the language in 40 CFR part 60, subpart AAa that requires maintenance for "any deficiency." Therefore, we agree with this aspect of the comment and are including the proposed rule language for monthly inspections that allow for operator discretion as to what issues "materially impact" the capture system performance in the final rule for 40 CFR part 60, subpart AAb (40 CFR 60.274b(d)).

Comment: A commenter asserted that the EPA should clarify the calculation for determining compliance with the opacity limits when using EPA Method 9 for 40 CFR part 60, subpart AAb. The commenter asked the EPA to clarify in the rule how facilities should determine compliance with the opacity limits. The commenter noted that compliance with the shop opacity limits will be determined based on the arithmetic average of 24 consecutive 15-second opacity observations over a 6-minute period. The commenter said that it is their understanding that the proposed zero opacity standard does not require all 24 15-second EPA Method 9 observation periods to be zero percent and that some of the 24 readings may exceed 0 percent provided the arithmetic average rounds down to 0. Similarly, in calculating compliance with the existing 6 percent shop opacity standard, some readings can exceed 6 percent provided the arithmetic average rounded down is below 6 percent. The commenter asked the EPA to confirm their interpretation of the rule is correct.

The commenter noted that this approach is consistent with prior NSPS rulemakings, including 40 CFR part 60, subpart KK (Lead-Acid Battery Manufacturing) and 40 CFR part 60, subpart NN (Phosphate Rock Plants). However, the commenter said the EPA specified in 40 CFR part 60, subparts KK and NN that compliance with the opacity standard is determined by taking the average opacity over a 6-minute period, according to EPA Method 9, and rounding the average to the nearest whole percentage (45 FR 2790 and 2794; January 14, 1980 and 47 FR 16564, 16566, 16582, and 16586; April 16, 1982). The commenter recommended the EPA add the same explanation provided in these earlier NSPS in the final shop opacity limit.

EPA Response: The method for calculating opacity has not changed substantially for 40 CFR part 60, subpart AAb; the final rule incorporates the current EPA Method 9 procedures for melting and refining, and for tapping (see section IV.B.2 in this preamble for changes to opacity measurement procedures with EPA Method 9 during charging). When determining the final value for opacity in 40 CFR part 60, subpart AAb, facilities should round to the nearest whole number (0 percent). Therefore, an average opacity level calculated to be 0.49 percent would round (down) to 0 percent.

3. What is the rationale for the final requirements for testing and monitoring?

We are finalizing the proposed requirement in 40 CFR part 60, subparts AA, AAa, and AAb that the melt shop be inspected for holes or other openings that would allow PM to escape because it clarifies the building inspection requirement already in the current NSPS. We are also incorporating into the final rules for 40 CFR part 60, subparts AA, AAa, and AAb the allowance of up to 24 hours to find and fix baghouse leaks following a BLDS alarm event because it is commensurate with many other EPA rules and no evidence exists for the specific need for limiting the tie period to 3 hours for EAF. The reasons that more than 3 hours and up to 24 hours is needed to respond to BLDS alarms provided by the commenter are valid. We are finalizing that sources complying with 40 CFR part 60, subpart AAb will be required to perform compliance testing every 5 years after the initial testing performed upon startup, as required under 40 CFR part 60.8. This requirement is already required in many of the permits for existing EAF in the EAF dataset and in the industry, and is a standard

requirement for testing for other sources of PM emissions for many other industrial sectors.

We learned through public comments that some of the proposed monitoring changes, BLDS monitoring, furnace static pressure monitoring and operation, and volumetric flow and static pressure monitoring and operation, would require significant capital investment through equipment purchases. Therefore, these changes requiring purchases of equipment are not being finalized for 40 CFR part 60, subparts AA, AAa, and AAb.

We are finalizing 2 proposed monitoring requirements for 40 CFR part 60, subparts AA, AAa, and AAb, which are the requirements for melt shop inspection and stipulation that the melt shop opacity limits apply at all times during the designated periods of applicability under the rules. We are also finalizing the proposed damper position and fan amperage monitoring requirements with modifications. Other miscellaneous monitoring requirements also are being finalized with modifications resulting from comments on the proposed requirements, as described in this section.

All testing and monitoring requirements proposed and finalized in this action were evaluated to ensure compliance with the NSPS emission standards under conditions of proper operation and maintenance. However, because we learned through comments that some of the proposed changes to monitoring in the existing NSPS rules would incur unintended costs, these requirements were either not finalized in their entirety or were finalized with modifications.

F. Electronic Reporting

The EPA is finalizing the proposed requirement that owners and operators of EAF and AOD subject to the current and new NSPS at 40 CFR part 60, subparts AA, AAa, and AAb submit electronic copies of required performance test reports and any semiannual excess emissions and continuous monitoring system performance and summary reports, through the EPA's CDX using the CEDRI. A description of the electronic data submission process is provided in the memorandum *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules*,¹⁸ available in the docket for this

action, and hereafter referred to as the "Electronic Reporting Memorandum." The finalized rule requires that performance test/demonstration of compliance results collected using test methods that are supported by the EPA's ERT as listed on the ERT website¹⁹ at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test/demonstration of compliance results be submitted in PDF using the attachment module of the ERT.

For semiannual reports, the finalized rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. The final versions of the templates for these reports are included in the docket for this action.²⁰

Additionally, the EPA has identified 2 broad circumstances in which electronic reporting extensions may be provided. These circumstances are: (1) Outages of the EPA's CDX or CEDRI which preclude an owner and operator from accessing the system and submitting required reports; and (2) *force majeure* events, which are defined as events that will be or have been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevent an owner and operator from complying with the requirement to submit a report electronically. Examples of *force majeure* events are acts of nature, acts of war or terrorism, equipment failure, or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible.

The electronic submittal of the reports addressed in this final rulemaking increase the usefulness of the data

Pollutants (NESHAP) Rules. Memorandum, Measurement Policy Group, U.S. Environmental Protection Agency, Research Triangle Park, NC. August 19, 2020.

¹⁹ <https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>.

²⁰ See 40 CFR part 60, subpart AA, AAa, and AAb, *Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels*, 40 CFR part 60.276(g) Semiannual Compliance Report Spreadsheet Template, available at Docket ID No. EPA-HQ-OAR-2002-0049-0064.

¹⁸ *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air*

contained in those reports and is keeping with current trends in data availability and transparency. Electronic submittal would further assist in the protection of public health and the environment by improving compliance, facilitating the ability of regulated facilities to demonstrate compliance with requirements, and by facilitating the ability of delegated state, local, Tribal, and territorial air agencies and the EPA to assess and determine compliance. Ultimately, electronic reporting would reduce the burden on regulated facilities, delegated air agencies, and the EPA by making the data easy to record and read. Electronic reporting also eliminates paper waste and redundancies and minimizes data reporting errors. The resulting electronic data are more quickly and accurately accessible to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan²¹ to implement Executive Order 13563 and is in keeping with the EPA's agency-wide policy²² developed in response to the White House's Digital Government Strategy.²³ For more information on the benefits of electronic reporting, see the "Electronic Reporting Memorandum" discussed earlier in this section.

No comments were received on electronic reporting. Therefore, we are finalizing the requirements for electronic reporting as proposed.

G. Effective Date and Compliance Dates

Pursuant to CAA section 111(b)(1)(B), affected sources that commence construction, reconstruction, or modification after May 16, 2022, must comply with all requirements of 40 CFR part 60, subpart AAb, no later than August 25, 2023 or upon startup, whichever is later.

The date for complying with the ERT submission requirements is February 21, 2024. The date for complying with the changes in the current rules, 40 CFR part 60, subparts AA and AAa is February 21, 2024 publication of the final rule.

²¹ EPA's Final Plan for Periodic Retrospective Reviews (August 2011). Available at: <https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154>.

²² E-Reporting Policy Statement for EPA Regulations (September 2013). Available at: <https://www.epa.gov/sites/default/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf>.

²³ Digital Government: Building a 21st Century Platform to Better Serve the American People (May 2012). Available at: <https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html>.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the air quality impacts?

For 40 CFR part 60, subpart AAb, reductions in PM and PM_{2.5} potentially emitted from new, modified, and reconstructed EAF compared to these emissions allowed under the current NSPS subpart AAa with 6 percent melt shop opacity will have a beneficial air impact.

Based on the actual emissions emitted by 31 facilities in the EAF dataset, where the actual average opacity was 0.14 percent, the emissions impact for PM from 9 new, modified, or reconstructed EAF facilities projected in the next 10 years (estimated to reflect 3 small, 4 medium, and 2 large) is estimated to be an emissions reduction of 134 tons PM that would otherwise be emitted in 2032. Using an estimate of 0.218²⁴ for the ratio of PM_{2.5} to PM the emissions impact for PM_{2.5} from nine new facilities projected in the next 10 years, as above, there would be an emissions reduction of 28 tons of PM_{2.5} in 2032. Details of these emissions estimates can be found in the "Emissions Memorandum" discussed in section IV.A.2.

No actual PM emission reductions are estimated for the new PM limit for facility-wide total baghouse emissions in lb/ton. The EPA did not estimate PM emission reductions from new, modified, and reconstructed sources under the facility-wide total baghouse limit because based the 2010 EAF dataset, all facilities in the dataset are already achieving an emission level comparable to the limit being finalized in this action.

B. What are the secondary impacts?

A secondary impact as a result of this rule is that solid wastes may increase slightly, with an estimated 15 tons per facility per year based on 2010 EAF performance, with the potential additional waste from PM collected to meet the 0 percent melting and refining opacity limit under NSPS subpart AAb. The small increase in solid wastes would be the same for both the carbon and specialty steel shops. However, most PM collected from EAF is recycled

²⁴ The PM_{2.5} to PM ratio is an average of similar uncontrolled sources, as cited in *Evaluation of PM_{2.5} Emissions and Controls at Two Michigan Steel Mills and a Coke Oven Battery*. Final Report. Work Assignment 4-12 under EPA Contract No. 68-D-01-073 by RTI International, Research Triangle Park, NC. U.S. Environmental Protection Agency, Research Triangle Park, NC. February 2006.

to reclaim zinc, which also defrays some of the disposal costs.^{25 26}

Additionally, a relatively small increase in energy may result from the use of electricity to power fans that draw EAF and AOD exhaust air into the canopy hood that captures the PM and sends PM-laden air to the baghouse, at 66, 940, 4,700 MW-hr per year for small, medium, and large facilities, respectively. However, if the A/C ratio of the fabric filters is lowered to meet the facility baghouse standard due to an increase in number of bags, some decrease in energy use may occur.

Finally, there will be no water or noise impacts with the promulgated NSPS subpart AAb.

C. What are the cost impacts?

Costs were estimated for regular testing every 5 years for 9 new facilities projected in the 10 years after May 16, 2022. The estimated annual testing costs for each facility are \$10,625 per year (\$2022) for conducting EPA Method 5 for PM emissions at each baghouse's exhaust over a 5-year period, using an estimate of 1.64 baghouses per facility based on the EAF data. While new, modified, or reconstructed sources that start up after May 16, 2022, are subject to testing every 5 years under the finalized NSPS subpart AAb, EPA Method 5 testing is required upon initial startup under 40 CFR 60.8. Therefore, in the first 5 years after startup, there will be no testing costs as a result of the finalized rule. Then, in the sixth through the tenth year after initial startup after May 16, 2022, the estimated new, modified, or reconstructed sources will incur costs of approximately \$9,562 per year (\$2022) per facility for testing, based on an estimate of 0.9 new, modified, or reconstructed facilities per year (0.9 × \$10,625). Due to the estimated staggered startup of these new, modified, or reconstructed facilities, with 0.9 new, modified, or reconstructed facilities starting each year after the proposal (May 16, 2022), the total costs for testing for all new, modified, or reconstructed facilities under this rule after the initial testing required under 40 CFR part 60.8 will range from approximately \$523,000 (\$2022) in the sixth year after May 16, 2022 (corresponding to 5.4 new facilities), to a total of approximately \$900,000 in the tenth year after May 16, 2022 (reflecting costs for 9 facilities, with testing costs of approximately

²⁵ Proven Waelz Kiln Technology. Accessed 2/18/22. http://www.globalsteeldust.com/waelz_kiln_technology.

²⁶ Rütten, J. *Application of the Waelz Technology on Resource Recycling of Steel Mill Dust*. Düsseldorf: GmbH. D-40225, 2006.

\$100,000 per facility per year), where the testing costs that would occur in years 6 through 10 are for the new, modified, or reconstructed facilities that start up in years 1 through 5 after May 16, 2022.

Based on information from 2010 through 2017 obtained by the EPA for 31 EAF facilities, the EPA found the average opacity to be 0.14 percent, with about half of the units achieving 0 percent opacity in the tests. Because opacity in the baseline is already low, the EPA expects any new, modified, or reconstructed facility would be able to meet the promulgated opacity and PM limits without any additional control devices beyond those already required by the NSR program, applicable state requirements or by minor process changes to improve capture of exhaust flows or other process parameters, if needed. While the actual cost impacts of the promulgated 0 percent opacity for melting and refining and 6 percent opacity for charging and tapping would likely be substantially lower, the EPA developed an upper bound estimate of potential compliance costs based upon the assumption that affected units would install a partial roof canopy above the crane rails to ensure 0 percent opacity during melting and refining and 6 percent opacity during charging and tapping compared to a hypothetical baseline model facility meeting 6 percent opacity at all times. These costs to achieve the opacity requirements are estimated to be \$86,000, \$1,140,000, \$5,700,000 (\$2022) per year per facility for small, medium, and large model facilities, respectively.

Total annual costs for NSPS subpart AAb, based on nine new, modified, or reconstructed facilities in the first 10 years after May 16, 2022, are \$560,000 per year (\$2022) for 3 small facilities, \$4.9M per year for 4 medium facilities, and \$11.5M per year for 2 large facilities, for a total of \$17M per year (\$2022) for 9 new facilities in the tenth year after May 16, 2022, using the same staggered startup rate described for testing costs. Details of the cost estimates for the final rule can be found in the "Cost Memorandum" discussed in section IV.A.2 (with proposal costs updated to 2022²⁷) which can be found in the docket for this rule.

²⁷ In the time since the proposal costs were assessed in 2020, inflation has increased with a subsequent increase in the gross national product (GNP), which is the basis for the U.S. dollars used in the costs estimates. In addition, interest rates, which affect capital costs, increased from 3.5 percent to 7.5 percent from proposal cost preparation (in 2021) to final rule cost preparation (in 2022).

For the promulgated mass-based PM standard in lb/ton for facility-wide total baghouse PM emissions, we estimated the capital and annual costs between a baseline scenario based on the current NSPS individual baghouse concentration limit (in gr/dscf) in 40 CFR part 60, subparts AA and AAa and a scenario based on a lower total facility-wide baghouse PM emissions in a mass-based limit (in lb/ton), which is the format for the standard of performance we are promulgating. Because data from the 31 existing EAF facilities in the 2010 dataset used by the EPA to develop the facility-wide PM limit show these facilities could already meet the 0.16 lb/ton total facility baghouse PM limit, we expect the promulgated mass-based standard applied to future new, modified, and reconstructed EAF facilities would be feasible and pose minimal cost impacts, if any.

