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DEPARTMENT OF AGRICULTURE

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Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Parts 4274, 4279, and 4280

[Docket No. RUS–20–TELECOM–0022]

RIN 0572–AC50

Special Authority To Enable Funding of Broadband and Smart Utility Facilities Across Select Rural Development Programs

AGENCY: Rural Utilities Service, Rural Housing Service, Rural Business-Cooperative Service, USDA.

ACTION: Final rule, confirmation and response to comments.

SUMMARY: The Rural Utilities Service, Rural Business-Cooperative Service, and Rural Housing Service, agencies that comprise the Rural Development (RD) Mission Area within the United States Department of Agriculture, published a final rule with comment in the **Federal Register** on September 15, 2020, to establish the special authority authorized by Section 6210 of the Agriculture Improvement Act of 2018, which will assist rural families and small businesses in gaining access to broadband service by permitting recipients of loans, grants, and loan guarantees from RD to use up to 10 percent of the amount provided to construct broadband infrastructure in areas not served by the minimum acceptable level of broadband service. The final rule described the procedures by which these agencies will consider projects eligible for special broadband authority. Through this action, the agencies are confirming the final rule as it was published and providing responses to the public comments that were received.

DATES: Effective October 19, 2023, the effective date of the final rule published September 15, 2020, at 85 FR 57077 is confirmed.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Regulations Management Division, Innovation Center, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250; telephone 202–690–1078, email *Michele.Brooks@usda.gov.*

SUPPLEMENTARY INFORMATION: Rural Development (RD) is a mission area within the United States Department of Agriculture (USDA) comprised of the Rural Utilities Service (RUS), Rural Housing Service (RHS) and Rural Business-Cooperative Service (RBCS). RD's mission is to increase economic opportunity and improve the quality of life for all rural Americans. Rural Development meets its mission by providing loans, loan guarantees, grants, and technical assistance through more than 40 programs aimed at creating and improving housing, businesses, and infrastructure throughout rural America. Part of rebuilding America's infrastructure is investing in rural broadband.

On December 20, 2018, Congress passed The Agricultural Improvement Act of 2018 (2018 Farm Bill) (Pub. L. 115–334). In addition to sweeping changes in broadband program authorities, Congress provided for special use of funding from other RD programs for broadband deployment in Section 6210, ''Smart Utility Authority for Broadband.'' The provision granted the Secretary of Agriculture the discretion to allow recipients of grants, loans, or loan guarantees under RD programs to use not more than 10 percent of such funding to finance broadband infrastructure in areas not served by the minimum acceptable level of broadband service and which will not result in competitive harm to a current RD loan, grant, or loan guarantee.

The final rule that published September 15, 2020 (85 FR 57077), included a 60-day comment period that ended on November 16, 2020. The agency received comments from eight respondents that included industry associations, individuals, and a non-profit organization. All eight respondents were supportive of the final rule.

Respondent 1: The respondent, an industry association, provided constructive feedback related to four specific issues and areas of concern.

(1) The evaluation of the 10 percent rule could complicate or delay overall approval of an application for a grant or loan product. Evaluation of the broadband portion of loans under the final rule should not result in a delay of loan approval or processing.

Agency response: The respondent's concern for not delaying the processing or approval of grant or loan products is acknowledged. The Agencies will work within their available resources to timely review and process any and all requests.

(2) Based on prior experience with other RD programs, the respondent urged the agencies to provide the applicant with access to the response/challenge filed in reply to their application and be given a chance to respond within a reasonable period and to verify incumbent claims of adequate service throughout the contested area.

Agency response: Through the public notice response process currently in place, the Agency can conduct an on-site review of the proposed service area to determine if adequate broadband exists. If an area of the proposed funded service area is found to be ineligible, the Agency will work with applicants to modify the proposed service area accordingly.

(3) The Agencies should clarify that it is requesting incumbents to provide actual speeds and results of speed test to verify the consumer experience and to provide pricing data for locations in question and urged the Agencies to avoid use of unreliable Broadband Data sets for verification.

Agency response: The Agency acknowledges the respondents comment and will take this recommendation into

consideration for future modifications to the public notice response process.

(4) The respondent also urged the RUS to regularly update the minimum acceptable level of broadband service.

Agency response: The minimum acceptable level of broadband service is designed to change with the ever-increasing bandwidth requirements that the public requires. The Agency has implemented procedures in 7 CFR 1738.2 that allow the definition of broadband service to be updated any time an application window is opened through a notice in the **Federal Register** or required by statute.

Respondent 2: The respondent, an industry association, provided three specific comments as part of their response.

(1) The respondent reminded the Agency it must comply with requirements applicable to all broadband funding to include notice and challenge, reporting and Agency coordination.

Agency response: The Agency acknowledges this comment and will continue to follow the regulations and processes it has in place for its existing broadband lending programs.

(2) The respondent requested that RUS clarify than an area is only eligible for funding if there is no broadband service available, whether fixed or mobile, that reaches the designated speeds.

Agency response: Section 1980.1207(b) states that if RUS determines that the minimum acceptable level of broadband service is available in the proposed retail service area after review of information submitted from service providers, if any, and all available data on broadband availability, the Awarding Agency shall not approve the use of funds for such purpose. The Agency feels this section addresses the respondents comment and no changes are needed.

(3) The respondent encouraged RUS to adopt new rules for all of its broadband funding programs through notice and comment rulemaking procedures.

Agency response: The Agency will continue to follow all rulemaking procedures as applicable.

Respondent 3: The respondent, an industry association, encouraged careful precision when multiplying the number of programs supporting broadband. The respondent encourages USDA and the FCC programs to work in concert stating that Section 6210 funds should be used in concert with USF to deploy the fastest, most reliable networks possible. The respondent noted ''as more RD programs support broadband network deployment under Sec 6210, it will remain essential to use the additional funds to supplement the work of existing programs instead of supporting an additional ISP in a rural area that will not even support one provider on its own.'' The respondent suggests that the rule ''include a provision indicating that, for an area where FCC data indicate that a provider is receiving High-Cost USF support and is subject to the corresponding obligation to deploy a network that will deliver 25/3 Mbps or greater service, no other provider will be eligible to obtain funds pursuant to Section 6210 in that specific area.''

Agency response: The Agency is committed to continuing to work with the FCC and other federal partners to ensure that their programs and RUS' programs are complementary of each other, not duplicative.

Respondent 4: The respondent, an industry association, provided a resolution that outlines the challenges that rural organizations and businesses have in identifying and accessing federal broadband resources. The resolution also provided generalized recommendations to Congress and federal agencies concerning adopting higher broadband speeds as the standard, strengthening local partnerships and coordination, addressing application barriers for businesses, local governments, cooperatives and Tribes; allocating designated portions of available funding to support projects on tribal lands and to leverage community anchor institutions to spur connectivity.