Additional cost analysis, including calculation of costs using the upper bound cost estimates for the installation of partial roof canopies, can be found in the Economic Impact Analysis (EIA) associated with this final rule, which is available in the docket for this rule. The EIA additionally presents costs in terms of the present value and equivalent annual value of projected compliance costs over the 2023 to 2032 period discounted at 3 and 7 percent.

D. What are the economic impacts?

Economic impact analyses focus on changes in market prices and output levels. If changes in market prices and output levels in the primary markets are significant enough, impacts on other markets may also be examined. Both the magnitude of costs associated with the promulgated requirements and the distribution of these costs among affected facilities can have a role in determining how the market will change in response to a regulatory requirement. As discussed in section IV.B. of this preamble, the cost analysis incorporates the assumption that units affected by the new NSPS subpart AAb would install a partial roof canopy above the crane rails to ensure 0 percent melt shop opacity compared to a hypothetical baseline model facility meeting 6 percent opacity. The costs should be viewed as upper bound estimates on the potential compliance costs as the EPA expects any new, modified or reconstructed facility would be able to meet the promulgated opacity and PM limits without any additional control devices beyond those already required by the NSR program, applicable state requirements, or by minor process changes to improve capture of exhaust

flows or other process parameters, if needed. As discussed in the EIA, even under the upper bound cost assumptions described, the EPA expects the potential economic impacts of this final rule will be small.

As required by the Regulatory Flexibility Act (RFA), we performed an analysis to determine if any small entities might be disproportionately impacted by the promulgated requirements. The EPA does not know what firms will construct new facilities in the future and, as a result, cannot perform a cost-to-sales analysis with the same confidence as we do with firms owning existing facilities. However, based on an assessment of the new units built during the 2011 to 2020 period and the units that have been announced, which are all owned by firms that are not considered to be small businesses, the EPA does not believe it is likely that any future facilities will be built by a small business. See the EIA in the docket for this action for additional information on the analysis presented in this section.

E. What are the benefits?

The new requirements being finalized in 40 CFR subpart AAb are expected to reduce PM emissions, including PM_{2.5}. In addition, the revisions to 40 CFR part 60, subparts AA and AAa will clarify the rules, enhance compliance and enforcement, and is expected to reduce PM emissions, including PM_{2.5}. As explained in section IV.A of this preamble, the requirements are projected to reduce 28 tons of PM_{2.5} in 2032. These emissions reductions are expected to produce health benefits in the affected locations. The *Integrated Science Assessment for Particulate Matter* (ISA)²⁸ contains synthesized toxicological, clinical, and epidemiological evidence that the EPA uses to determine whether each pollutant is causally related to an array of adverse human health outcomes associated with either acute (*i.e.*, hours or days-long) or chronic (*i.e.*, years-long) exposure. For each outcome, the ISA includes the EPA conclusions as to whether this relationship is causal, likely to be causal, suggestive of a causal relationship, inadequate to infer a causal relationship, or not likely to be a causal relationship.

In the ISA, it was found that acute exposure to PM_{2.5} was causally related to cardiovascular effects and mortality (*i.e.*, premature death), and respiratory

²⁸ *Integrated Science Assessment for Particulate Matter* (Final Report, 2019). EPA/600/R19/188. U.S. Environmental Protection Agency, Washington, DC. 2019.

effects as likely-to-be-causally related. Further, the EPA identified cardiovascular effects and total mortality as causally related to long-term exposure to PM_{2.5} and respiratory effects as likely-to-be-causal; the evidence was suggestive of a causal relationship for reproductive and developmental effects as well as cancer, mutagenicity, and genotoxicity.

The benefits per ton (BPT) of the PM_{2.5} emissions reductions cited earlier in this preamble for years 2025 and 2030 and at 3 percent and 7 percent discount rates are presented in Table 7 below in 2022 dollars. The BPT of the PM_{2.5} emissions reductions for year 2025, at a 3 percent discount rate translates to a low projection of \$417,000 per ton emission reduction, to

a high projection of \$891,000 per ton emission reduction (in 2022 dollars). Information regarding the process by which these BPTs were calculated is available in the technical support document *Estimating the Benefit per Ton of Reducing Directly-Emitted PM_{2.5}, PM_{2.5} Precursors, and Ozone Precursors from 21 Sectors*.

TABLE 7—BENEFITS PER TON OF PM_{2.5} REDUCED

Year	\$/ton PM _{2.5} emission reductions \$2022			
	3 Percent discount rate		7 Percent discount rate	
	Low	High	Low	High
2025	\$417,000	\$891,000	\$375,000	\$803,000
2030	451,000	933,000	405,000	839,000

Note: The range reported here reflects the use of risk estimates from two alternative long-term exposure PM-mortality studies.²⁹

F. What analysis of environmental justice did we conduct?

Executive Order 12898 directs the EPA to identify the populations of concern that are most likely to experience unequal burdens from environmental harms, which are specifically minority populations (people of color), low-income populations, and Indigenous peoples (59 FR 7629; February 16, 1994). Additionally, Executive Order 13985 is intended to advance racial equity and support underserved communities through Federal government actions (86 FR 7009; January 20, 2021). The EPA defines EJ as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”³⁰ The EPA further defines fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.” In recognizing that people of color and low-income populations often bear an unequal burden of environmental harms and risks, the EPA continues to consider ways of protecting them from adverse public health and

environmental effects of air pollution. For purposes of analyzing regulatory impacts, the EPA relies upon its June 2016 “Technical Guidance for Assessing Environmental Justice in Regulatory Analysis,”³¹ which provides recommendations that encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time, resource constraints, and analytical challenges will vary by media and circumstance. The Technical Guidance states that a regulatory action may involve potential EJ concerns if it could: (1) Create new disproportionate impacts on minority populations, low-income populations, and/or Indigenous peoples; (2) exacerbate existing disproportionate impacts on minority populations, low-income populations, and/or Indigenous peoples; or (3) present opportunities to address existing disproportionate impacts on minority populations, low-income populations, and/or Indigenous peoples through this action under development.

The Agency has conducted an analysis of the demographics of the populations living near existing facilities in the EAF population in the U.S. Because this action finalizes standards of performance for new, modified, and reconstructed EAF sources that commence construction after May 16, 2022, the locations of the construction of new EAF facilities are not known. In addition, it is not known which of the existing facilities will be modified or reconstructed in the future. Therefore, the demographic analysis was conducted for the 88 existing EAF facilities as a characterization of the

demographics in areas where these facilities are now located.

The full results of the demographic analysis can be found in section E, “What are the environmental justice impacts?,” of the preamble to the proposed rule (87 FR 29724). The analysis included an assessment of individual demographic groups of the populations living within 5 km and within 50 km of the existing facilities. We then compared the data from the analysis to the national average for each of the demographic groups. The results show that for populations within 5 km of the 87 existing EAF facilities (we identified one additional existing facility since the proposed rule was published for a total of 88 facilities, but the overall results did not change). The percent of the population that is African American is above the national average (17 percent versus 12 percent). The percent of people living below the poverty level is also above the national average (17 percent versus 13 percent). The percent of the population that is Native American, Hispanic or Latino, or Other/Multiracial are below the national averages. The percent of the population over 25 without a high school diploma and the percent of the population in linguistic isolation are similar to the national averages. The results of the analysis of populations within 50 km of the 88 EAF facilities is similar to the 5 km analysis.

The methodology and the results of the demographic analysis for the final rule are presented in a technical report, *Analysis of Demographic Factors for Populations Living Near Electric Arc Furnace Facilities*, available in the docket for this action (Docket ID No. EPA-HQ-OAR-2002-0049).

²⁹ *Estimating the Benefit per Ton of Reducing Directly-emitted PM_{2.5}, PM_{2.5} Precursors and Ozone Precursors from 21 Sectors*. U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711. 2022. Available at: https://www.epa.gov/system/files/documents/2021-10/source-apportionment-tsd-oct-2021_0.pdf.

³⁰ See <https://www.epa.gov/environmentaljustice>.

³¹ See <https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis>.

The EPA expects that the Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed after May 16, 2022, will ensure compliance via frequent testing and reduce emissions via a lower opacity limit for melt shops and with the standards at all times (including periods of SSM). The rule will also increase data transparency through electronic reporting. Therefore, effects of emissions on populations in proximity to any future affected sources, including in communities potentially overburdened by pollution, which are often people of color, and low-income and Indigenous communities will be reduced due to compliance with the standards of performance being finalized in this action.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was, therefore, not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

The information collection activities in this final rule have been submitted for approval to OMB under the PRA. The information collection request (ICR) document that the EPA prepared has been assigned the EPA ICR number 1060.21. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

These amendments to 40 CFR part 60, subparts AA and AAa to require electronic reporting, and implement editorial and clarifying changes to rule language are estimated to reduce time spent and paperwork for rule. We are promulgating a new subpart for new, modified, or reconstructed facilities that start up after May 16, 2022, under 40 CFR part 60, subpart AAb with similar reporting, recordkeeping, and compliance requirements as 40 CFR part 60, subparts AA and AAa.

Respondents/affected entities: EAF and AOD facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subparts AA; AAa; and AAb).

Estimated number of respondents: 90, includes 88 estimated current facilities subject to 40 CFR part 60, subparts AA and AAa, and 3 new facilities that would be subject to 40 CFR part 60, subpart AAb in the 3 years after proposal (May 16, 2022).

Frequency of Response: One time.

Total estimated burden: The annual recordkeeping and reporting burden for facilities to comply with all the requirements in the NSPS is estimated to be 57,100 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: The annual recordkeeping and reporting costs for all facilities to comply with all of the requirements in the NSPS is estimated to be \$7,400,000 (per year), of which \$65,686 (per year) is for this final rule (\$60,000 for EPA Method 5 compliance and \$696 for electronic reporting), and \$7,130,000 for other costs related to continued compliance with the NSPS, including \$198,000 for paperwork associated with operation and maintenance requirements. The total rule costs reflect an increase/decrease cost of \$450,000 (per year) from the previous ICR that reflects savings due to electronic reporting and an increase to the labor rates.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on the three identified small entities among the approximately 90 EAF facilities (36 companies), because most facilities are likely to be performing regular compliance tests as part of their permit renewal process. Additionally, no facilities are expected to be built by small entities over the next 10 years based on past industry growth and small business starts. The 3 current facilities owned by small businesses were started in 1912, 1968, and 1994, respectively.

Further discussion is included in the EIA for this final rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates an enforceable duty on the private sector, the cost does not exceed \$100 million or more.

E. Executive Order 13132: Federalism

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

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

This action does not have Tribal implications as specified in Executive Order 13175. This rule will implement improvements in air quality due to new EAF in all locations of new EAF facilities, including any new EAF which are in proximity to Tribal grounds. It would not have substantial direct effects on Tribal governments, 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. No Tribal governments own facilities that are the subject of this rulemaking. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with Tribal officials during the development of this action. A copy of the memorandum dated May 17, 2022, sent to Tribal leaders concerning the EAF NSPS is provided in the docket to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885; April 23, 1997) directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because it is not economically

significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The EPA does not believe there are disproportionate risks to children because the new subpart AAb lowers emissions from the melt shop during melting and refining, which will benefit children's health; and other changes made to all subparts, AA, AAa, and AAb, increase compliance with emission limits, which also benefits children's health. However, EPA's Policy on Children's Health applies to this action. Information on how the Policy was applied is available under "Children's Environmental Health" in the Supplementary Information section of this preamble.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action involves technical standards. Therefore, the EPA conducted searches for the EAF NSPS through the Enhanced National Standards Systems Network Database managed by the American National Standards Institute (ANSI). We also contacted voluntary consensus standards (VCS) organizations and accessed and searched their databases. We conducted searches for EPA Methods 1, 2, 3, 3A, 3B, 4, 5, 5D, and 22 of 40 CFR part 60, appendix A. During the EPA's VCS search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures that are similar to the EPA's reference method, the EPA reviewed it as a potential equivalent method. We reviewed all potential standards to determine the practicality of the VCS for this rule. This review requires significant method validation data that meet the requirements of EPA Method 301 for accepting alternative methods or scientific, engineering and policy equivalence to procedures in the EPA reference methods. The EPA may reconsider determinations of impracticality when additional information is available for a particular VCS. No applicable VCS were identified for EPA Methods 5D and 22.

The EPA is incorporating by reference the VCS ANSI/ASME PTC 19.10–1981,

"Flue and Exhaust Gas Analyses," to provide that the manual procedures (but not instrumental procedures) of VCS ANSI/ASME PTC 19.10–1981—Part 10 may be used as an alternative to EPA Method 3B. The manual procedures (but not instrumental procedures) of VCS ANSI/ASME PTC 19.10–1981—Part 10 may be used as an alternative to EPA Method 3B for measuring the oxygen or carbon dioxide content of the exhaust gas. This standard is acceptable as an alternative to EPA Method 3B and is available from ASME at www.asme.org; by mail at Three Park Avenue, New York, NY 10016–5990; or by telephone at (800) 843–2763. This method determines quantitatively the gaseous constituents of exhausts resulting from stationary combustion sources. The gases covered in ANSI/ASME PTC 19.10–1981 are oxygen, carbon dioxide, carbon monoxide, nitrogen, sulfur dioxide, sulfur trioxide, nitric oxide, nitrogen dioxide, hydrogen sulfide, and hydrocarbons. However, the use in this rule is only applicable to oxygen and carbon dioxide.

In the final rule, the EPA is incorporating by reference the VCS ASTM D7520–16, Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere, which is an instrumental method to determine plume opacity in the outdoor ambient environment as an alternative to visual measurements made by certified smoke readers in accordance with EPA Method 9. The concept of ASTM D7520–16, also known as the Digital Camera Opacity Technique or DCOT, is a test protocol to determine the opacity of visible emissions using a digital camera. It was based on previous method development using digital still cameras and field testing of those methods. The purpose of ASTM D7520–16 is to set a minimum level of performance for products that use DCOT to determine plume opacity in ambient environments. The DCOT method is an acceptable alternative to EPA Method 9 with the following caveats:

- During the DCOT certification procedure outlined in Section 9.2 of ASTM D7520–16, the facility or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds or a sparse tree stand).

- The facility must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

- The facility must follow the recordkeeping procedures outlined in 40 CFR 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination.

- The facility or the DCOT vendor must have a minimum of 4 independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one anyone reading, and the average error must not exceed 7.5 percent opacity.

- This approval does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 is on the facility, DCOT operator, and DCOT vendor. This method describes procedures to determine the opacity of a plume, using digital imagery and associated hardware and software, where opacity is caused by PM emitted from a stationary point source in the outdoor ambient environment. The opacity of emissions is determined by the application of a DCOT that consists of a digital still camera, analysis software, and the output function's content to obtain and interpret digital images to determine and report plume opacity. The ASTM D7520–16 document is available from ASTM at www.astm.org or 1100 Barr Harbor Drive, West Conshohocken, PA 19428–2959, telephone number: (610) 832–9500, fax number: (610) 832–9555 at service@astm.org.