Agency response: Respondent four comments were more general and not specifically related to suggested changes for this final rule. The Agency appreciates the respondent's commitment to Rural America and to maintaining positive local and federal relationships.

Respondent 5, a university student, suggested the Agency increase the funding amount from 10 percent to 15 percent.

Agency response: Section 6210 of the 2018 Farm Bill specifically states 10 percent. An increase of this percentage would require a statutory change.

Respondent 6, an individual, petitioned USDA to consider three changes:

(1) To define the minimum acceptable level of broadband service from 25MB down and 3MB up to 50MB down and 10MP up speeds.

Agency response: As stated in an earlier response, the minimum acceptable level of broadband service is designed to change with the ever-increasing bandwidth requirements that the public requires and to comply with statutory requirements. The Agency has implemented procedures in 7 CFR 1738.2 that allow the definition of broadband speeds to be updated any time an application window is opened through a notice in the **Federal Register**.

(2) Consider a temporary interest rate reduction on loans for organizations that provide broadband services to families engaged in distance education at a reduced cost.

Agency response: Section 6210 of the 2018 Farm Bill does not include a provision for an interest rate reduction when implementing this special broadband authority.

(3) Increase the percentage organizations can spend on broadband and smart utility facilities from 10 percent to 15 percent.

Agency response: As stated in a previous response, Section 6210 of the 2018 Farm Bill specifically limits such assistance to 10 percent. An increase of this percentage would require a statutory change.

Respondent 7, an individual, offered his support of USDA establishing the authority authorized by section 6210 of the Agricultural Improvement Act of 2018.

Agency response: The Agency appreciates the respondent's comments and support of this final rule.

Respondent 8, a non-profit organization, did not offer comments specific to the rule. Instead, they outlined the importance of accurate broadband mapping data and their proposed solution to help with this undertaking.

Agency response: The Agency appreciates the respondent's efforts to improve broadband mapping data and their commitment to Rural America.

The Agency evaluated the responsive comments and based on analysis, confirms the final rule without change.

Farah Ahmad,

Deputy Under Secretary for Rural Development.

[FR Doc. 2023–23070 Filed 10–18–23; 8:45 am]

BILLING CODE 3410–15–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 140

[NRC–2023–0130]

RIN 3150–AL02

Increase in the Maximum Amount of Primary Nuclear Liability Insurance

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to increase the required amount of primary nuclear liability insurance from $450 million to $500 million for each nuclear reactor that is licensed to operate, is designed for the production of electrical energy, and has a rated capacity of 100,000 electrical kilowatts or more. This change complies with the provision in the Price-Anderson Amendments Act of 1988 that states the amount of primary financial protection required of licensees by the NRC shall be the maximum amount available at reasonable cost and on reasonable terms from private sources.

DATES: This final rule is effective on January 1, 2024.

ADDRESSES: Please refer to Docket ID NRC–2023–0130 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0130. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals 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 the **SUPPLEMENTARY INFORMATION** section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. 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, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Stewart Schneider, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–4123, email: *Stewart.Schneider@nrc.gov* and Mable Henderson, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–3760, email: *Mable.Henderson@nrc.gov.* Both are employees of the NRC.

SUPPLEMENTARY INFORMATION:

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I. Discussion

The NRC's regulations in part 140 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Financial Protection Requirements and Indemnity Agreements,'' provide requirements and procedures for implementing the financial protection requirements for certain licensees and other persons under the Price-Anderson Amendments Act of 1988 (Pub. L. 100–408) (Price-Anderson Act), incorporated as Section 170 of the Atomic Energy Act of 1954, as amended (AEA). The Price-Anderson Act amended § 170b.(1) to state that for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more (henceforth referred to as large operating reactors), ''the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources.'' This requirement of the Price-Anderson Act is implemented in the NRC's regulations at § 140.11 ''Amounts of financial protection for certain reactors.'' Section 140.11(a)(4) refers to the current dollar amount of the maximum amount liability insurance from private sources of $450 million. Therefore, § 140.11(a)(4) currently requires large operating reactors to have and maintain primary nuclear liability insurance in the amount of $450 million.

In a letter dated July 14, 2023, American Nuclear Insurers (ANI), the underwriter of American nuclear liability policies, acting on behalf of its member companies, notified the NRC that it will be increasing ''its maximum available primary nuclear liability limit from $450 million to $500 million, effective on January 1, 2024'' (ADAMS Accession No. ML23212A986). The ANI makes such adjustments on a non-periodic basis. The last such adjustment was made in 2017, and the NRC revised § 140.11 to reflect the increased maximum available amount of primary nuclear liability insurance (81 FR 96347; December 30, 2016).

To implement this adjustment, in accordance with the Price-Anderson Act, the NRC is revising 10 CFR part 140 to require large operating reactors to have and maintain $500 million in primary financial protection.

The NRC is not currently revising the appendices in § 140.91, § 140.92, or § 140.93 that provide general forms of liability policies and indemnity agreements that were determined to be acceptable to the Commission. These appendices include historical insurance providers and protection amounts for primary liability insurance that are no longer in use (for example, values of $124 million and $36 million from the 1979 final rule (44 FR 20632; April 6, 1979) and values of $200 million, $155 million, and $45 million from the 1989 final rule (54 FR 24157; June 6, 1989)). However, these appendices continue to provide relevant general forms of policies and agreements.

II. Rulemaking Procedure

This final rule is being issued without prior public notice or opportunity for public comments. The Administrative Procedure Act (5 U.S.C. 553(b)(B)) does not require an agency to use the public notice and comment process ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' In this instance, the NRC finds, for good cause, that solicitation of public comment on this final rule is unnecessary because the Price-Anderson Act requires a non-discretionary adjustment in the maximum amount required for primary nuclear liability insurance. Requesting public comment on this non-discretionary adjustment, which is required by statute, would not result in a change to the adjusted amount.

III. Section-by-Section Analysis

The following paragraph describes the specific changes that are reflected in this final rule.

§ 140.11 Amounts of Financial Protection for Certain Reactors

In paragraph (a)(4), this final rule removes ''$450,000,000'' and replaces it with the increased maximum amount of

primary nuclear liability insurance of ''$500,000,000''.