The EPA is finalizing the use of the guidance document, *Fabric Filter Bag Leak Detection Guidance*, EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, September 1997. This document provides guidance on the use of triboelectric monitors as fabric filter bag leak detectors. The document includes fabric filter and monitoring system descriptions; guidance on monitor selection, installation, setup, adjustment, and operation; and quality assurance procedures. The document is available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=2000D5T6.PDF>.

Additional information for the VCS search and determinations can be found in the three memoranda titled *Voluntary Consensus Standard Results for Standards of Performance for Steel Plants: Electric Arc Furnaces Constructed After October 21, 1974, and*

On or Before August 17, 1983; Voluntary Consensus Standard Results for Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After August 17, 1983, and On or Before May 16, 2022; and Voluntary Consensus Standard Results for Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed After May 16, 2022, available in the docket for this final rule.

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) 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 (people of color and/or Indigenous peoples) and low-income populations.

The EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on people of color, low-income populations, and/or indigenous peoples if a modified or reconstructed EAF facility becomes subject to the final rule for 40 CFR part 60, subpart AAb, considering the demographics analysis for the existing EAF facilities described in section V.F of this preamble. However, it is unknown where new EAF facilities will be located so it is not possible to predict the impacts of these facilities on people of color, low-income populations, and/or indigenous peoples.

The EPA believes that this action is not likely to result in new disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. The impacts of these final rules are beneficial to all demographic groups, and include requirements to clarify current rules in 40 CFR part 60, subparts AA, AAa and, for new sources built after publication of this final rule (in 40 CFR part 60, subpart AAb), to ensure compliance via frequent testing, to meet a lower opacity limit for melt shops during melting and refining, to meet a baghouse emissions limit as a facility-wide total in lb/ton, and to meet all the promulgated standards at all times, including periods of SSM.

The information supporting this Executive Order review is contained in section V.F of this preamble and in a technical report, *Analysis of Demographic Factors For Populations Living Near Steel Plants Using Electric Arc Furnaces*, located in the docket for this rule. Because the EPA does not know where new facilities will be located that will become subject to this new 40 CFR part 60, subpart AAb, a demographic analysis was performed on the existing EAF/AOD population, which could become subject to 40 CFR part 60, subpart AAb if a modification or reconstruction increases emissions.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedures, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR part 60 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart A—General Provisions.

■ 2. Section 60.17 is amended by revising paragraphs (g)(14), (h)(206), and (j)(2) to read as follows:

§ 60.17 Incorporation by reference.

* * * * *

(g) * * *

(14) ASME/ANSI PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], (Issued August 31, 1981), IBR approved for §§ 60.56c(b); 60.63(f); 60.106(e); 60.104a(d), (h), (i), and (j); 60.105a(b), (d), (f), and (g); 60.106a(a); 60.107a(a), (c), and (d); 60.275(e); 60.275a(e); 60.275b(e); tables 1 and 3 to subpart EEEE; tables 2 and 4 to subpart FFFF; table 2 to subpart JJJJ; §§ 60.285a(f); 60.396(a); 60.2145(s) and (t); 60.2710(s) and (t); 60.2730(q); 60.4415(a); 60.4900(b); 60.5220(b); tables 1 and 2 to subpart LLLL; tables 2 and 3 to subpart

MMMM; §§ 60.5406(c); 60.5406a(c); 60.5407a(g); 60.5413(b); 60.5413a(b); and (d).

* * * * *

(h) * * *

(206) ASTM D7520–16, Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere, approved April 1, 2016; IBR approved for §§ 60.271(k); 60.272(a) and (b); 60.273(c) and (d); 60.274(h); 60.275(e); 60.276(c); 60.271a; 60.272a(a) and (b); 60.273a(c) and (d); 60.274a(h); 60.275a(e); 60.276a(f); 60.271b; 60.272b(a) and (b); 60.273b(c) and (d); 60.274b(h); 60.275b(e); 60.276b(f); 60.374a(d).

* * * * *

(j) * * *

(2) EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, September 1997, <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=2000D5T6.PDF>; IBR approved for §§ 60.273(e); 60.273a(e); 60.273b(e); 60.373a(b); 60.2145(r); 60.2710(r); 60.4905(b); 60.5225(b).

* * * * *

Subpart AA—Standards of Performance for Steel Plants: Electric Arc Furnaces Constructed After October 21, 1974, and On or Before August 17, 1983

■ 3. Section 60.270 is amended by revising paragraph (b) to read as follows:

§ 60.270 Applicability and designation of affected facility.

* * * * *

(b) The provisions of this subpart apply to each affected facility identified in paragraph (a) of this section that commenced construction, modification, or reconstruction after October 21, 1974, and on or before August 17, 1983, where a modification is any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which this standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which this standard applies) into the atmosphere not previously emitted.

■ 4. Section 60.271 is amended by:

■ a. Revising paragraphs (a), (d) through (f), (i) through (k), (m), and (n); and

■ b. Adding new paragraphs (p) through (r).

The revisions and additions read as follows:

§ 60.271 Definitions.

* * * * *

(a) *Electric arc furnace (EAF)* means a furnace that produces molten steel and heats the charge materials with electricity using carbon electrodes. Furnaces that continuously feed direct-reduced iron ore pellets as the primary source of iron are not affected facilities within the scope of this definition.

* * * * *

(d) *Capture system* means the equipment (including ducts, hoods, fans, dampers, etc.) used to capture particulate matter generated by the operation of an EAF and transport captured particulate matter to the air pollution control device.

(e) *Charge* means the addition of iron and steel scrap or other materials into the shell of an electric arc furnace.

(f) *Charging period* means the time period when iron and steel scrap or other materials are added into the top of an EAF until the melting and refining period commences.

* * * * *

(i) *Melting and refining* means that phase of the steel production cycle when charge material is melted and undesirable elements are removed from the metal.

(j) *Melting and refining period* means the time period commencing at the initial energizing of the electrode to begin the melting process and ending at the initiation of the tapping period, excluding any intermediate times when the electrodes are not energized as part of the melting process.

(k) *Shop opacity* means the arithmetic average of 24 or more opacity observations of any EAF emissions emanating from, and not within, the shop, taken in accordance with EPA Method 9 of appendix A of this part. Alternatively, ASTM D7520–16 (incorporated by reference, see § 60.17), may be used with the following five conditions: (1) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16 (incorporated by reference, see § 60.17), the owner or operator or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand);

(2) The owner or operator must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16 (incorporated by reference, see § 60.17);

(3) The owner or operator must follow the recordkeeping procedures outlined

in § 60.7(f) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination;

(4) The owner or operator or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of anyone reading and the average error must not exceed 7.5 percent opacity;

(5) Use of this approved alternative does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 (incorporated by reference, see § 60.17) and these requirements is on the facility, DCOT operator, and DCOT vendor.

* * * * *

(m) *Shop* means the building that houses one or more EAF's and serves as the point from which compliance with § 60.272(a)(3), "Standard for Particulate Matter," is measured.

(n) *Direct shell evacuation system* means any system that creates and maintains a negative pressure within the EAF shell during melting and refining, and transports emissions to the control device.

* * * * *

(p) *Damper* means any device used to open, close or throttle a DEC system or hood designed to capture emissions from an EAF and route them to the associated control device(s). It does not include isolation dampers used to isolate a fan or baghouse compartment for repair or cleaning, or dampers controlling collection of emissions from equipment other than an EAF.

(q) *Negative-pressure fabric filter* means a fabric filter with the fans on the downstream side of the filter bags.

(r) *Positive-pressure fabric filter* means a fabric filter with the fans on the upstream side of the filter bags.

■ 5. Section 60.272 is amended by revising paragraphs (a)(2), (a)(3) introductory text, and (b) to read as follows:

§ 60.272 Standard for particulate matter.

(a) * * *

(2) Exit from a control device and exhibit three percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

(3) Exit from a shop and, due solely to operations of any EAF(s), exhibit 6 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. Shop opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of visible emissions, only one observation of shop opacity will be required. In this case, the shop opacity observations must be made for the site of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident, except:

* * * * *

(b) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from dust-handling equipment any gases which exhibit 10 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

■ 6. Section 60.273 is amended by:

■ a. Revising paragraphs (c), (d), (e) introductory text and (e)(3);

■ b. In paragraph (e)(4) introductory text, remove the text "the U.S. Environmental Protection Agency guidance document "Fabric Filter Bag Leak Detection Guidance" (EPA-454/R-98-015)" and add, in its place, the text "EPA-454/R-98-015, Fabric Filter Bag Leak Detection Guidance (incorporated by reference, see § 60.17)";

■ c. Revising paragraphs (e)(6)(ii), and (7), (f) introductory text, and (f)(1) and (5);

■ d. Redesignating paragraph (f)(6) as paragraph (f)(7);

■ e. Adding new paragraph (f)(6); and

■ f. Revising paragraph (g).

The revisions and addition read as follows:

§ 60.273 Emission monitoring.

* * * * *

(c) A continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) is not required on any modular, multi-stack, negative-pressure or positive-

pressure fabric filter or on any single-stack fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer and the owner installs and operates a bag leak detection system according to paragraph (e) of this section whenever the control device is being used to remove particulate matter from the EAF. Visible emission observations shall be conducted at least once per day of the control device for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9 of appendix A to this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, the EPA Method 9 observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272(a)(2).

(d) A furnace static pressure monitoring device is not required on any EAF equipped with a DEC system if observations of shop opacity are performed by a certified visible emission observer as follows:

(1) At least once per day when the furnace is operating.

(2) No less than once per week, commencing from the tap of one EAF heat cycle to the tap of the following heat cycle. A melt shop with more than one EAF shall conduct these readings while both EAFs are in operation. Both EAFs are not required to be on the same schedule for tapping.

(3) Shop opacity shall be determined as the arithmetic average of 24 or more consecutive 15-second opacity observations of emissions from the shop taken in accordance with EPA Method 9, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. Shop opacity shall be recorded for any point(s) where visible emissions are observed in proximity to an affected EAF. Where it is possible to determine that a number of visible emission points

relate to only one incident of visible emissions, only one observation of shop opacity will be required. In this case, the shop opacity observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident.

(e) A bag leak detection system must be installed on all single-stack fabric filters and operated whenever the control device is being used to remove particulate matter from the EAF if the owner or operator elects not to install and operate a continuous opacity monitoring system as provided for under paragraph (c) of this section. In addition, the owner or operator shall meet the visible emissions observation requirements in paragraph (c) of this section. The bag leak detection system must meet the specifications and requirements of paragraphs (e)(1) through (8) of this section.

(3) The bag leak detection system must be equipped with an alarm system that will activate when an increase in relative particulate loading is detected over the alarm set point established according to paragraph (e)(4) of this section, and the alarm must be located such that it can be identified by the appropriate plant personnel.

* * * * *

(6) * * *

(ii) If opacities greater than zero percent are observed over four consecutive 15-second observations during the daily opacity observations required under paragraph (c) of this section and the alarm on the bag leak detection system alarm is not activated, the owner or operator shall lower the alarm set point on the bag leak detection system to a point where the alarm would have been activated during the period when the opacity observations were made.

(7) For negative pressure, induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, the bag leak detection sensor must be installed downstream of the baghouse or upstream of any wet scrubber.

* * * * *

(f) For each bag leak detection system installed according to paragraph (e) of this section, the owner or operator shall initiate procedures to determine the cause of all alarms within 1 hour of an alarm. The cause of the alarm must be alleviated within 24 hours of the time the alarm occurred by taking whatever response action(s) are necessary. Response actions may include, but are not limited to the following:

(1) Inspecting the baghouse for air leaks, torn or broken bags or filter media, or any other condition that may have caused an increase in particulate emissions;

* * * * *

(5) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system;

(6) Establishing to the extent acceptable by the delegated authority that the alarm was a false alarm and not caused by a bag leak or other malfunction that could reasonably result in excess particulate emissions; or

* * * * *

(g) In approving the site-specific monitoring plan required in paragraph (e)(4) of this section, the Administrator or delegated authority may allow owners or operators more than 24 hours to alleviate specific conditions that cause an alarm if the owner or operator identifies the condition that could lead to an alarm in the monitoring plan, adequately explains why it is not feasible to alleviate the condition within 24 hours of the time the alarm occurred, and demonstrates that the requested additional time will ensure alleviation of the condition as expeditiously as practicable.

■ 7. Section 60.274 is amended by revising paragraphs (b) through (g), and (i) to read as follows:

§ 60.274 Monitoring of operations.

* * * * *

(b) Except as provided under paragraph (d) of this section, the owner or operator subject to the provisions of this subpart shall:

(1) Monitor and record on a continuous basis the rolling 15-minute average furnace static pressure (if a DEC system is in use, and a furnace static pressure gauge is installed according to paragraph (f) of this section) and either:

(i) Install, calibrate, and maintain a monitoring device that continuously records the capture system fan motor amperes and damper position(s);

(ii) Install, calibrate, and maintain a monitoring device that continuously records on a rolling 15-minute average basis either the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and continuously record damper position(s).

(2) The volumetric flow monitoring device(s) may be installed in any appropriate location in the capture system such that reproducible flow rate monitoring will result. The flow rate monitoring device(s) shall have an

accuracy of ± 10 percent over its normal operating range and shall be calibrated according to the manufacturer's instructions. The Administrator may require the owner or operator to demonstrate the accuracy of the monitoring device(s) relative to EPA Methods 1 and 2 of appendix A of this part.

(3) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded on a rolling averaging period not to exceed 15 minutes.

(c) When the owner or operator of an affected facility is required to demonstrate compliance with the standards under § 60.272(a)(3) and at any other time that the Administrator may require (under section 114 of the CAA, as amended), the owner or operator shall determine during periods in which a hood is operated for the purpose of capturing emissions from the affected facility subject to paragraph (b) of this section, either:

(1) Monitor and record the fan motor amperes at each damper position, and damper position consistent with paragraph (i)(5) of this section;

(2) install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate through each separately ducted hood; or

(3) install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (i)(5) of this section.

(4) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded on a rolling averaging period not to exceed 15 minutes.

(5) The owner or operator may petition the Administrator or delegated authority for reestablishment of these parameters whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the EAF operating conditions upon which the parameters were previously established are no longer applicable. The values of the parameters as determined during the most recent demonstration of compliance shall be the appropriate operational range or control set point throughout each applicable period. Operation at values beyond the accepted operational range or control set point may be subject to the requirements of § 60.276(a).

(d) The owner or operator may petition the Administrator or delegated authority to approve any alternative method that will provide a continuous

record of operation of each emission capture system.

(e) The owner or operator shall perform monthly operational status inspections of the equipment that is important to the performance of the total capture system (*i.e.*, pressure sensors, dampers, and damper switches). This inspection shall include observations of the physical appearance of the equipment (*e.g.*, presence of hole in ductwork or hoods, flow constrictions caused by dents or excess accumulations of dust in ductwork, and fan erosion) and building inspections to ensure that the building does not have any holes or other openings for particulate matter laden air to escape. Any deficiencies that are determined by the operator to materially impact the efficacy of the capture system shall be noted and proper maintenance performed.