IV. Regulatory Flexibility Certification

The Regulatory Flexibility Act does not apply to regulations for which a Federal agency is not required by law, including the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), to publish a general notice of proposed rulemaking (5 U.S.C. 604). As discussed in this document under Section II, ''Rulemaking Procedure,'' the NRC is not publishing this final rule for notice and comment. Accordingly, the NRC has determined that the requirements of the Regulatory Flexibility Act do not apply to this final rule.

V. Regulatory Analysis

A regulatory analysis was not prepared for this final rule because the change in the maximum amount of nuclear liability insurance is mandated by the Price-Anderson Act. This final rule does not involve an exercise of Commission discretion.

VI. Backfitting and Issue Finality

The NRC has not prepared a backfit analysis for this final rule. This final rule does not involve any provision that would impose a backfit, nor is it inconsistent with any issue finality provision, as those terms are defined in 10 CFR chapter I. These mandatory adjustments are non-discretionary, required by statute, and do not represent any change in position by the NRC with respect to the design, construction, or operation of a licensed facility.

VII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885).

VIII. National Environmental Policy Act

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

IX. Paperwork Reduction Act

This final rule does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget, approval number 3150–0039.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

X. Congressional Review Act

This final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects in 10 CFR Part 140

Criminal penalties, Extraordinary nuclear occurrence, Insurance, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 140.

PART 140—FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

■ 1. The authority citation for part 140 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 161, 170, 223, 234 (42 U.S.C. 2201, 2210, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

§ 140.11 [Amended]

■ 2. In § 140.11, amend paragraph (a)(4) by removing the number ''$450,000,000'' and adding in its place the number ''$500,000,000''.

Dated: September 29, 2023.

For the Nuclear Regulatory Commission.

Scott A. Morris,

Acting Executive Director for Operations.

[FR Doc. 2023–23062 Filed 10–18–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE–2017–BT–STD–0048]

RIN 1904–AF27

Energy Conservation Program: Energy Conservation Standards for Dedicated Purpose Pool Pump Motors

Correction

In rule document 2023–20343, appearing on pages 66966 through 67041 in the issue of Thursday, September 28, 2023, make the following correction:

§ 431.482 Materials incorporated by reference. [Corrected]

■ On page 67041, in the second column, the 26th line from the bottom of the page ''following paragraphs of this section:'' should read ''following paragraphs of this section.''.

[FR Doc. C2–2023–20343 Filed 10–18–23; 8:45 am]

BILLING CODE 0099–10–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1325; Airspace Docket No. 23–AGL–17]

RIN 2120–AA66

Amendment of VOR Federal Airway V–36 and Establishment of RNAV Route T–675; Northcentral United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, delay of effective date.

SUMMARY: This action changes the effective date of a final rule published in the **Federal Register** on September 22, 2023, amending Very High Frequency Omnidirectional Range (VOR) Federal airway V–36 and establishing Canadian Area Navigation (RNAV) route T–675 in the northcentral United States (U.S.). The FAA is delaying the effective date to coincide with the expected completion of the associated aeronautical data requirements for establishing all segments of Canadian RNAV route T–675 within U.S. airspace and to adopt the rule amendments concurrently.

DATES: The effective date of the final rule published on September 22, 2023 (88 FR 65311) is delayed from November 30, 2023, to March 21, 2024. The Director of the Federal Register

approved this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA JO Order 7400.11 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

Background

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2023–1325 (88 FR 65311, September 22, 2023), amending VOR Federal airway V–36 and establishing Canadian RNAV route T–675 within U.S. airspace. In the final rule, the FAA added a cross-border route segment to T–675, at NavCanada's request, and explained the inclusion of the additional route segment as a difference from the proposed action published in the notice of proposed rulemaking (NPRM). The effective date for that final rule is November 30, 2023. After publishing the final rule, the FAA realized that not all the necessary aeronautical data required for establishing the additional segment of Canadian RNAV route T–675 within U.S. airspace had been submitted in time or accomplished for updating the FAA's National Airspace System Resource (NASR) database to meet the November 30, 2023, effective date. The FAA has determined delaying the effective date for the entire rule prevents confusion associated with amending V–36 and establishing T–675 in Airspace Docket 23–AGL–17 with two different effective dates for two chart cycles four months apart, and ensures all of the V–36 and T–675 actions publish accurately and concurrently on the same date.

The FAA expects to complete the associated aeronautical data requirements and update the NASR database for establishing all segments of Canadian RNAV route T–675 by March 21, 2024; therefore, the rule amending VOR Federal airway V–36 and establishing Canadian RNAV route T–675 within US airspace is delayed to coincide with that date.

VOR Federal airways are published in paragraph 6010(a) and Canadian Area Navigation Routes (T-routes) are published in paragraph 6013 of FAA JO Order 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available 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.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Good Cause for No Notice and Comment

Section 553(b)(3)(B) of Title 5, United States Code, (the Administrative Procedure Act) authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking. The FAA finds that prior notice and public comment to this final rule is unnecessary due to the brief length of the extension of the effective date and the fact that there is no substantive change to the rule.

Delay of Effective Date

Accordingly, pursuant to the authority delegated to me, the effective date of the final rule, Airspace Docket 23–AGL–17, as published in the **Federal Register** on September 22, 2023 (88 FR 65311), FR Doc. 2023–20449, is hereby delayed until March 21, 2024.

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.

Issued in Washington, DC, on October 13, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–22993 Filed 10–18–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 231013–0245]

RIN 0694–AJ41

Entity List Additions

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding 13 entities to the Entity List under the destination of the People's Republic of China (China). These entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States.

DATES: This rule is effective October 17, 2023.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730–774)) 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, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the ''License Review Policy'' column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the entity to the Entity List. The Bureau of Industry and Security (BIS) places entities on the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

Additions to the Entity List

The ERC determined to add Beijing Biren Technology Development Co., Ltd.; Guangzhou Biren Integrated Circuit Co., Ltd.; Hangzhou Biren Technology Development Co., Ltd.; Light Cloud (Hangzhou) Technology Co., Ltd.; Moore Thread Intelligent Technology (Beijing) Co., Ltd.; Moore Thread Intelligent Technology (Chengdu) Co., Ltd.; Moore Thread Intelligent Technology (Shanghai) Co., Ltd.; Shanghai Biren Information Technology Co., Ltd.; Shanghai Biren Integrated Circuit Co., Ltd.; Shanghai Biren Intelligent Technology Co., Ltd.; Superburning Semiconductor (Nanjing) Co., Ltd.; Suzhou Xinyan Holdings Co., Ltd.; and Zhuhai Biren Integrated Circuit Co., Ltd., all under the destination of China, to the Entity List. These entities are involved in the development of advanced computing integrated circuits (ICs). As described in an upcoming amendment to regulations regarding advanced computing items and supercomputer and semiconductor end use, advanced computing ICs can be used to provide artificial intelligence capabilities to further development of weapons of mass destruction, advanced weapons systems, and high-tech surveillance applications that create national security concerns. This activity is contrary to U.S. national security and foreign policy interests under § 744.11 of the EAR. For all of these entities, BIS imposes a license requirement for all items subject to the EAR, which will be reviewed under a presumption of denial. They are also given a footnote 4 designation, which means that ''items subject to the EAR,'' for the purpose of these license requirements, include foreign-produced items that are subject to the EAR pursuant to § 734.9(e)(2) of the EAR.

For the reasons described above, this final rule adds the following 13 entities, including aliases where appropriate, to the Entity List:

China

- Beijing Biren Technology Development Co., Ltd.;
- Guangzhou Biren Integrated Circuit Co., Ltd.;
- Hangzhou Biren Technology Development Co., Ltd.;
- Light Cloud (Hangzhou) Technology Co., Ltd.;
- Moore Thread Intelligent Technology (Beijing) Co., Ltd.;
- Moore Thread Intelligent Technology (Chengdu) Co., Ltd.;
- Moore Thread Intelligent Technology (Shanghai) Co., Ltd.;
- Shanghai Biren Information Technology Co., Ltd.;
- Shanghai Biren Integrated Circuit Co., Ltd.;
- Shanghai Biren Intelligent Technology Co., Ltd.;
- Superburning Semiconductor (Nanjing) Co., Ltd.;
- Suzhou Xinyan Holdings Co., Ltd.; and
- Zhuhai Biren Integrated Circuit Co., Ltd.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on October 17, 2023, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before November 16, 2023. Any such items not actually exported, reexported or transferred (in-country) before midnight, on October 17, 2023, require a license in accordance with this final rule.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at *https://www.reginfo.gov/public/do/PRAMain.*

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—END-USE AND END-USER CONTROLS

■ 1. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of November 8, 2022, 87 FR 68015, 3 CFR, 2022 Comp., p. 563; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023).

■ 2. Supplement no. 4 is amended under CHINA, PEOPLE'S REPUBLIC OF by adding, in alphabetical order, entries for ''Beijing Biren Technology Development Co., Ltd.;'' ''Guangzhou Biren Integrated Circuit Co., Ltd.;'' ''Hangzhou Biren Technology Development Co., Ltd.;'' ''Light Cloud (Hangzhou) Technology Co., Ltd.;'' ''Moore Thread Intelligent Technology (Beijing) Co., Ltd.;'' ''Moore Thread Intelligent Technology (Chengdu) Co., Ltd.;'' ''Moore Thread Intelligent Technology (Shanghai) Co., Ltd.'',

''Shanghai Biren Information Technology Co., Ltd.;'' ''Shanghai Biren Integrated Circuit Co., Ltd.;'' ''Shanghai Biren Intelligent Technology Co., Ltd.;'' ''Superburning Semiconductor (Nanjing) Co., Ltd.;'' ''Suzhou Xinyan Holdings Co., Ltd.;'' and ''Zhuhai Biren Integrated Circuit Co., Ltd.'' to read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	* * *	*	* *	*
CHINA, PEOPLE'S REPUBLIC OF.	* *	*	* *	*
	Beijing Biren Technology Development Co., Ltd., Building 13, Room 201, 9th Floor, Wangjing East Area, Zone 4, Chaoyang District, Beijing, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Guangzhou Biren Integrated Circuit Co., Ltd., Room 1061, Room 406, No. 1 Yichuang Street, Sino-Singapore Guangzhou Knowledge City, Huangpu District, Guangzhou, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Hangzhou Biren Technology Development Co., Ltd., Building A, Room 3029, 3rd Floor, No. 482 Qianmo Road, Binjiang District, Hangzhou, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Light Cloud (Hangzhou) Technology Co., Ltd., Room 403, Building 15, No. 1818–2, Wenyi West Road, Yuhang Street, Yuhang District, Hangzhou, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Moore Thread Intelligent Technology (Beijing) Co., Ltd., a.k.a, the following two aliases: —Moore Threads; *and* —Mo'er Xianchen. Room 209, Floor 2, No. 31, Haidian Street, Haidian District, Beijing, China; *and* Building 14, B655, 4th Floor, Cuiwei Zhongli, Haidian District, Beijing, China; *and* Units 04 and 05, Floor 12, No. 3, Jinke Road, Shanghai, China; *and* Building B, B2–1405, No. 15 Keyuan Road, Nanshan District, Shenzhen, China; *and* Building 6 Floors 1 and 3, Wangjing East Road, Chaoyang District, Beijing, China; *and* R&D Center Building, No. R2505, Floors 1–14 and 16–28, East Lake New Technology Development Zone, Wuhan, China; *and* Building 4, Room 1502, Floor 15, Taiwei Smart Chain Center, Xi'an, China; *and* Building 1, Room 31816, 3rd Floor, Puyan Street, Binjiang District, Hangzhou, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	Moore Thread Intelligent Technology (Chengdu) Co., Ltd., Building 2, No. 23–32, 12th Floor, Block E5, Chengdu Hightech Zone, Pilot Free Trade Zone, Chengdu, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	Moore Thread Intelligent Technology (Shanghai) Co., Ltd., Units 1–5, 12th Floor, No. 2, Jinke Road, Pilot Free Trade Zone, Shanghai, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Shanghai Biren Information Technology Co., Ltd., Building 2, No. 692 Yongjia Road, Xuhui District, Shanghai, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	Shanghai Biren Integrated Circuit Co., Ltd., Building 16, Room 1301, 13th Floor, No. 2388 Chenhang Highway, Minhang District, Shanghai, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	Shanghai Biren Intelligent Technology Co., Ltd., a.k.a., the following two aliases: —Biren; *and* —Biren Technology. Building 16, Room 1302, 13th Floor, No. 2388 Chenhang Highway, Minhang District, Shanghai, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Superburning Semiconductor (Nanjing) Co., Ltd., No. 8, Lanhua Road, Room 806, Building 4, Pukou District, Nanjing, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Suzhou Xinyan Holdings Co., Ltd., a.k.a., the following one alias: —Shanghai Xinzhili Enterprise Development Co., Ltd. Modern Logistics Building (no. 112), Room 139, No. 88 Modern Avenue, Suzhou Industrial Park, Free Trade Pilot Zone Suzhou Area, Suzhou, China; *and* Building C, No. 888 Huanhu West 2nd Road, Lingang New Area, Shanghai, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
	Zhuhai Biren Integrated Circuit Co., Ltd., Building 18, Room 419, No. 1889 Huandao East Road, Hengqin New District, Zhuhai, China.	For all items subject to the EAR. (See §§ 734.9(e)(2) and 744.11 of the EAR) [4].	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 10/19/2023.
	* *	*	* *	*
*	* * * * * * *			

[4] For this entity, ''items subject to the EAR'' includes foreign-produced items that are subject to the EAR under § 734.9(e)(2) of the EAR. See § 744.11(a)(2)(ii) for related license requirements and license review policy.