(f) Except as provided for under § 60.273(d), where emissions during any phase of the heat time are controlled by use of a direct shell evacuation system, the owner or operator shall install, calibrate, and maintain a monitoring device that continuously records the pressure in the free space inside the EAF. The pressure shall be recorded as no greater than 15-minute integrated block averages. The monitoring device may be installed in any appropriate location in the EAF or DEC duct prior to the introduction of ambient air such that reproducible results will be obtained. The pressure monitoring device shall have an accuracy of ± 5 mm of water gauge over its normal operating range and shall be calibrated according to the manufacturer's instructions.

(g) Except as provided for under § 60.273(d), when the owner or operator of an EAF is required to demonstrate compliance with the standard under § 60.272(a)(3) and at any other time the Administrator may require (under section 114 of the Act, as amended), the pressure in the free space inside the furnace shall be determined during the melting and refining period(s) using the monitoring device under paragraph (f) of this section. The owner or operator may petition the Administrator or delegated authority for reestablishment of the 15-minute integrated average pressure whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the EAF operating conditions upon which the pressures were previously established are no longer applicable. The pressure range or control setting during the most recent demonstration of compliance shall be maintained at all times the EAF is operating in a melting and refining

period. Continuous operation at pressures higher than the operational range or control setting may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility.

* * * * *

(i) During any performance test required under § 60.8, and for any report thereof required by § 60.276(c) of this subpart or to determine compliance with § 60.272(a)(3) of this subpart, the owner or operator shall monitor the following information for all heats covered by the test:

(1) Charge weights and materials, and tap weights and materials;

(2) Heat times, including start and stop times, and a log of process operation, including periods of no operation during testing and, if a furnace static pressure monitoring device is operated pursuant to paragraph (f) of this section, the pressure inside the furnace when DEC systems are used;

(3) Control device operation log;

(4) Continuous opacity monitor or EPA Method 9 data, or, as an alternative to EPA Method 9, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271;

(5) All damper positions, no less frequently than performed in the latest melt shop opacity compliance test for a full heat, if selected as a method to demonstrate compliance under paragraph (b) of this section;

(6) Fan motor amperes at each damper position, if selected as a method to demonstrate compliance under paragraph (b) of this section;

(7) Volumetric air flow rate through each separately ducted hood, if selected as a method to demonstrate compliance under paragraph (b) of this section; and

(8) Static pressure at each separately ducted hood, if selected as a method to demonstrate compliance under paragraph (b) of this section.

(9) Parameters monitored pursuant to paragraphs (i)(6)–(8) of this section shall be recorded on a rolling averaging period not to exceed 15 minutes.

■ 8. Section 60.275 is amended by:

■ a. Revising paragraphs (a) and (b)(2);

■ b. Adding paragraph (b)(3);

■ c. Revising paragraphs (c), (e)(1), (3), and (4);

■ d. Removing paragraph (g);

■ e. Redesignating existing paragraphs (h) through (j) as paragraphs (g) through (i), respectively; and

■ f. Revising newly redesignated paragraphs (g) introductory text, (g)(3), and (h).

The revisions and additions read as follows:

§ 60.275 Test methods and procedures.

(a) During performance tests required in § 60.8, the owner or operator shall not add gaseous diluent to the effluent gas after the fabric filter in any pressurized fabric collector, unless the amount of dilution is separately determined and considered in the determination of emissions.

(b) * * *

(2) Use a method that is acceptable to the Administrator or delegated authority and that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(3) Any combination of the criteria of paragraphs (b)(1) and (b)(2) of this section.

(c) When emissions from any EAF(s) are combined with emissions from facilities not subject to the provisions of this subpart, compliance with § 60.272(a)(3) will be based on emissions from only the affected facility(ies). The owner or operator may use operational knowledge to determine the facilities that are the sources, in whole or in part, of any emissions observed in demonstrations of compliance with § 60.272(a)(3).

* * * * *

(e) * * *

(1) EPA Method 5 (and referenced EPA Methods 1, 2, 3, 3A, 3B, and 4) shall be used for negative-pressure fabric filters and other types of control devices and EPA Method 5D (and referenced EPA Method 5) shall be used for positive-pressure fabric filters to determine the particulate matter concentration and, if applicable, the volumetric flow rate of the effluent gas. The sampling time and sample volume for each run shall be at least 4 hours and 4.5 dscm (160 dscf) and, when a single EAF is sampled, the sampling time shall include an integral number of heats. The manual portions only and not the instrumental portion of the voluntary consensus standard ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17) is an acceptable alternative to EPA Methods 3, 3A, and 3B.

* * * * *

(3) EPA Method 9 or, as an alternative, ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271, and the procedures of § 60.11 shall be used to determine opacity.

(4) To demonstrate compliance with § 60.272(a)(1), (2), and (3), the EPA Method 9 test runs shall be conducted concurrently with the particulate matter

test runs, unless inclement weather interferes.

* * * * *

(g) Where emissions from any EAF(s) are combined with emissions from facilities not subject to the provisions of this subpart, the owner or operator may use any of the following procedures for demonstrating compliance with § 60.272(a)(3), except if the combined emissions are controlled by a common capture system and control device, in which case the owner or operator may use any of the following procedures during an opacity performance test and during shop opacity observations:

* * * * *

(3) Any combination of the criteria of paragraphs (g)(1) and (2) of this section.

(h) If visible emissions observations are made in lieu of using a continuous opacity monitoring system, as allowed for by § 60.273(c), visible emission observations shall be conducted at least once per day for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9. If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, the EPA Method 9 observations must be made for the site of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272(a).

* * * * *

■ 9. Section 60.276 is amended by:

■ a. Revising paragraphs (a), (b), (c) introductory text, (c)(3), (4), (6)(iv), (10), (d), and (e)(3); and

■ b. Adding paragraphs (f) through (k).

The revisions and additions read as follows:

§ 60.276 Recordkeeping and reporting requirements.

(a) Continuous operation at a furnace static pressure that exceeds the operational range or control setting under § 60.274(g), for owners and operators that elect to install a furnace static pressure monitoring device under § 60.274(f) or operation at flow rates lower than those established under § 60.274(c) may be considered by the Administrator or delegated authority to be unacceptable operation and

maintenance of the affected facility. Operation at such values shall be reported to the Administrator or delegated authority semiannually.

(b) When the owner or operator of an EAF is required to demonstrate compliance with the standard under § 60.275(b)(2) or a combination of (b)(1) and (b)(2), the owner or operator shall provide notice to the Administrator or delegated authority of the procedure(s) that will be used to determine compliance. Notification of the procedure(s) to be used must be postmarked at least 30 days prior to the performance test.

(c) For the purpose of this subpart, the owner or operator shall conduct the demonstration of compliance with § 60.272(a) of this subpart and furnish the Administrator or delegated authority with a written report of the results of the test. This report shall include the following information:

* * * * *

(3) Make and model of the control device, and continuous opacity monitoring equipment, if applicable;

(4) Flow diagram of process and emission capture system including other equipment or process(es) ducted to the same control device;

* * * * *

(6) * * *

(iv) Continuous opacity monitor or EPA Method 9 data, or, as an alternative to EPA Method 9, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

* * * * *

(10) Test observers from any outside agency;

* * * * *

(d) The owner or operator shall maintain records of all shop opacity observations made in accordance with § 60.273(d). All shop opacity observations in excess of the emission limit specified in § 60.272(a)(3) of this subpart shall indicate a period of excess emissions, and shall be reported to the Administrator or delegated authority semi-annually, according to § 60.7(c) and submitted according to paragraph (h) of this section. In addition to the information required at § 60.7(c), the report shall include the following information:

(1) The company name and address of the affected facility.

(2) An identification of each affected facility being included in the report.

(3) Beginning and ending dates of the reporting period.

(4) A certification by a certifying official of truth, accuracy, and completeness. This certification shall

state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(e) * * *

(3) An identification of the date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, if procedures were initiated within 1 hour of the alarm, the cause of the alarm, an explanation of the actions taken, the date and time the cause of the alarm was alleviated, and if the alarm was alleviated within 24 hours of the alarm.

(f) Records of the measurements required in § 60.274 must be retained for at least 5 years following the date of the measurement.

(g) Within 60 days after the date of completing each performance test or demonstration of compliance required by this subpart, you must submit the results of the performance test following the procedures specified in paragraphs (g)(1) through (3) of this section.

(1) Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test. Submit the results of the performance test to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov/>). The data must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website.

(2) Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test. The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) Confidential business information (CBI). Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information submitted under paragraph (g)(1) or (2) of this section, you must submit a complete file, including information claimed to be

CBI, to the EPA. The file must be generated using the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. The preferred method to submit CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (e.g., Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (g)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(h) You must submit a report of excess emissions and monitoring systems performance report according to § 60.7(c) to the Administrator semiannually. Submit all reports to the EPA via CEDRI, which can be accessed through the EPA's CDX (<https://cdx.epa.gov/>). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. You must use the appropriate electronic report template on the CEDRI website (<https://www.epa.gov/electronic-reporting-air-emissions/cedri>) for this subpart. The date report templates become available will be listed on the CEDRI website. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Although we do not expect persons to assert a claim of CBI,

if you wish to assert a CBI claim, follow paragraph (g)(3) of this section except send to the attention of the Electric Arc Furnace Sector Lead. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (h). All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(i) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with that reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (i)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed, and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(j) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of

force majeure for failure to timely comply with that reporting requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (j)(1) through (5) of this section.

(1) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (e.g., hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (e.g., large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the force majeure event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of force majeure and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

(k) Any records required to be maintained by this subpart that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

Subpart AAa—Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarbonization Vessels Constructed After August 17, 1983 and On or Before May 16, 2022

■ 10. Section 60.270a is amended by revising paragraph (b) to read as follows:

§ 60.270a Applicability and designation of affected facility.

* * * * *

(b) The provisions of this subpart apply to each affected facility identified in paragraph (a) of this section that commences construction, modification, or reconstruction after August 17, 1983 and on or before May 16, 2022, where a modification is any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which this standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which this standard applies) into the atmosphere not previously emitted.

■ 11. Section 60.271a is amended by:

■ a. Revising definitions for “capture system” and “charge”;

■ b. Adding in alphabetical order the definition for “Charging period” and “Damper”;

■ c. Revising the definitions for “Direct-shell evacuation control system (DEC system),” “Dust-handling system,” “Electric arc furnace (EAF),” “Heat cycle,” “Meltdown and refining period,” “Refining,” “Shop,” and “Shop opacity”.

The revisions and additions read as follows:

§ 60.271a Definitions.

* * * * *

Capture system means the equipment (including ducts, hoods, fans, dampers, etc.) used to capture particulate matter generated by the operation of an electric arc furnace or AOD vessel and transport captured particulate matter to the air pollution control device.

Charge means the addition of iron and steel scrap or other materials into the shell of an electric arc furnace or the addition of molten steel or other materials into the top of an AOD vessel.

Charging period means the time period when iron and steel scrap or other materials are added into the top of an electric arc furnace until the melting and refining period commences.

* * * * *

Damper means any device used to open, close or throttle a DEC system or hood designed to capture emissions from an EAF or AOD vessel and route

them to the associated control device(s). It does not include isolation dampers used to isolate a fan or baghouse compartment for repair or cleaning, or dampers controlling collection of emissions from equipment other than an EAF or AOD vessel.

Direct-shell evacuation control system (DEC system) means a system that creates and maintains a negative pressure within the electric arc furnace shell during melting and refining, and transports emissions to the control device.

Dust-handling system means equipment used to handle particulate matter collected by the control device for an electric arc furnace or AOD vessel subject to this subpart. For the purposes of this subpart, the dust-handling system shall consist of the control device dust hoppers, the dust-conveying equipment, any silo, dust storage equipment, the dust-treating equipment (e.g., pug mill, pelletizer), dust transfer equipment (including, but not limited to transfers from a silo to a truck or rail car), and any secondary control devices used with the dust transfer equipment.

Electric arc furnace (EAF) means a furnace that produces molten steel and heats the charge materials with electricity using-carbon electrodes. For the purposes of this subpart, an EAF shall consist of the furnace shell and roof and the transformer. Furnaces that continuously feed direct-reduced iron ore pellets as the primary source of iron are not affected facilities within the scope of this definition.

Heat cycle means the period beginning when scrap is charged to an EAF shell and ending when the EAF tap is completed or beginning when molten steel is charged to an AOD vessel and ending when the AOD vessel tap is completed.

Melting and refining period means the time period commencing at the initial energizing of the electrode to begin the melting process and ending at the initiation of the tapping period, excluding any intermediate times when the electrodes are not energized as part of the melting process.

* * * * *

Refining means that phase of the steel production cycle during which impurities are removed from the molten steel and alloys are added to reach the final metal chemistry.

Shop means the building that houses one or more EAF's or AOD vessels and serves as the point from which compliance with § 60.272a(a)(3), “Standard for Particulate Matter,” is measured.

Shop opacity means the arithmetic average of 24 observations of the opacity

of any EAF or AOD emissions emanating from, and not within, the shop, taken in accordance with EPA Method 9 of appendix A of this part. Alternatively, ASTM D7520–16 (incorporated by reference, see § 60.17), may be used with the following five conditions:

(1) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16 (incorporated by reference, see § 60.17), the owner or operator or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand);

(2) The owner or operator must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16 (incorporated by reference, see § 60.17);

(3) The owner or operator must follow the recordkeeping procedures outlined in § 60.7(f) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination;

(4) The owner or operator or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of anyone reading and the average error must not exceed 7.5 percent opacity;

(5) Use of this approved alternative does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 (incorporated by reference, see § 60.17) and these requirements is on the facility, DCOT operator, and DCOT vendor.

* * * * *

■ 12. Revise § 60.272a to read as follows:

§ 60.272a Standard for particulate matter.

(a) On and after the date of which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from an EAF or an AOD vessel any gases which:

(1) Exit from a control device and contain particulate matter in excess of 12 mg/dscm (0.0052 gr/dscf);

(2) Exit from a control device and exhibit 3 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271; and

(3) Exit from a shop and, due solely to the operations of any affected EAF(s) or AOD vessel(s), exhibit 6 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. Shop opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of visible emissions, only one observation of shop opacity will be required. In this case, the shop opacity observations must be made for the site of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident.

(b) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from the dust-handling system any gases that exhibit 10 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

■ 13. Section 60.273a is amended by:

- a. Revising paragraphs (c), (d), (e) introductory text, (e)(3);
- b. In paragraph (e)(4) introductory text, remove the text “the U.S. Environmental Protection Agency guidance document “Fabric Filter Bag Leak Detection Guidance” (EPA–454/R–98–015)” and add, in its place, the text “EPA–454/R–98–015, Fabric Filter Bag Leak Detection Guidance (incorporated by reference, see § 60.17)”;
- c. Revising paragraphs (e)(6)(i) and (ii), (e)(7), (f) introductory text, (f)(1) and (5);
- d. Redesignating paragraph (f)(6) as paragraph (f)(7);
- e. Adding new paragraph (f)(6); and
- f. Revising paragraph (g).

The revisions and addition read as follows:

§ 60.273a Emission monitoring.