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–23048 Filed 10–17–23; 8:45 am]

BILLING CODE 3510–33–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 03–123, 10–51; FCC 23–78; FR ID 177808]

Video Relay Service Compensation Formula

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, to ensure that the providers of Telecommunications Relay Services (TRS) are compensated for the provision of Video Relay Service (VRS), the Federal Communications Commission (Commission) adopts a formula to compensate such providers from the Interstate TRS Fund (TRS Fund) for the provision of service for the next five-year compensation period.

DATES: This rule has been classified as a major rule subject to Congressional review. The effective date is December 18, 2023.

FOR FURTHER INFORMATION CONTACT: Michael Scott, Consumer and Governmental Affairs Bureau, 202–418–1264, *Michael.Scott@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, in CG Docket Nos. 03–123 and 10–51; FCC 23–78, adopted on September 22, 2023, released on September 28, 2023. The Commission previously sought comment on these issues in a Notice of Proposed Rulemaking, published at 86 FR 29969, June 4, 2021, with a correction published at 86 FR 31668, July 15, 2021. The full text of this document can be accessed electronically via the FCC's Electronic Document Management System (EDOCS) website at *https://docs.fcc.gov/public/attachments/FCC-23-78A1.pdf* or via the FCC's Electronic Comment Filing System (ECFS) website at *www.fcc.gov/ecfs.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov,* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice).

Synopsis

1. Section 225 of the Communications Act of 1934, as amended (the Act), requires the Commission to ensure the availability of Telecommunications Relay Services (TRS) to persons who are deaf, hard of hearing, or deafblind or have speech disabilities, ''to the extent possible and in the most efficient manner.'' 47 U.S.C. 225(b)(1). TRS are defined as ''telephone transmission services'' enabling such persons to communicate by wire or radio ''in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services.'' 47 U.S.C. 225(a)(2). VRS, a relay service that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment, is supported entirely by the TRS Fund. VRS providers are compensated for the reasonable costs of providing VRS in accordance with payment formulas approved by the Commission. In a number of decisions over the past 20 years, the Commission has addressed whether certain cost categories are reasonable costs eligible for recovery from the TRS Fund. Reasonable costs are generally defined as those costs that providers must incur to provide relay service in accordance with mandatory minimum TRS standards.

2. In 2007, to ensure that VRS users could choose from a range of service offerings, despite significant disparities in VRS providers' market shares and per-minute costs, the Commission introduced a tiered compensation structure for VRS. Under this approach, a VRS provider's monthly compensation payment is calculated based on the application of different per-minute amounts to each of three specified ''tiers'' of minutes of service. The highest per-minute amount applies to an initial tier of minutes up to a defined maximum number, a lower amount applies to the next tier, again up to a second defined maximum number of minutes, and a still lower amount applies to any minutes of service in excess of the second maximum. Under the tiered approach, providers that handle a relatively small amount of minutes and therefore have relatively higher per-minute costs will receive compensation on a monthly basis that likely more accurately correlates to their

actual costs—and the same is true of providers that have more minutes and lower per-minute costs.

The 2021 Notice of Proposed Rulemaking

3. In May 2021, the Commission released the *Notice of Proposed Rulemaking,* seeking comment on the adoption of a new VRS compensation plan. The Commission proposed to maintain a tiered compensation structure. The Commission also found no reason to depart from the Commission's longstanding policy objectives of bringing TRS Fund payments into closer alignment with allowable costs and preserving and promoting quality-of-service competition among multiple providers. In addition, the Commission sought comment on how cost and demand estimates should be adjusted, if at all, to account for post-COVID costs and demand, and whether projected costs were reliable enough to serve as a reasonable basis to set rates for a new multi-year rate cycle. The Commission also sought comment on whether to rely on historical costs only, in anticipation that VRS costs and demand may decrease to pre-pandemic levels once the pandemic subsides. Further, the Commission asked what labor cost adjustments, if any, should be applied. The Commission also sought comment on whether and how to modify the current compensation structure, whether to revisit any prior Commission determinations on allowable costs, what rate levels should be set, how to structure the compensation period, and whether to provide for rate adjustments during that period.

The Need for a Revised Compensation Plan

4. In setting VRS compensation formulas, the Commission first determines the relevant costs of providing service. Relying on cost and demand data reported by VRS providers to the TRS Fund administrator, the Commission estimates each provider's average per-minute cost to provide VRS (the provider's total allowable expenses divided by its total minutes), and also calculates a weighted-average per-minute cost for the industry as a whole (all providers' total allowable expenses divided by their total minutes). The Commission then adds an allowed operating margin. In the *Notice of Proposed Rulemaking,* the Commission sought comment on whether to revisit any of its prior determinations regarding allowable costs.

Changes in Allowable Cost Criteria

5. *Research and Development (R&D).* The Commission revises its allowable cost criteria to allow TRS Fund support for the reasonable cost of research and development to enhance the functional equivalency of VRS. No commenter opposes this change. The Commission agrees with commenters who assert that the current criterion is unnecessarily restrictive. First, in 2013, when it authorized TRS Fund support of Commission-directed (non-provider) research to improve the efficiency, availability, and functional equivalence of TRS, the Commission recognized that TRS Fund resources can appropriately be used to support research into service improvements that may exceed the existing minimum TRS standards. Authorizing providers (as well as Commission-directed entities) to conduct such research is consistent with the Commission's policy of promoting service improvement by encouraging VRS providers to compete with one another based on service quality—a form of competition that logically may lead a provider to develop innovative features not already required by the Commission's rules. The Commission finds that expenses incurred by VRS providers to develop such improvements are appropriately included as part of the ''reasonable cost'' of service supported by the TRS Fund.

6. Second, changed circumstances support removal of the current limitation. Recent changes in how people communicate are posing new technology challenges for VRS providers. To promote the integration of VRS with video conferencing, even though it is not currently required by the Commission's rules, VRS providers need to conduct research and development on methods of achieving such integration. Further, the risk of wasting TRS Fund resources on unproductive research appears less likely today, because the Commission no longer resets compensation each year based on annual cost reporting, as it did in 2004 when the current limitation on allowable research and development costs was established. With compensation plans now being set for multi-year periods, providers that reduce costs during a compensation period are able to retain the resulting profit. Consequently, providers are less likely to spend money on wasteful or unnecessary research.

7. Therefore, the Commission concludes that the development of service improvements is deserving of TRS Fund support, even if such improvements exceed what is necessary for compliance with the Commission's minimum TRS standards. The Commission stresses that, as with all provider-reported expenses, expenses for research and development to improve VRS are allowable only if reasonable. In addition, expenses incurred to develop proprietary user devices or software (or any non-TRS product or service) are not recoverable from the TRS Fund.

8. *Number Acquisition and 911 Calling.* The Commission revises its allowable-cost criteria to permit TRS Fund support for the reasonable cost of assigning and porting North American Numbering Plan telephone numbers for TRS users. Last year, the Commission similarly revised its allowable-cost criteria for IP Relay to permit recovery of number assignment costs by IP Relay providers. The Commission agrees that precluding recovery of such costs is no longer justified. Based on the current record, the Commission concludes that voice service providers and VRS providers are not similarly situated regarding the ability to recover such costs from users. As a threshold matter, since 2008 it has become clear that a VRS provider's cost of obtaining the numbers it assigns to its registered users actually is attributable to the use of relay service to facilitate a call. If relay service were not provided, these numbers would not be needed by VRS users. Further, the current record indicates that, as a practical matter, these costs are never passed on to VRS users, but rather are absorbed by VRS providers. While voice service providers have a billing relationship with their customers, VRS providers typically do not, and there would be little point in creating such a relationship for the sole purpose of passing through what likely would be a de minimis monthly charge.

9. In this regard, there is an important difference between traditional text-telephone (TTY) based TRS and internet-based TRS. To place a call using a TTY, a consumer must subscribe to traditional telephone service, for which a telephone number is automatically issued to the subscriber (and for which the number acquisition cost is bundled into the service rate). To place a call using VRS, a consumer must subscribe to broadband internet access service, for which no telephone number is automatically provided (unless the consumer also subscribes to Voice over internet Protocol (VoIP) service—which a VRS user would have no reason to do).

10. As for costs associated with acquisition and use of toll-free numbers, the record does not indicate that any VRS provider still issues toll-free

numbers to registered VRS users. Therefore, the Commission does not find it necessary to revisit that question.

11. Similarly, the record does not indicate that any VRS provider is currently assessed a fee under a state or local E911 funding mechanism. Such fees are typically assessed on providers of telephone service. As a general matter, the TRS Fund supports the reasonable cost of ensuring that E911 calls placed by VRS users are handled in a functionally equivalent manner. FCC rules impose numerous E911-related requirements on VRS providers, including that they provide automatic location information for mobile VRS calls to 911 if technically feasible. The Commission clarifies that the TRS Fund supports reasonable expenses incurred by VRS providers to improve their ability to quickly connect a VRS user's 911 call to the Public Service Answering Point (PSAP) nearest the user's location and to automatically provide specific location data to such PSAP. Such costs are directly related to routing TRS calls to an appropriate PSAP and facilitating emergency call handling. Thus, such costs are allowable under the criteria adopted by the Commission in 2008.

12. *Outreach.* TRS outreach has a dual educational focus: making the general public aware of the availability and use of relay services, *e.g.,* to prevent the uninformed rejection of TRS calls by a called party; and providing ''non-branded'' information about relay services to potential users—*i.e.,* members of the public who are deaf or hard of hearing—to make them aware of the availability and benefits of TRS. Before 2013, the TRS Fund compensated TRS providers for outreach activities. However, the Commission grew concerned about the effectiveness of provider outreach. In 2013, the Commission directed the establishment of a pilot program to provide coordinated nationwide outreach for VRS and IP Relay through contractors or other third parties. The Commission also disallowed TRS Fund support for outreach conducted by VRS and IP Relay providers. Last year, the Commission revised its allowable-cost criteria for IP Relay to permit recovery of outreach costs by IP Relay providers.

13. The Commission concludes that VRS providers' reasonable outreach expenses should be recoverable from the TRS Fund. First, the pilot National Outreach Program expired in 2017 and has not been reauthorized. Although the Commission continues to be skeptical about the extent to which provider-conducted outreach can be effective in educating the general public, in the absence of a national outreach program, the TRS Fund should support outreach by VRS providers who choose to engage in it. However, outreach expenses of this kind are allowable only to the extent that the communication focuses on educating the public about the availability and use of VRS. Expenditures on advertisements about other matters do not constitute allowable outreach expenses.

14. Second, it appears that little is accomplished by continuing to prohibit TRS Fund support of provider outreach to potential VRS users. As the Commission has previously observed, outreach to potential TRS users (unlike outreach to the general public) is not always easy to distinguish from branded marketing, and branded marketing is an allowable TRS expense. Since the Commission's 2013 determination to cease TRS Fund support for outreach by VRS providers, the amounts reported by VRS providers as outreach have decreased, while the amounts reported as allowable marketing expenses have increased. To the extent that VRS providers are motivated to communicate with potential users, whether through branded marketing or otherwise, such efforts can be effective in introducing the service to new users, including subgroups that may lack awareness of the availability of a service or how it can meet their needs.

15. In allowing outreach, the Commission does not reopen the door to wasteful spending. As explained earlier in connection with research and development, with compensation plans being set for multi-year periods, providers that reduce costs during a compensation period are able to retain the resulting profit. Consequently, providers are less likely to spend wastefully on unproductive outreach activity—especially as the resources involved are more likely to lead to increased compensation revenue if used for branded marketing.

16. *User Access Software.* The Commission revises its allowable-cost criteria to allow TRS Fund support for the reasonable cost of providing downloadable software applications that are needed to enable users to access VRS from off-the-shelf user devices. The Commission agrees that the TRS Fund should support reasonable costs incurred by VRS providers in developing, maintaining, and providing the software necessary to allow VRS users' non-proprietary equipment to route calls and connect to VRS. The Commission allows TRS Fund recovery of VRS providers' reasonable costs directly related to the provision of software that can be downloaded and self-installed by VRS users onto off-the-shelf user devices such as mobile phones, desktop computers, and laptops running on widely available operating systems. Such costs must be incurred by any provider to enable users to connect to its service platform; therefore, they are attributable to the provision of VRS. Further, recovery of the cost of software needed to connect such user devices to VRS is consistent with the Commission's policy to promote the availability of off-the-shelf IP-enabled devices for VRS use and decrease consumers' dependence on VRS equipment specifically designed for connection to a particular VRS provider.