* * * * *

(c) A continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) is not required on any modular, multi-stack, negative-pressure or positive-pressure fabric filter or on any single-stack fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer and the owner installs and operates a bag leak detection system according to paragraph (e) of this section whenever the control device is being used to remove particulate matter from the EAF or AOD. Visible emission observations shall be conducted at least once per day of the control device for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, the EPA Method 9 observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272a(a)(2).

(d) A furnace static pressure monitoring device is not required on any EAF equipped with a DEC system if observations of shop opacity are performed by a certified visible emission observer as follows:

(1) At least once per day when the furnace is operating.

(2) No less than once per week, commencing from the tap of one EAF heat cycle to the tap of the following heat cycle. A melt shop with more than one EAF shall conduct these readings while both EAFs are in operation. Both EAFs are not required to be on the same schedule for tapping.

(3) Shop opacity shall be determined as the arithmetic average of 24 consecutive 15-second opacity observations of emissions from the shop taken in accordance with EPA Method 9, or, as an alternative, according to

ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. Shop opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of visible emissions, only one observation of shop opacity will be required. In this case, the shop opacity observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident.

(e) A bag leak detection system must be installed on all single-stack fabric filters and operated whenever the control device is being used to remove particulate matter from the EAF or AOD vessel if the owner or operator elects not to install and operate a continuous opacity monitoring system as provided for under paragraph (c) of this section. In addition, the owner or operator shall meet the visible emissions observation requirements in paragraph (c) of this section. The bag leak detection system must meet the specifications and requirements of paragraphs (e)(1) through (8) of this section.

* * * * *

(3) The bag leak detection system must be equipped with an alarm system that will activate when an increase in relative particulate loading is detected over the alarm set point established according to paragraph (e)(4) of this section, and the alarm must be located such that it can be identified by the appropriate plant personnel.

* * * * *

(6) * * *

(i) Once per quarter, the owner or operator may adjust the sensitivity of the bag leak detection system to account for seasonal effects including temperature and humidity according to the procedures identified in the site-specific monitoring plan required under paragraph (e)(4) of this section.

(ii) If opacities greater than zero percent are observed over four consecutive 15-second observations during the daily opacity observations required under paragraph (c) of this section and the alarm on the bag leak detection system alarm is not activated, the owner or operator shall lower the alarm set point on the bag leak detection system to a point where the alarm would have been activated during the period when the opacity observations were made.

(7) For negative pressure, induced air baghouses, and positive pressure baghouses that are discharged to the

atmosphere through a stack, the bag leak detection sensor must be installed downstream of the baghouse or upstream of any wet scrubber.

* * * * *

(f) For each bag leak detection system installed according to paragraph (e) of this section, the owner or operator shall initiate procedures to determine the cause of all alarms within 1 hour of an alarm. The cause of the alarm must be alleviated within 24 hours of the time the alarm occurred by taking whatever response action(s) are necessary. Response actions may include, but are not limited to, the following:

(1) Inspecting the baghouse for air leaks, torn or broken bags or filter media, or any other condition that may have caused an increase in particulate emissions;

* * * * *

(5) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system;

(6) Establishing to the extent acceptable by the delegated authority that the alarm was a false alarm and not caused by a bag leak or other malfunction that could reasonably result in excess particulate emissions; and

* * * * *

(g) In approving the site-specific monitoring plan required in paragraph (e)(4) of this section, the Administrator or delegated authority may allow owners or operators more than 24 hours to alleviate specific conditions that cause an alarm if the owner or operator identifies the condition that could lead to an alarm in the monitoring plan, adequately explains why it is not feasible to alleviate the condition within 24 hours of the time the alarm occurred, and demonstrates that the requested additional time will ensure alleviation of the condition as expeditiously as practicable.

■ 14. Section 60.274a is amended by revising paragraphs (b) through (h) to read as follows:

§ 60.274a Monitoring of operations.

* * * * *

(b) Except as provided under paragraph (e) of this section, the owner or operator subject to the provisions of this subpart shall:

(1) Monitor and record on a continuous basis the rolling 15-minute average furnace static pressure (if a DEC system is in use, and a furnace static pressure gauge is installed according to paragraph (f) of this section) and either:

(i) Install, calibrate, and maintain a monitoring device that continuously records the capture system fan motor amperes and damper position(s);

(ii) Install, calibrate, and maintain a monitoring device that continuously records on a rolling 15-minute average basis either the volumetric flow rate through each separately ducted hood; or

(iii) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet continuously record damper positions(s).

(2) The volumetric flow monitoring device(s) may be installed in any appropriate location in the capture system such that reproducible flow rate monitoring will result. The flow rate monitoring device(s) shall have an accuracy of ± 10 percent over its normal operating range and shall be calibrated according to the manufacturer's instructions. The Administrator may require the owner or operator to demonstrate the accuracy of the monitoring device(s) relative to EPA Methods 1 and 2 of appendix A of this part.

(3) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded on a rolling averaging period not to exceed 15 minutes.

(c) When the owner or operator of an affected facility is required to demonstrate compliance with the standards under § 60.272a(a)(3) and at any other time that the Administrator may require (under section 114 of the CAA, as amended), the owner or operator shall determine during periods in which a hood is operated for the purpose of capturing emissions from the affected facility subject to paragraph (b) of this section, all damper positions and either the:

(1) Monitor and record the fan motor amperes at each damper position, and damper position consistent with paragraph (h)(5) of this section;

(2) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate through each separately ducted hood; or

(3) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (h)(5) of this section.

(4) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded on a rolling averaging period not to exceed 15 minutes.

(5) The owner or operator may petition the Administrator or delegated authority for reestablishment of these parameters whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the affected facility

operating conditions upon which the parameters were previously established are no longer applicable. The values of the parameters as determined during the most recent demonstration of compliance shall be the appropriate operational range or control set point throughout each applicable period. Operation at values beyond the accepted operational range or control set point may be subject to the requirements of § 60.276a(c).

(d) Except as provided under paragraph (e) of this section, the owner or operator shall perform monthly operational status inspections of the equipment that is important to the performance of the capture system (*i.e.*, pressure sensors, dampers, and damper switches). This inspection shall include observations of the physical appearance of the equipment (*e.g.*, presence of holes in ductwork or hoods, flow constrictions caused by dents or excess accumulations of dust in ductwork, and fan erosion) and building inspections to ensure that the building does not have any holes or other openings for particulate matter laden air to escape. Any deficiencies that are determined by the operator to materially impact the efficacy of the capture system shall be noted and proper maintenance performed.

(e) The owner or operator may petition the Administrator or delegated authority to approve any alternative to either the monitoring requirements specified in paragraph (b) of this section or the monthly operational status inspections specified in paragraph (d) of this section if the alternative will provide a continuous record of operation of each emission capture system.

(f) Except as provided for under § 60.273a(d), if emissions during any phase of the heat cycle are controlled by the use of a DEC system, the owner or operator shall install, calibrate, and maintain a monitoring device that allows the pressure in the free space inside the EAF to be monitored. The pressure shall be recorded as no greater than 15-minute integrated block averages. The monitoring device may be installed in any appropriate location in the EAF or DEC duct prior to the introduction of ambient air such that reproducible results will be obtained. The pressure monitoring device shall have an accuracy of ± 5 mm of water gauge over its normal operating range and shall be calibrated according to the manufacturer's instructions.

(g) Except as provided for under § 60.273a(d), when the owner or operator of an EAF controlled by a DEC is required to demonstrate compliance

with the standard under § 60.272a(a)(3), and at any other time the Administrator may require (under section 114 of the Clean Air Act, as amended), the pressure in the free space inside the furnace shall be determined during the melting and refining period(s) using the monitoring device required under paragraph (f) of this section. The owner or operator may petition the Administrator or delegated authority for reestablishment of the pressure whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the EAF operating conditions upon which the pressures were previously established are no longer applicable. The pressure range or control setting during the most recent demonstration of compliance shall be maintained at all times when the EAF is operating in a melting and refining period. Continuous operation at pressures higher than the operational range or control setting may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility.

(h) During any performance test required under § 60.8, and for any report thereof required by § 60.276a(f) of this subpart, or to determine compliance with § 60.272a(a)(3) of this subpart, the owner or operator shall monitor the following information for all heats covered by the test:

(1) Charge weights and materials, and tap weights and materials;

(2) Heat times, including start and stop times, and a log of process operation, including periods of no operation during testing and, if a furnace static pressure monitoring device is operated pursuant to paragraph (f) of this section, the pressure inside an EAF when DEC systems are used;

(3) Control device operation log;

(4) Continuous opacity monitor or EPA Method 9 data, or, as an alternative to EPA Method 9, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271;

(5) All damper positions, no less frequently than performed in the latest melt shop opacity compliance test for a full heat, if selected as a method to demonstrate compliance under paragraph (b) of this section;

(6) Fan motor amperes at each damper position, if selected as a method to demonstrate compliance under paragraph (b) of this section;

(7) Volumetric air flow rate through each separately ducted hood, if selected as a method to demonstrate compliance under paragraph (b) of this section; and

(8) Static pressure at each separately ducted hood, if selected as a method to demonstrate compliance under paragraph (b) of this section.

(9) Parameters monitored pursuant to paragraphs (h)(6) through (8) of this section shall be recorded on a rolling averaging period not to exceed 15 minutes.

■ 15. Section 60.275a is amended by:

■ a. Revising paragraphs (a) and (b)(2);

■ b. Adding paragraph (b)(3);

■ c. Revising paragraphs (c) and (e);

■ d. Removing paragraph (h);

■ e. Redesignating paragraphs (i) and (j) as paragraphs (h) and (i) and revising the newly redesignated paragraph (h).

The revisions and addition read as follows:

§ 60.275a Test methods and procedures.

(a) During performance tests required in § 60.8, the owner or operator shall not add gaseous diluents to the effluent gas stream after the fabric filter in any pressurized fabric filter collector, unless the amount of dilution is separately determined and considered in the determination of emissions.

(b) * * *

(2) Use a method that is acceptable to the Administrator or delegated authority and that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(3) Any combination of the criteria of paragraphs (b)(1) and (b)(2) of this section.

(c) When emission from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart, compliance with § 60.272a(a)(3) will be based on emissions from only the affected facility(ies). The owner or operator may use operational knowledge to determine the facilities that are the sources, in whole or in part, of any emissions observed in demonstrations of compliance with § 60.272a(a)(3).

* * * * *

(e) The owner or operator shall determine compliance with the particulate matter standards in § 60.272a as follows:

(1) EPA Method 5 (and referenced EPA Methods 1, 2, 3, 3A, 3B, and 4) shall be used for negative-pressure fabric filters and other types of control devices and EPA Method 5D (and referenced EPA Method 5) shall be used for positive-pressure fabric filters to determine the particulate matter concentration and volumetric flow rate of the effluent gas. The sampling time and sample volume for each run shall be at least 4 hours and 4.50 dscm (160 dscf) and, when a single EAF or AOD vessel

is sampled, the sampling time shall include an integral number of heats. The manual portions only and not the instrumental portion of the voluntary consensus standard ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17) is an acceptable alternative to EPA Methods 3, 3A, and 3B.

(2) When more than one control device serves the EAF(s) being tested, the concentration of particulate matter shall be determined using the following equation:

$$c_{st} = \left[\sum_{i=1}^n (c_{si} Q_{sdi}) \right] / \sum_{i=1}^n Q_{sdi}$$

Where:

c_{st} = average concentration of particulate matter, mg/dscm (gr/dscf).

c_{si} = concentration of particulate matter from control device “i”, mg/dscm (gr/dscf).

n = total number of control devices tested.

Q_{sdi} = volumetric flow rate of stack gas from control device “i”, dscm/hr (dscf/hr).

(3) EPA Method 9 or, as an alternative, ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271, and the procedures of § 60.11 shall be used to determine opacity.

(4) To demonstrate compliance with § 60.272a(a) (1), (2), and (3), the EPA Method 9 test runs shall be conducted concurrently with the particulate matter test runs, unless inclement weather interferes.

* * *

(h) Where emissions from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart, determinations of compliance with § 60.272a(a)(3) will only be based upon emissions originating from the affected facility(ies), except if the combined emissions are controlled by a common capture system and control device, in which case the owner or operator may use any of the following procedures during an opacity performance test and during shop opacity observations:

(1) Base compliance on control of the combined emissions; or

(2) Utilize a method acceptable to the Administrator that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(i) Unless the presence of inclement weather makes concurrent testing infeasible, the owner or operator shall conduct concurrently the performance tests required under § 60.8 to demonstrate compliance with § 60.272a(a) (1), (2), and (3) of this subpart.

■ 16. Section 60.276a is amended by:

- a. Revising paragraphs (a) through (c), (e), (f) introductory text, (f)(3) and (4), (6)(iv), (10), (g), and (h)(3); and
- b. Adding new paragraphs (i) through (m).

The revisions and additions read as follows:

§ 60.276a Recordkeeping and reporting requirements.

(a) Records of the measurements required in § 60.274a must be retained for at least 5 years following the date of the measurement.

(b) Each owner or operator shall submit a written report of exceedances of the control device opacity to the Administrator or delegated authority semi-annually. For the purposes of these reports, exceedances are defined as all 6-minute periods during which the average opacity of emissions from the control device is 3 percent or greater.

(c) Continuous operation at a furnace static pressure that exceeds the operational range or control setting under § 60.274a(g), for owners and operators that elect to install a furnace static pressure monitoring device under § 60.274a(f) or operation at flow rates lower than those established under § 60.274a(c) may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility. Operation at such values shall be reported to the Administrator or delegated authority semiannually.

* * *

(e) When the owner or operator of an EAF or AOD is required to demonstrate compliance with the standard under § 60.275a(b)(2) or a combination of § 60.275a(b)(1) and (b)(2) the owner or operator shall provide notice to the Administrator or delegated authority of the procedure(s) that will be used to determine compliance. Notification of the procedure(s) to be used must be postmarked at least 30 days prior to the performance test.

(f) For the purpose of this subpart, the owner or operator shall conduct the demonstration of compliance with § 60.272a(a) of this subpart and furnish the Administrator or delegated authority with a written report of the results of the test. This report shall include the following information:

* * *

(3) Make and model of the control device, and continuous opacity monitoring equipment, if applicable;

(4) Flow diagram of process and emission capture system including other equipment or process(es) ducted to the same control device;

* * *

(6) * * *

(iv) Continuous opacity monitor or EPA Method 9 data, or, as an alternative to EPA Method 9, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

* * *

(10) Test observers from any outside agency;

* * *

(g) The owner or operator shall maintain records of all shop opacity observations made in accordance with § 60.273a(d). All shop opacity observations in excess of the emission limit specified in § 60.272a(a)(3) of this subpart shall indicate a period of excess emissions and shall be reported to the Administrator or delegated authority semi-annually, according to § 60.7(c) and submitted according to paragraph (j) of this section. In addition to the information required at § 60.7(c), the report shall include the following information:

(1) The company name and address of the affected facility.

(2) An identification of each affected facility being included in the report.

(3) Beginning and ending dates of the reporting period.