17. However, the Commission declines to also allow recovery of costs incurred in developing, maintaining, or providing software for user devices that are distributed by one VRS provider and cannot be directly connected to other VRS providers' services. While the Commission agrees that users need a software interface to access VRS, they do not need proprietary devices that can be connected to and used with only one provider's service, nor do they need software designed for such devices. Although the Commission has not prohibited providers from distributing such devices and software to consumers requesting them, it is not necessary to support proprietary devices and software with TRS Fund resources. Sorenson Communications, LLC (Sorenson), asserts that the proprietary devices it distributes offer higher video resolutions and more screen space than off-the-shelf platforms, but provides no details supporting this claim. Even if true, Sorenson fails to show that such alleged advantages necessitate the availability of TRS Fund payments for such features or the software supporting them. Sorenson acknowledges that many of its customers (as well as 100% of the customers of other providers that do not distribute proprietary devices) use VRS software running on an off-the-shelf device, either alone or in addition to using a proprietary Sorenson device. Therefore, whatever perceived advantages proprietary devices may have, as a practical matter they provide a useful but not essential means of accessing VRS.

18. Further, allowing recovery of such software costs would not advance the Commission's policy to enable users to access VRS from off-the-shelf IP-enabled devices and to avoid dependence on VRS equipment specifically designed for a particular provider's network. By limiting TRS Fund support to user software that allows VRS access from off-the-shelf equipment that can be connected to any VRS provider, the

Commission promotes the availability of multiple service options for consumers.

19. The Commission recognizes that it may often be difficult for a VRS provider to differentiate precisely between the portions of certain expenses that are attributable to, *e.g.,* the development of software applications for connecting proprietary and non-proprietary equipment to the provider's platform. In cases where such expenses cannot be directly assigned, the provider should adopt a reasonable allocation method and specify the method used in its cost reports, so that it can be evaluated by the TRS Fund administrator and the Commission.

20. *Field Staff Issues.* Because the costs of installing, maintaining, and training customers to use provider-distributed devices are not recoverable through TRS Fund compensation, providers must not report the costs of field staff visits for such purposes as allowable expenses. Costs incurred to install and maintain software for a VRS provider's proprietary user devices are also non-allowable. Therefore, field staff costs related to installation, maintenance, and training of customers to use such software also must be excluded. However, the Commission clarifies that the reasonable cost of service-related work performed by field staff during a visit to a new or current user is an allowable cost of providing VRS. Reasonable costs incurred for service-related field staff visits for the purpose of, *e.g.,* assisting customers with registration, use of VRS on a non-proprietary device, or completing a port are allowable.

21. The above clarifications also apply to the reporting of field staff costs incurred by IP CTS providers. However, any change in the allowability of field staff costs related to installation and provision of IP CTS equipment is beyond the scope of this proceeding.

Estimating Costs

22. *Need for adjustment of provider cost projections.* For the past 13 years, the Commission has established the cost basis for provider compensation by averaging VRS providers' reported historical expenses for the prior calendar year with their projected expenses for the current calendar year. The Commission has found this method to be a useful way to counteract providers' tendency to overestimate future costs. However, for a number of reasons specific to this proceeding, the Commission's averaging approach requires modification to achieve reasonably accurate estimates of provider costs for the purpose of establishing VRS compensation for the new compensation period.

23. First, due to a recent increase in the general inflation rate, which does not appear to be offset by comparable efficiency improvements, the average of VRS providers' historical 2022 and projected 2023 expenses is likely to understate the costs that will be incurred by VRS providers in many expense categories in the new compensation period. There is likely to be significant inflation during the 12-month lag between this 2022–23 reporting period and the 2023–24 Fund Year, which is the first year of the new compensation period. Second, VRS providers may incur expenses in newly allowable cost categories, which are not reflected in their current reporting of allowable costs. Third, the record indicates that, due to a shortage of qualified American Sign Language (ASL) interpreters and the challenges posed by new modes of communication, VRS providers need to substantially increase communications assistant (CA) wages and technology spending to continue providing high-quality, functionally equivalent service.

24. Finally, recent inflation and other factors appear to have caused an unusual amount of uncertainty and variation in VRS providers' estimates of future costs. In projecting costs for 2023 and 2024, different providers appear to have made very different assumptions about future input costs, as well as the extent to which compensation levels will increase sufficiently to justify additional spending. As a result, estimating each provider's cost of providing VRS based on an average of that provider's historical and projected expenses is likely to cause discrepancies.

25. Providers suggest different approaches for addressing these concerns. ZP Better Together, LLC (ZP) argues that the Commission should abandon any attempt to estimate current provider costs. Instead, ZP recommends applying an inflation adjustment (as well as certain adjustments meant to reflect newly allowable costs) to the compensation rates set in 2017. The Commission rejects this approach, which incorrectly assumes that providers' 2016–17 costs (on which the rates set in 2017 were based) remain relevant for purposes of setting compensation for 2023–24 and beyond. There is no logical or record basis for this assumption, which underlies a number of the assertions in ZP's recent *ex partes—e.g.,* that any rate card should give ZP and Convo Communications, LLC, a share of the new revenues at least equal to its market share. Due to the changes that have taken place since 2017, ''old'' provider revenues resulting from the current rates are disproportionately allocated in relation to provider cost. Therefore, there is no logical necessity for ''new'' revenues to be proportionate to providers' market shares. There is no conceivable basis in section 225 of the Act or economics for such a proposal, divorced from costs and operating margins. The relative per-minute costs of VRS providers are now very different than they were seven years ago. Further, ZP's argument that the tiered rate structure and rates of 2017 reflect immutable truths about economies of scale at different volumes of minutes is based on a flawed study.

26. Sorenson, on the other hand, suggests that the Commission modify past practice by using historical 2022 cost, rather than an average of historical and projected cost, as a baseline for estimating future VRS cost, and apply uniform factors to adjust each provider's 2022 costs for inflation and to make the targeted, above-inflation adjustments needed in certain areas. The Commission believes this approach has merit. Historical costs are more reliably accurate, and each provider's historical cost can be adjusted by a uniform factor to address inflation or other likely cost changes affecting all providers, so as not to unduly distort, or give any provider an undue advantage in, the resulting rates. While ZP has raised concerns about some aspects of Sorenson's reported 2022 costs, Sorenson has provided reasonable explanations for its 2022 cost increases.