(4) A certification by a certifying official of truth, accuracy, and completeness. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(h) * * *

(3) An identification of the date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, if procedures were initiated within 1 hour of the alarm, the cause of the alarm, an explanation of the actions taken, the date and time the cause of the alarm was alleviated, and if the alarm was alleviated within 24 hours of the alarm.

(i) Within 60 days after the date of completing each performance test or demonstration of compliance required by this subpart, you must submit the results of the performance test following the procedures specified in paragraphs (i)(1) through (3) of this section.

(1) Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test. Submit the results of the performance test to the EPA via the Compliance and Emissions Data

Reporting Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov/>). The data must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website.

(2) Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test. The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) Confidential business information (CBI). Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information submitted under paragraph (i)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated using the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. The preferred method to submit CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (e.g., Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (i)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions

data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(j) You must submit a report of excess emissions and monitoring systems performance report according to § 60.7(c) to the Administrator semiannually. Submit all reports to the EPA via CEDRI, which can be accessed through the EPA's CDX (<https://cdx.epa.gov/>). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. You must use the appropriate electronic report template on the CEDRI website (<https://www.epa.gov/electronic-reporting-air-emissions/cedri>) for this subpart. The date report templates become available will be listed on the CEDRI website. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, follow paragraph (i)(3) of this section except send to the attention of the Electric Arc Furnace Sector Lead. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (j). All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(k) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with that reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (k)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first

knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(l) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of force majeure for failure to timely comply with that reporting requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (l)(1) through (5) of this section.

(1) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (e.g., hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (e.g., large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the force majeure event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of force majeure and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

(m) Any records required to be maintained by this subpart that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

■ 17. Add subpart AAb to part 60 to read as follows:

Subpart AAb—Standards of Performance for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarbonization Vessels Constructed After May 16, 2022

Sec.

§ 60.270b Applicability and designation of affected facility.

§ 60.271b Definitions

§ 60.272b Standard for particulate matter.

§ 60.273b Emission monitoring

§ 60.274b Monitoring of operations

§ 60.275b Test methods and procedures.

§ 60.276b Recordkeeping and reporting requirements.

§ 60.270b Applicability and designation of affected facility.

(a) The provisions of this subpart are applicable to the following affected facilities in steel plants that produce carbon, alloy, or specialty steels: electric arc furnaces (EAF), argon-oxygen decarburization (AOD) vessels, and dust-handling systems.

(b) The provisions of this subpart apply to each affected facility identified in paragraph (a) of this section that commences construction, modification, or reconstruction after May 16, 2022.

§ 60.271b Definitions

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act and in subpart A of this part.

Argon-oxygen decarburization vessel (AOD vessel) means any closed-bottom,

refractory-lined converter vessel with submerged tuyeres through which gaseous mixtures containing argon and oxygen or nitrogen may be blown into molten steel for further refining.

Bag leak detection system means a system that is capable of continuously monitoring relative particulate matter (dust) loadings in the exhaust of a baghouse to detect bag leaks and other conditions that result in increases in particulate loadings. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, electrodynamic, light scattering, light transmittance, or other effect to continuously monitor relative particulate matter loadings.

Capture system means the equipment (including ducts, hoods, fans, dampers, etc.) used to capture particulate matter generated by the operation of an electric arc furnace (EAF) or AOD vessel and transport captured particulate matter to the air pollution control device.

Charge means the addition of iron and steel scrap or other materials into the shell of an EAF or the addition of molten steel or other materials into the top of an AOD vessel.

Charging period means the time period when iron and steel scrap or other materials are added into the top of an EAF until the melting and refining period commences.

Control device means the air pollution control equipment used to remove particulate matter from the effluent gas stream generated by an EAF or AOD vessel.

Damper means any device used to open, close or throttle a DEC system or hood designed to capture emissions from an EAF or AOD vessel and route them to the associated control device(s). It does not include isolation dampers used to isolate a fan or baghouse compartment for repair or cleaning, or dampers controlling collection of emissions from equipment other than an EAF or AOD vessel.

Direct-shell evacuation control system (DEC system) means a system that designed to create and maintain a negative pressure within the EAF shell during melting and refining, and transports emissions to the control device.

Dust-handling system means equipment used to handle particulate matter collected by the control device for an EAF or AOD vessel subject to this subpart. For the purposes of this subpart, the dust-handling system shall consist of the control device dust hoppers, the dust-conveying equipment, any silo, dust storage equipment, the dust-treating equipment (e.g., pug mill, pelletizer), dust transfer equipment

(including, but not limited to transfers from a silo to a truck or rail car), and any secondary control devices used with the dust transfer equipment.

Electric arc furnace (EAF) means a furnace that produces molten steel and heats the charge materials with electricity using carbon electrodes. For the purposes of this subpart, an EAF shall consist of the furnace shell and roof and the transformer. Furnaces that continuously feed direct-reduced iron ore pellets as the primary source of iron are not affected facilities within the scope of this definition.

Electric arc furnace facility means the EAF(s) or AOD(s) subject to this rule and the air pollution control equipment used to remove particulate matter from the effluent gas stream generated by the EAF(s) or AOD(s).

Furnace static pressure means the pressure exerted by the flow of air at the walls of the furnace, perpendicular to the flow, measured using a manometer or equivalent device to determine pressure inside an EAF when DEC systems are used or pressure in the free space inside the EAF.

Heat cycle means the period beginning when scrap is charged to an EAF shell and ending when the EAF tap is completed or beginning when molten steel is charged to an AOD vessel and ending when the AOD vessel tap is completed.

Melting means that phase of steel production cycle during which the iron and steel scrap is heated to the molten state.

Melting and refining period means the time period commencing at the initial energizing of the electrode to begin the melting process and ending at the initiation of the tapping period, excluding any intermediate times when the electrodes are not energized as part of the melting process.

Modified facility means any physical or operational change to an existing facility which results in an increase in the emission rate (in kilograms per hour) to the atmosphere of any pollutant to which a standard applies. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere. See § 60.14.

Negative-pressure fabric filter means a fabric filter with the fans on the downstream side of the filter bags.

Positive-pressure fabric filter means a fabric filter with the fans on the upstream side of the filter bags.

Reconstructed facility means an existing facility which upon reconstruction becomes an affected

facility, irrespective of any change in emission rate, due to the replacement of components of an existing facility to such an extent that the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility, where “fixed capital cost” means the capital needed to provide all the depreciable components, and it is technologically and economically feasible to meet the applicable standards set forth in this subpart after reconstruction.

Refining means that phase of the steel production cycle during which impurities are removed from the molten steel and alloys are added to reach the final metal chemistry.

Shop means the building that houses one or more EAF’s or AOD vessels and serves as the point from which compliance with § 60.272b(a)(3), “Standard for Particulate Matter,” is measured.

Shop opacity means the arithmetic average of 24 observations of the opacity of any EAF or AOD emissions emanating from, and not within, the shop, during melting and refining, and during tapping, taken in accordance with EPA Method 9 of appendix A of this part, and during charging, according to the procedures in section 2.5 of Method 9 in appendix A to part 60 of this chapter, with the modification to determine the 3-minute block average opacity from the average of 12 consecutive observations recorded at 15-second intervals. For the daily opacity observation during melting and refining, during charging, and during tapping, facilities may measure opacity by EPA Method 22 of appendix A of this part, modified to require the recording of the aggregate duration of visible emissions at 15 second intervals. Alternatively, ASTM D7520–16 (incorporated by reference, see § 60.17), may be used with the following five conditions:

(1) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16 (incorporated by reference, see § 60.17), the owner or operator or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand);

(2) The owner or operator must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM

D7520–16 (incorporated by reference, see § 60.17);

(3) The owner or operator must follow the recordkeeping procedures outlined in § 60.7(f) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination;

(4) The owner or operator or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of anyone reading and the average error must not exceed 7.5 percent opacity;

(5) Use of this approved alternative does not provide or imply a certification or validation of any vendor’s hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 (incorporated by reference, see § 60.17) and these requirements is on the facility, DCOT operator, and DCOT vendor.

Static pressure means the pressure exerted by the flow of air at the furnace walls, perpendicular to the flow, measured using a manometer or equivalent device. This refers to either furnace static pressure, or static pressure in air ducts, or pressure in the EAF capture system, *i.e.*, static pressure at each separately ducted hood]

Tap means the pouring of molten steel from an EAF or AOD vessel.

Tapping period means the time period commencing at the moment an EAF begins to pour molten steel and ending either three minutes after steel ceases to flow from an EAF, or six minutes after steel begins to flow, whichever is longer.

§ 60.272b Standard for particulate matter.

(a) On and after the date of which the performance tests required to be conducted by § 60.8 or § 60.272b(d) are completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from an EAF or an AOD vessel any gases which:

(1) Exit from control devices at the facility and contain particulate matter as a total for the facility in excess of 79 mg/kg steel produced (0.16 lb/ton steel produced) for the facility;

(2) Exit from a control device and exhibit 3 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271; and

(3) Exit from a shop and, due solely to the operations of any affected EAF(s) or AOD vessel(s) during melting and refining exhibit greater than 0 percent opacity, and during charging exhibit greater than 6 percent opacity, as measured in accordance with EPA Method 9 of appendix A of this part, and during charging, exhibit greater than 6 percent opacity, as measured according to the procedures in section 2.5 of Method 9 in appendix A to part 60 of this chapter, with the modification of this section of Method 9 to determine the 3-minute block average opacity from the average of 12 consecutive observations recorded at 15-second intervals; or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271 or, for the daily opacity observations, exhibit 0 seconds of visible emissions as measured by EPA Method 22 of appendix A of this part, modified to require the recording of the aggregate duration of visible emissions at 15 second intervals. Shop opacity shall be recorded for any point(s) during melting and refining, during charging, and during tapping where visible emissions are observed. Where it is possible to determine that a number of visible emission sites relate to only one incident of visible emissions during melting and refining, during charging, or during tapping, only one observation of shop opacity or visible emissions will be required during melting and refining, during charging, or during tapping. In this case, the shop opacity or visible emissions observations must be made for the point of highest emissions during melting and refining, during charging, or during tapping that directly relates to the cause (or location) of visible emissions observed during a single incident.

(b) On and after the date on which the performance tests required to be conducted by § 60.8 or § 60.272b(d) are completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from the dust-handling system any gases that exhibit 10 percent opacity or greater, as measured in accordance with EPA Method 9 of appendix A of this part, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.

(c) The standards in paragraphs (a) and (b) apply at all times. The exemptions to opacity standards under § 60.11(c) do not apply to this subpart. As provided in § 60.11(f), this provision supersedes the exemptions for periods

of startup, shutdown and malfunction in the Part 60 general provisions in Subpart A.

(d) Performance tests required to be conducted to show compliance with the standards in paragraph (a) of this section shall be repeated at least every 5 years after the performance tests required by § 60.8 are conducted.

§ 60.273b Emission monitoring

(a) Except as provided under paragraphs (b) and (c) of this section, a continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) shall be installed, calibrated, maintained, and operated by the owner or operator subject to the provisions of this subpart.

(b) No continuous monitoring system shall be required on any control device serving the dust-handling system.

(c) A continuous monitoring system for the measurement of the opacity of emissions discharged into the atmosphere from the control device(s) is not required on any modular, multi-stack, negative-pressure or positive-pressure fabric filter or on any single-stack fabric filter if observations of the opacity of the visible emissions from the control device are performed by a certified visible emission observer and the owner installs and operates a bag leak detection system according to paragraph (e) of this section whenever the control device is being used to remove particulate matter from the EAF or AOD. Visible emission observations shall be conducted at least once per day on the control device for at least three 6-minute periods when the furnace is operating in the melting and refining period. All visible emissions observations shall be conducted in accordance with EPA Method 9, or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271. If visible emissions occur from more than one point, the opacity shall be recorded for any points where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of the visible emission, only one set of three 6-minute observations will be required. In that case, the EPA Method 9 observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Records shall be maintained of any 6-minute average that is in excess of the emission limit specified in § 60.272b(a)(2).

(d) A furnace static pressure monitoring device is not required on any EAF equipped with a DEC system if observations of shop opacity are performed by a certified visible emission observer as follows:

(1) At least once per day when the furnace is operating.

(2) No less than once per week, commencing from the tap of one EAF heat cycle to the tap of the following heat cycle. A melt shop with more than one EAF shall conduct these readings while both EAFs are in operation. Both EAFs are not required to be on the same schedule for tapping.

(3) Shop opacity shall be determined as the arithmetic average of 24 consecutive 15-second opacity observations of emissions from the shop taken in accordance with EPA Method 9 during melting and refining and during tapping; and during charging determined according to the procedures in section 2.5 of Method 9 in appendix A to part 60 of this chapter, with the modification to determine the 3-minute block average opacity from the average of 12 consecutive observations recorded at 15-second intervals; or, as an alternative, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271, or as the total duration of visible emissions measured according to EPA Method 22 over a six minute period, modified to require the recording of the aggregate duration of visible emissions at 15 second intervals. Shop opacity shall be recorded for any point(s) where visible emissions are observed. Where it is possible to determine that a number of visible emission points relate to only one incident of visible emissions, only one observation of shop opacity will be required. In this case, the shop opacity observations must be made for the point of highest opacity that directly relates to the cause (or location) of visible emissions observed during a single incident. Shop opacity shall be determined daily during melting and refining, during charging, and during tapping.

(e) A bag leak detection system must be installed on all fabric filters and operated on all single-stack fabric filters whenever the control device is being used to remove particulate matter from the EAF or AOD vessel if the owner or operator elects not to install and operate a continuous opacity monitoring system as provided for under paragraph (c) of this section. In addition, the owner or operator shall meet the visible emissions observation requirements in paragraph (c) of this section. The bag leak detection system must meet the

specifications and requirements of paragraphs (e)(1) through (8) of this section.

(1) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at a concentrations of 1 milligram per actual cubic meter (0.00044 grains per actual cubic foot) or less.

(2) The bag leak detection system sensor must provide output of relative particulate matter loadings and the owner or operator shall continuously record the output from the bag leak detection system using electronic or other means (e.g., using a strip chart recorder or a data logger.)

(3) The bag leak detection system must be equipped with an alarm system that will activate when an increase in relative particulate loading is detected over the alarm set point established according to paragraph (e)(4) of this section, and the alarm must be located such that it can be identified by the appropriate plant personnel.

(4) For each bag leak detection system required by paragraph (e) of this section, the owner or operator shall develop and submit to the Administrator or delegated authority, for approval, a site-specific monitoring plan that addresses the items identified in paragraphs (i) through (v) of this paragraph (e)(4). For each bag leak detection system that operates based on the triboelectric effect, the monitoring plan shall be consistent with the recommendations contained in EPA–454/R–98–015, “Fabric Filter Bag Leak Detection Guidance” (incorporated by reference, see § 60.17). The owner or operator shall operate and maintain the bag leak detection system according to the site-specific monitoring plan at all times. The plan shall describe the following:

(i) Installation of the bag leak detection system;

(ii) Initial and periodic adjustment of the bag leak detection system including how the alarm set-point will be established;

(iii) Operation of the bag leak detection system including quality assurance procedures;

(iv) How the bag leak detection system will be maintained including a routine maintenance schedule and spare parts inventory list; and

(v) How the bag leak detection system output shall be recorded and stored.

(5) The initial adjustment of the system shall, 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 (if applicable).

(6) Following initial adjustment, the owner or operator shall not adjust the averaging period, alarm set point, or alarm delay time without approval from the Administrator or delegated authority except as provided for in paragraphs (e)(6)(i) and (ii) of this section.

(i) Once per quarter, the owner or operator may adjust the sensitivity of the bag leak detection system to account for seasonal effects including temperature and humidity according to the procedures identified in the site-specific monitoring plan required under paragraph (e)(4) of this section.

(ii) If opacities greater than 0 percent are observed over four consecutive 15-second observations during the daily opacity observations required under paragraph (c) of this section and the alarm on the bag leak detection system alarm is not activated, the owner or operator shall lower the alarm set point on the bag leak detection system to a point where the alarm would have been activated during the period when the opacity observations were made.

(7) For negative pressure, induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, the bag leak detection sensor must be installed downstream of the baghouse or upstream of any wet scrubber.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(f) For each bag leak detection system installed according to paragraph (e) of this section, the owner or operator shall initiate procedures to determine the cause of all alarms within 1 hour of an alarm. The cause of the alarm must be alleviated within 24 hours of the time the alarm occurred by taking whatever response action(s) are necessary. Response actions may include, but are not limited to, the following:

(1) Inspecting the baghouse for air leaks, torn or broken bags or filter media, or any other condition that may have caused an increase in particulate emissions;

(2) Sealing off defective bags or filter media;

(3) Replacing defective bags or filter media or otherwise repairing the control device;

(4) Sealing off a defective baghouse compartment;

(5) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system;

(6) Establishing to the extent acceptable by the delegated authority that the alarm was a false alarm and not caused by a bag leak or other

malfunction that could reasonably result in excess particulate emissions; and

(7) Shutting down the process producing the particulate emissions.

(g) In approving the site-specific monitoring plan required in paragraph (e)(4) of this section, the Administrator or delegated authority may allow owners or operators more than 24 hours to alleviate specific conditions that cause an alarm if the owner or operator identifies the condition that could lead to an alarm in the monitoring plan, adequately explains why it is not feasible to alleviate the condition within 24 hours of the time the alarm occurred, and demonstrates that the requested additional time will ensure alleviation of the condition as expeditiously as practicable.

§ 60.274b Monitoring of operations.

(a) The owner or operator subject to the provisions of this subpart shall maintain records of the following information:

(1) All data obtained under paragraph (b) of this section; and

(2) All monthly operational status inspections performed under paragraph (c) of this section.

(b) Except as provided under paragraph (e) of this section, the owner or operator subject to the provisions of this subpart shall conduct the following monitoring of the capture system to demonstrate continuous compliance:

(1) If a DEC system is in use, according to paragraph (f) of this section, monitor and record on a continuous basis the furnace static pressure and any one of (2) through (4) in this paragraph:

(2) Monitor and record the fan motor amperes at each damper position, and damper position consistent with paragraph (h)(5) of this section;

(3) Install, calibrate, and maintain a monitoring device that continuously records the volumetric air flow rate or static pressure at each separately ducted hood; or

(4) Install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (h)(5) of this section.

(5) The static pressure monitoring device(s) shall be installed in an EAF or DEC duct prior to combining with other ducts and prior to the introduction of ambient air, at a location that has no flow disturbance due to the junctions.

(6) The volumetric flow monitoring device(s) may be installed in any appropriate location in the capture system such that reproducible flow rate monitoring will result. The flow rate

monitoring device(s) shall have an accuracy of ± 10 percent over its normal operating range and shall be calibrated according to the manufacturer's instructions. The Administrator may require the owner or operator to demonstrate the accuracy of the monitoring device(s) relative to EPA Methods 1 and 2 of appendix A of this part.

(7) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded on a rolling averaging period not to exceed 15 minutes.

(c) When the owner or operator of an affected facility is required to demonstrate compliance with the standards under § 60.272b(a)(3) and at any other time that the Administrator may require (under section 114 of the CAA, as amended), the owner or operator shall determine during all periods in which a hood is operated for the purpose of capturing emissions from the affected facility subject to paragraph (b) of this section, either:

(1) Monitor and record the fan motor amperes at each damper position, and damper position consistent with paragraph (h)(5) of this section;

(2) install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate through each separately ducted hood; or

(3) install, calibrate, and maintain a monitoring device that continuously records the volumetric flow rate at the control device inlet and monitor and record the damper position consistent with paragraph (h)(5) of this section.

(4) Parameters monitored pursuant to this paragraph, excluding damper position, shall be recorded on a rolling averaging period not to exceed 15 minutes.

(5) The owner or operator may petition the Administrator or delegated authority for reestablishment of these parameters whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the affected facility operating conditions upon which the parameters were previously established are no longer applicable. The values of the parameters as determined during the most recent demonstration of compliance shall be the appropriate operational range or control set point throughout each applicable period. Operation at values beyond the accepted operational range or control set point may be subject to the requirements of § 60.276b(c).

(d) Except as provided under paragraph (e) of this section, the owner or operator shall perform monthly operational status inspections of the

equipment that is important to the performance of the capture system (*i.e.*, pressure sensors, dampers, and damper switches). This inspection shall include observations of the physical appearance of the equipment (*e.g.*, presence of holes in ductwork or hoods, flow constrictions caused by dents or excess accumulations of dust in ductwork, and fan erosion) and building inspections to ensure that the building does not have any holes or other openings for particulate matter laden air to escape. Any deficiencies that are determined by the operator to materially impact the efficacy of the capture system shall be noted and proper maintenance performed.

(e) The owner or operator may petition the Administrator or delegated authority to approve any alternative to either the monitoring requirements specified in paragraph (b) of this section or the monthly operational status inspections specified in paragraph (d) of this section if the alternative will provide a continuous record of operation of each emission capture system.

(f) Except as provided under § 60.273b(d), if emissions during any phase of the heat cycle are controlled by the use of a DEC system, the owner or operator shall install, calibrate, and maintain a monitoring device that allows the pressure in the free space inside the EAF to be monitored. The pressure shall be recorded as no greater than 15-minute integrated block averages. The monitoring device may be installed in any appropriate location in the EAF or DEC duct prior to the introduction of ambient air such that reproducible results will be obtained. The pressure monitoring device shall have an accuracy of ± 5 mm of water gauge over its normal operating range and shall be calibrated according to the manufacturer's instructions.

(g) When the owner or operator of an EAF controlled by a DEC is required to demonstrate compliance with the standard under § 60.272b(a)(3), and at any other time the Administrator may require (under section 114 of the Clean Air Act, as amended), the pressure in the free space inside the furnace shall be determined during the melting and refining period(s) using the monitoring device required under paragraph (f) of this section. The owner or operator may petition the Administrator or delegated authority for reestablishment of the pressure whenever the owner or operator can demonstrate to the Administrator's or delegated authority's satisfaction that the EAF operating conditions upon which the pressures were previously established are no

longer applicable. The pressure range or control setting during the most recent demonstration of compliance shall be maintained at all times when the EAF is operating in a melting and refining period. Continuous operation at pressures higher than the operational range or control setting may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility.

(h) During any performance test required under § 60.8 or § 60.272b(d), and for any report thereof required by § 60.276b(f) of this subpart, or to determine compliance with § 60.272b(a)(3) of this subpart, the owner or operator shall monitor the following information for all heats covered by the test:

(1) Charge weights and materials, and tap weights and materials;

(2) Heat times, including start and stop times, and a log of process operation, including periods of no operation during testing and, if a furnace static pressure monitoring device is operated pursuant to paragraph (f) of this section, the pressure inside an EAF when DEC systems are used;

(3) Control device operation log;

(4) Continuous opacity monitor (COM) or EPA Method 9 data, or, as an alternative to EPA Method 9, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271;

(5) All damper positions, no less frequently than performed in the latest melt shop opacity compliance test for a full heat, if selected as a method to demonstrate compliance under paragraph (b) of this section;

(6) Fan motor amperes at each damper position, if selected as a method to demonstrate compliance under paragraph (b) of this section;

(7) Volumetric air flow rate through each separately ducted hood, if selected as a method to demonstrate compliance under paragraph (b) of this section; and

(8) Static pressure at each separately ducted hood, if selected as a method to demonstrate compliance under paragraph (b) of this section.

(9) Parameters monitored pursuant to paragraphs (h)(6)–(8) of this section shall be recorded on a rolling averaging period not to exceed 15 minutes.

§ 60.275b Test methods and procedures.

(a) During performance tests required in §§ 60.8 and 60.272b(d), the owner or operator shall not add gaseous diluents to the effluent gas stream after the fabric filter in any pressurized fabric filter

collector, unless the amount of dilution is separately determined and considered in the determination of emissions.

(b) When emissions from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart but controlled by a common capture system and control device, the owner or operator shall use any one of the following procedures during a performance test (see also § 60.276b(e)):

(1) Determine compliance using the combined emissions.

(2) Use a method that is acceptable to the Administrator or delegated authority and that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(3) Any combination of the criteria of paragraphs (b)(1) and (2) of this section.

(c) When emission from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart, compliance with § 60.272b(a)(3) will be based on emissions from only the affected facility(ies). The owner or operator may use operational knowledge to determine the facilities that are the sources, in whole or in part, of any emissions observed in demonstrations of compliance with § 60.272b(a)(3).

(d) In conducting the performance tests required in §§ 60.8 and 60.272b(d), the owner or operator shall use as reference methods and procedures the test methods in appendix A of this part or other methods and procedures as specified in this section, except as provided in § 60.8(b).

(e) The owner or operator shall determine compliance with the particulate matter standards in § 60.272b as follows:

(1) EPA Method 5 (and referenced EPA Methods 1, 2, 3, 3A, 3B, and 4) shall be used for negative-pressure fabric filters and other types of control devices and EPA Method 5D (and referenced EPA Method 5) shall be used for positive-pressure fabric filters to determine the particulate matter concentration and volumetric flow rate of the effluent gas. The sampling time and sample volume for each run shall be at least 4 hours and 4.50 dry standard cubic meter (160 dry standard cubic feet) and, when a single EAF or AOD vessel is sampled, the sampling time shall include an integral number of heats. The manual portions only (not the instrumental portion) of the voluntary consensus standard ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17) are acceptable alternatives to EPA Methods 3, 3A, and 3B.

(2) When more than one control device serves the EAF(s) being tested, the concentration of particulate matter shall be determined using the following equation:

$$E_{sf} = \sum_{i=1}^n \left(\frac{R_{si}}{P_i} \right)$$

where:

E_{sf} = average emission rate of particulate matter, mg/kg (lb/ton).

R_{si} = emission rate of particulate matter from control device "i", mg/hr (lb/hr).

n = total number of control devices at the facility.

P_i = steel production rate during testing of control device "i", kg/hr (ton/hr).

(3) EPA Method 9 or, as an alternative, ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271, and the procedures of § 60.11 shall be used to determine opacity.

(4) To demonstrate compliance with § 60.272b(a) (1), (2), and (3), the EPA Method 9 test runs shall be conducted concurrently with the particulate matter test runs, unless inclement weather interferes.

(f) To comply with § 60.274b(c), (f), (g), and (h), the owner or operator shall obtain the information required in these paragraphs during the particulate matter runs.

(g) Any control device subject to the provisions of the subpart shall be designed and constructed to allow measurement of emissions using applicable test methods and procedures.

(h) Where emissions from any EAF(s) or AOD vessel(s) are combined with emissions from facilities not subject to the provisions of this subpart, determinations of compliance with § 60.272b(a)(1), (2), and (3) will only be based upon emissions originating from the affected facility(ies), except if the combined emissions are controlled by a common capture system and control device, in which case the owner or operator may use any of the following procedures during an opacity performance test and during shop opacity observations:

(1) Base compliance on control of the combined emissions; or

(2) Utilize a method acceptable to the Administrator that compensates for the emissions from the facilities not subject to the provisions of this subpart.

(3) Any combination of the criteria of paragraphs (h)(1) and (2) of this section.

(i) Unless the presence of inclement weather makes concurrent testing infeasible, the owner or operator shall conduct concurrently the performance

tests required under § 60.8 or § 60.272b(d) to demonstrate compliance with § 60.272b(a)(1), (2), and (3) of this subpart.

§ 60.276b Recordkeeping and reporting requirements.

(a) Records of the measurements required in § 60.274b must be retained for at least 5 years following the date of the measurement.

(b) Each owner or operator shall submit a written report of exceedances of the control device opacity to the Administrator or delegated authority semi-annually. For the purposes of these reports, exceedances are defined as all 6-minute periods during which the average opacity of emissions from the control device is 3 percent or greater or, where the daily shop opacity visible emissions were measured according to EPA Method 22 and exceeded 0 seconds.

(c) Operation at a furnace static pressure that exceeds the operational range or control setting under § 60.274b(g), for owners and operators that elect to install a furnace static pressure monitoring device under 60.274b(f) or operation ranges or control settings outside of those established under § 60.274b(c) may be considered by the Administrator or delegated authority to be unacceptable operation and maintenance of the affected facility. Operation at such values shall be reported to the Administrator or delegated authority semiannually.

(d) The requirements of this section remain in force until and unless EPA, in delegating enforcement authority to a State under section 111(c) of the Act, approves reporting requirements or an alternative means of compliance surveillance adopted by such State. In that event, affected sources within the State will be relieved of the obligation to comply with this section, provided that they comply with the requirements established by the State.

(e) When the owner or operator of an EAF or AOD is required to demonstrate compliance with the standard under § 60.275b(b)(2) or a combination of (b)(1) and (b)(2) the owner or operator provide notice to the Administrator or delegated authority of the procedure(s) that will be used to determine compliance. Notification of the procedure(s) to be used must be postmarked at least 30 days prior to the performance test.

(f) For the purpose of this subpart, the owner or operator shall conduct the demonstration of compliance with § 60.272b(a) of this subpart and furnish the Administrator or delegated authority with a report of the results of the test

according to paragraph (i) of this section. This report shall include the following information:

- (1) Facility name and address;
 - (2) Plant representative;
 - (3) Make and model of the control device, and continuous opacity monitoring equipment, if applicable;
 - (4) Flow diagram of process and emission capture system including other equipment or process(es) ducted to the same control device;
 - (5) Rated (design) capacity of process equipment;
 - (6) Those data required under § 60.274b(h) of this subpart;
 - (i) List of charge and tap weights and materials;
 - (ii) Heat times and process log;
 - (iii) Control device operation log; and
 - (iv) Continuous opacity monitor or EPA Method 9 data, or, as an alternative to EPA Method 9, according to ASTM D7520–16 (incorporated by reference, see § 60.17), with the caveats described under *Shop opacity* in § 60.271.
 - (7) Test dates and test times;
 - (8) Test company;
 - (9) Test company representative;
 - (10) Test observers from any outside agency;
 - (11) Description of test methodology used, including any deviation from standard reference methods;
 - (12) Schematic of sampling location;
 - (13) Number of sampling points;
 - (14) Description of sampling equipment;
 - (15) Listing of sampling equipment calibrations and procedures;
 - (16) Field and laboratory data sheets;
 - (17) Description of sample recovery procedures;
 - (18) Sampling equipment leak check results;
 - (19) Description of quality assurance procedures;
 - (20) Description of analytical procedures;
 - (21) Notation of sample blank corrections; and
 - (22) Sample emission calculations.
- (g) The owner or operator shall maintain records of all shop opacity observations made in accordance with § 60.273b(d). All shop opacity observations in excess of the emission limit specified in § 60.272b(a)(3) of this subpart shall indicate a period of excess emissions and shall be reported to the Administrator or delegated authority semi-annually, according to § 60.7(c) and submitted according to paragraph (j) of this section. In addition to the information required at § 60.7(c), the report shall include the following information:
- (1) The company name and address of the affected facility.

(2) An identification of each affected facility being included in the report.

(3) Beginning and ending dates of the reporting period.

(4) A certification by a certifying official of truth, accuracy, and completeness. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(h) The owner or operator shall maintain the following records for each bag leak detection system required under § 60.273b(e):

(1) Records of the bag leak detection system output;

(2) Records of bag leak detection system adjustments, including the date and time of the adjustment, the initial bag leak detection system settings, and the final bag leak detection system settings; and

(3) An identification of the date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, if procedures were initiated within 1 hour of the alarm, the cause of the alarm, an explanation of the actions taken, the date and time the cause of the alarm was alleviated, and if the alarm was alleviated within 24 hours of the alarm.

(i) Within 60 days after the date of completing each performance test or demonstration of compliance required by this subpart, you must submit the results of the performance test following the procedures specified in paragraphs (i)(1) through (3) of this section.

(1) Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (<https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert>) at the time of the test. Submit the results of the performance test to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov/>). The data must be submitted in a file format generated using the EPA's ERT. Alternatively, you may submit an electronic file consistent with the extensible markup language (XML) schema listed on the EPA's ERT website.

(2) Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test. The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT

website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) Confidential business information (CBI). Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information submitted under paragraph (i)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated using the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. The preferred method to submit CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (e.g., Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404-02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (i)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(j) You must submit a report of excess emissions and monitoring systems performance report according to § 60.7(c) to the Administrator semiannually. Submit all reports to the EPA via CEDRI, which can be accessed through the EPA's CDX (<https://cdx.epa.gov/>). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as CBI.

Anything submitted using CEDRI cannot later be claimed CBI. You must use the appropriate electronic report template on the CEDRI website (<https://www.epa.gov/electronic-reporting-air-emissions/cedri>) for this subpart. The date report templates become available will be listed on the CEDRI website. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, follow paragraph (i)(3) of this section except send to the attention of the Electric Arc Furnace Sector Lead. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (j). All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(k) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with that reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (k)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the

reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(l) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of force majeure for failure to timely comply with that reporting requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (l)(1) through (5) of this section.

(1) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a force majeure event is defined as an

event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.*, hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.*, large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the force majeure event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of force majeure and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

(m) Any records required to be maintained by this subpart that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

[FR Doc. 2023-16747 Filed 8-24-23; 8:45 am]

BILLING CODE 6560-50-P

Reader Aids

Federal Register

Vol. 88, No. 164

Friday, August 25, 2023

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	202-741-6000
Laws	741-6000
Presidential Documents	
Executive orders and proclamations	741-6000
The United States Government Manual	741-6000
Other Services	
Electronic and on-line services (voice)	741-6020
Privacy Act Compilation	741-6050

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: www.govinfo.gov.

Federal Register information and research tools, including Public Inspection List and electronic text are located at: www.federalregister.gov.

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to <https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new>, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to <http://listserv.gsa.gov/archives/publaws-l.html> and select *Join or leave the list (or change settings)*; then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: fedreg.info@nara.gov

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, AUGUST

49993-50532	1
50533-51208	2
51209-51694	3
51695-52020	4
52021-53348	7
53349-53758	8
53759-54222	9
54223-54486	10
54487-54872	11
54873-55330	14
55331-55548	15
55549-55904	16
55905-56458	17
56459-56744	18
56745-56998	21
56999-57328	22
57329-57860	23
57861-58064	24
58065-58494	25

CFR PARTS AFFECTED DURING AUGUST

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR	214.....53761
184.....57750	217.....50759
200.....57750	
3 CFR	9 CFR
Proclamations:	93.....49994
10605.....53759	130.....49994
10606.....55331	381.....55909
10607.....57329	Proposed Rules:
Executive Orders:	11.....56924
14103.....50535	
14104.....51203	10 CFR
14105.....54867	1.....57873
14106.....55905	2.....57873
Administrative Orders:	26.....57873
Memorandums:	32.....57873
Memorandum of July	40.....57873
25, 2023.....50533	50.....56750, 56752, 57873
Memorandum of July	51.....57873
28, 2023.....53349	52.....56750, 56752, 57873
Notices:	72.....51209, 57873
Notice of August 14,	73.....57873
2023.....55549	100.....56750, 56752
Presidential	429.....53371
Determinations:	430.....53371
No. 2023-09 of August	431.....53371
11, 2023.....56997	Proposed Rules:
5 CFR	50.....53384, 56780
7001.....53351	72.....51253
Proposed Rules:	429.....56392
300.....55586	430.....50810, 55128
362.....55586	431.....56392
410.....55586	850.....57365
532.....55421, 55423	900.....55826, 57011
1321.....56708	
7 CFR	11 CFR
27.....49993	Proposed Rules:
210.....57792	112.....55606
215.....57792	
220.....57792	12 CFR
225.....57792	201.....50760
226.....57792	204.....50761
235.....57792	1002.....58065
984.....56745	1022.....58065
1146.....57861	1026.....58065
1147.....57861	
1205.....55345	13 CFR
Proposed Rules:	107.....50003, 55913
58.....55426	120.....50003
247.....54908	121.....55913
250.....54908	142.....50003
251.....54908	146.....50003
253.....54908	
254.....54908	14 CFR
354.....54796	25.....51695, 55359
3550.....55601	39.....50005, 50008, 50011,
3555.....55601	50014, 50762, 51218, 51220,
8 CFR	51223, 51225, 51227, 51230,
103.....53358	51695, 52021, 52024, 53761,
	54223, 55362, 55551, 56459,
	56753, 56756, 56999, 57331
	71.....50018, 50764, 54225,
	54227, 54228, 54229, 54230,

54231, 54232, 54233, 55553, 58071	416.....55366, 57004	2510.....54511	385.....54406
93.....54873	Proposed Rules:	2520.....54511	38 CFR
97.....56760, 56761	404.....51747	2550.....54511	38.....51236
382.....50020	416.....51747, 57910	2590.....51552	Proposed Rules:
1204.....50765	422.....51747	4022.....56583	17.....54972
Proposed Rules:	21 CFR	4044.....56583	39 CFR
21.....53815	161.....53764	4050.....56583	111.....54239
25.....55941	164.....53764	4262.....56583	40 CFR
27.....55941	184.....53764	4281.....56583	52.....50770, 50773, 51702,
29.....55941	186.....53764	30 CFR	51711, 51713, 53793, 53795,
39.....50067, 51739, 51742,	500.....55559	250.....57334	53798, 53800, 53802, 54240,
51745, 52055, 53402, 53406,	510.....55559	285.....54880	54899, 55377, 55379, 55383,
53823, 54500, 54933, 54935,	516.....55559	1206.....53790, 57881	55576, 57358, 57361, 57882
54939, 54941, 54944, 54946,	520.....55559	1208.....53790	60.....58442
54949, 55953, 55956, 57012,	522.....55559	1217.....53790, 55571	70.....53802
57902, 57904, 57907, 58114,	524.....55559	1220.....53790	80.....51239
58116, 58120	526.....55559	Proposed Rules:	180.....52040, 53806, 54244,
61.....55959	529.....55559	56.....54961	55578, 56772, 56773, 57887,
71.....54248, 54249, 54251,	556.....55559	57.....54961	57891, 57894, 57898
54252, 54254, 54503, 54952,	558.....55559	60.....54961	260.....54086
54955, 54956, 54959	1300.....50036	70.....54961	261.....54086
91.....55941, 55959	1302.....50036	71.....54961	262.....54086
121.....55941	1306.....53377	72.....54961	264.....54086
125.....55941	1308.....50036, 56466	75.....54961	265.....54086
135.....55941	Proposed Rules:	90.....54961	266.....54086
401.....56546	146.....55607	550.....58173	270.....54086
413.....56546	161.....53827, 58157	556.....58173	271.....54086, 55387, 55394
415.....56546	164.....53827	590.....58173	272.....55394
431.....56546	184.....53827	926.....52082, 52084, 52086	300.....55582
435.....56546	186.....53827	31 CFR	441.....54086
437.....56546	22 CFR	515.....58102	Proposed Rules:
440.....56546	171.....58072	555.....52026	2.....54118
450.....56546	24 CFR	587.....52038	51.....54118
460.....56546	880.....56764	591.....52038, 52039	52.....53431, 54257, 54259,
15 CFR	888.....56764	802.....57348	54534, 54975, 54983, 54996,
30.....54234	903.....56764	Proposed Rules:	54998, 55428, 56787, 57014,
738.....54875, 56763	905.....56764	Ch. VIII.....54961	57018, 57020, 58178, 58202
742.....54875	964.....56764	32 CFR	62.....56787
744.....57002	970.....56764	1700.....51234	63.....55858, 57381
774.....56462	983.....56764	33 CFR	98.....50282
902.....53704	25 CFR	100.....54487, 55572, 56469,	123.....55276
950.....56465	2.....53774	56766, 58102	124.....55276
Proposed Rules:	502.....55366	117.....54487, 54488, 56470,	147.....55610
922.....58123	556.....55366	58102	180.....57026
16 CFR	558.....55366	165.....50042, 50765, 51699,	232.....55276
310.....57333	26 CFR	51701, 54237, 54489, 54880,	233.....55276
1309.....54878	1.....50041, 55506	55371, 55373, 55375, 55572,	257.....55220
1310.....55554	Proposed Rules:	55913, 55915, 56768, 56770,	260.....53836, 54537
Proposed Rules:	1.....51756, 52057, 57916	57004, 57006, 57352, 57354,	261.....53836, 54537
432.....56780	5.....52057	57356, 57882, 58104, 58106,	262.....53836, 54537
801.....54256	54.....51552	58108, 58110, 58112	263.....54537
803.....54256	301.....52057	207.....51234	264.....53836, 54537
17 CFR	602.....52057	326.....51234	265.....53836, 54537
39.....53664	27 CFR	Proposed Rules:	266.....53836, 54537
140.....53664	Proposed Rules:	100.....51763, 57374	267.....54537
229.....51896	555.....57370	117.....58174, 58176	268.....54537
232.....51896	28 CFR	165.....57378	270.....53836, 54537
239.....51896	Proposed Rules:	34 CFR	271.....53836, 55429
240.....51896	35.....51948	Ch. II.....54882	272.....55429
249.....51896	105.....58167	165.....58112	300.....55611
270.....51404	29 CFR	36 CFR	441.....53836
274.....51404	1.....57526	1190.....53604	745.....50444
279.....51404	3.....57526	Proposed Rules:	41 CFR
Proposed Rules:	5.....57526	1195.....50096	60-1.....51717
23.....53409, 58145	102.....58075, 58076	37 CFR	60-2.....51717
37.....58145	1614.....57879	6.....50767	60-4.....51717
240.....53960	Proposed Rules:	201.....54491	60-20.....51717
275.....50076, 53960	1636.....54714	205.....54491	60-30.....51717
279.....50076			60-40.....51717
20 CFR			60-50.....51717
404.....55366, 57004			60-300.....51717, 57009
			60-741.....51717, 57009

42 CFR	1110.....53810	19.....53751	Proposed Rules:
73.....54247	Proposed Rules:	23.....53754	171.....55430
405.....57901	101.....55613	26.....53748	174.....55430
410.....57901	146.....51552	52.....53748, 53751, 53754,	180.....55430
411.....53200, 57901	147.....51552	53756	245.....57043
412.....50986, 51054, 57901	180.....57029	53.....53754	246.....57044
413.....53200, 57901	46 CFR	203.....55937	531.....56128, 58229, 58232
416.....57901	169.....51737	204.....55937	533.....56128, 58229, 58232
417.....50043	Proposed Rules:	206.....55937	535.....56128, 58229, 58232
418.....51164	401.....55629	212.....55937	537.....56128, 58229, 58232
419.....57901	47 CFR	215.....55937, 55940	1500.....57044
422.....50043	7.....55584	225.....55940	1530.....57044
423.....50043	8.....52043	234.....55940	1570.....57044
424.....51164, 57901	14.....50053	235.....55937	1572.....57044
455.....50043	54.....55401, 55918, 57363	252.....55940	1580.....57044
460.....50043	64.....51240	501.....53811	1582.....57044
485.....57901	73.....51249	Proposed Rules:	1584.....57044
488.....53200	Proposed Rules:	1.....51672, 52102	
489.....53200, 57901	Ch. I.....58211	2.....51672	50 CFR
Proposed Rules:	1.....50486, 55961, 57030	4.....51672	17.....56471, 57046
405.....52262, 57029	2.....55961	5.....51672	20.....54830, 56489
410.....52262, 57029	14.....52088	7.....51672	223.....54026
411.....52262	15.....55961	9.....51672	226.....54026
414.....52262	25.....55961	10.....51672	300.....53383
415.....52262	27.....55961	11.....51672	622.....50063, 50806, 55585,
416.....57029	54.....53837, 56579, 57383	12.....51672, 52102	56527
418.....52262	63.....50486	13.....51672	635.....50807, 53812, 56777
419.....57029	64.....52088, 53850	15.....51672	648.....50065, 50808, 51737,
422.....52262	73.....57031, 57032, 57033,	16.....53855	54495, 54899, 55411, 56527,
423.....52262	58210	18.....51672	56544, 58113
424.....52262, 57029	74.....55961	22.....52102	660.....51250, 52046, 53813
425.....52262	78.....55961	23.....51672	679.....52053, 53704, 55419,
455.....52262	101.....55961	26.....51672	56778, 57009
485.....57029	48 CFR	36.....51672	Proposed Rules:
488.....57029	Ch. 1.....53748, 53756	37.....51672	17.....54263, 54548, 55962,
489.....52262, 57029	1.....53748	39.....51672	55991, 57060, 57180, 57224,
491.....52262	2.....53751	42.....51672	57292, 57388
495.....52262	9.....53754	47.....52102	223.....55431
498.....52262	11.....53754	52.....51672, 52102	622.....51255, 57916
600.....52262	12.....53748	49 CFR	635.....50822, 50829
45 CFR		192.....50056	660.....50830, 57400
620.....50044		195.....50056	679.....50097

LIST OF PUBLIC LAWS Note: No public bills which have become law were received by the Office of the Federal Register for inclusion	in today's List of Public Laws. Last List August 9, 2023	Public Laws Electronic Notification Service (PENS) PENS is a free email notification service of newly	enacted public laws. To subscribe, go to <i>https://portalguard.gsa.gov/—layouts/PG/register.aspx</i>. Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. PENS cannot respond to specific inquiries sent to this address.