27. To address this unusual confluence of rate-setting issues, the Commission adjusts the costs reported in 2022 to: take account of cost changes due to inflation during the 18-month time lag between calendar year 2022 (the cost reporting period) and Fund Year 2023–24 (the first year of the new compensation period); add amounts sufficient to cover necessary increases in technology spending and CA wages and benefits; include estimates of provider expenditures in newly allowable cost categories; and address new costs incurred by Sorenson to provide video-text service. Finally, the Commission adds an appropriate operating margin. The Commission does not anticipate that the modifications made to address these issues will need to be repeated in subsequent compensation proceedings. The current confluence of pandemic-related effects, a sudden change in the inflation rate, shortage of skilled labor, and provider uncertainty regarding future costs is unlikely to recur, or if it does, is

unlikely to coincide with the end of a compensation period.

28. *Adjusting Historical Cost for Inflation.* To ensure that compensation is sufficient to cover likely inflation-related cost increases between calendar year 2022 and Fund Year 2023–24, the Commission increases its estimate of each provider's expenses in most categories by 7.23%, which is the change from fourth quarter 2021 to second quarter 2023 in the Bureau of Labor Statistics (BLS) index of seasonally adjusted total compensation for private industry workers in professional, scientific, and technical services.

29. *Estimating CA Cost.* Several commenters report that VRS labor costs are likely to continue increasing by substantially more than the 18-month inflation adjustment described above, due to a continuing shortage of CAs. All providers increased CA wages in 2022, and Sorenson and ZP both projected further wage increases, leading to higher CA cost in 2023 and 2024. While the Commission agrees that a further increase in CA wages is needed, providers' projections in that regard vary widely. As discussed above, these disparate projections appear to be based on different assumptions about future inflation and future compensation levels. To address the need for CA wages to increase substantially more than inflation, while avoiding the distorting effects caused by disparate provider projections, the Commission estimates costs in this category by assuming that all providers' CA wages and benefits will increase by a constant percentage over historical levels.

30. For this category only, the Commission uses Fund Year 2020–21 as the baseline for estimating increased CA cost. This is because, CA wages were relatively stable through the end of 2021, and the wage increases provided in 2022 differed substantially among the providers. Given the wide disparity among the providers' projections of future wage increases, the Commission must resort to rough estimates. The Commission believes Sorenson's projection, which is at the high end, is closer to being accurate than those of ZP and Convo. However, the Commission is not convinced that CA wages will or should increase to the full extent of Sorenson's estimate.

31. Sorenson's projection is largely based on its claims that community interpreters' compensation averages $80–$100 per hour, and that CA wages must be raised closer to that level to ensure that qualified interpreters are willing to work as VRS CAs. However, the Commission questions the extent to which Sorenson's estimate of $80–$100 per hour for community interpreter compensation is applicable nationwide. Information from other sources appears inconsistent with Sorenson's claim. Also, many of the rates cited by Sorenson do not include travel time. If an interpreter can handle VRS calls at home, as many increasingly do, two hours of VRS work at $50 per hour would earn the interpreter $100, while a one-hour community interpreting engagement, paying $90 per hour of interpreting and requiring an additional hour of travel to and from the interpreter's home, would earn the interpreter only $90. Where travel time is compensated, hourly compensation may be substantially lower.

32. Further, while the Commission recognizes the inherent difficulty of VRS work, working as a CA also has certain advantages that may make it attractive to interpreters despite lower hourly compensation. First, in general, community interpreting work is only available when a meeting has been scheduled that requires an interpreter. VRS, by contrast, is operating 24/7, and there must always be interpreters ready to handle any call that happens to be made. Thus, it is often possible for interpreters to arrange for VRS work during periods when community interpreting work is unavailable. Second, community interpreting necessitates travel, while many VRS CAs handle calls from their homes. As a result, VRS work not only is more convenient for interpreters, but also can be performed by interpreters who live in areas where community interpreting work is relatively scarce or whose personal circumstances make it difficult to work away from home.

33. Finally, as noted above, VRS providers have frequently over-projected the amount by which costs are likely to increase. Taking all these factors into account, the Commission finds it reasonable to assume that the CA costs of VRS providers will rise by a percentage of the increase projected by Sorenson. Under this approach, each provider's CA cost is estimated to be 65% higher than its CA cost in 2020–21. The Commission notes that this estimate gives substantial weight to Sorenson's projection, as 65% is substantially more than a simple average of the CA cost increases projected by the three providers.

34. The Commission recognizes that this estimate is necessarily a matter of judgment. While the Commission is setting compensation for a five-year period, the Commission reserves the right to make adjustments in the formulas, based on a strong showing that such adjustments are needed. Thus, if CA wages are increased consistently with the above estimate, and VRS providers then conclude that further increases are needed, they may present relevant evidence for the Commission's consideration. On the other hand, to the extent that CA wages are not increased consistently with the above estimate, the Commission may also consider and make appropriate adjustments in light of such evidence.

35. *Estimating Engineering and R&D Cost.* The Commission finds that engineering and R&D expenses are likely to increase by a percentage higher than inflation, as all providers work to address the unusually demanding technology upgrades needed to meet service challenges in the next compensation period. Engineering and R&D are closely related aspects of technology spending: successful research and development leads to service innovations, the deployment of which increases engineering costs, and increased engineering staff and resources can also be used to expand research and development. Important changes in how people communicate—such as the rapid growth of video conferencing—are posing new technology challenges for VRS providers. For example, VRS providers must dedicate additional research, development, and engineering resources to collaboration with video platform providers, so that VRS CAs can have an integrated, audio-visual presence in video conferences. In addition, with the Commission taking steps to modernize the E911 system, the Commission anticipates the deployment of new technology to automatically provide the dispatchable location of any mobile VRS user calling 911. VRS providers may expend additional resources to help find and implement a one-number solution that ends the ''siloing'' of VRS, seamlessly merging the use of relay with mainstream voice, video, and texting services.

36. The Commission must ensure that the TRS Fund supports sufficient spending on technology to address the challenges described above, so that VRS users have functionally equivalent access to video conferencing and emergency communication. As directed by the Act, the Commission must implement TRS in a way that both encourages the use of existing technology and does not deter the development of improved technology. Further, support for emergency communications is a fundamental part of the Commission's TRS mandate. The amounts that VRS providers will need to spend to address these specific

challenges are not easy to quantify. Perhaps because providers have more leeway to defer spending on new technology, current projections for technology spending are subject to wide variation among the providers. Sorenson projects substantially increased spending on R&D and engineering in 2023 and 2024, while ZP and Convo project declines. For the reasons stated above, the Commission believes all VRS providers will need to increase spending substantially in these areas to ensure that they remain competitive in the evolving communications landscape. Despite their projections of a decline in spending on engineering and R&D, ZP and Convo agree that such increases are needed. Given the uncertainties inherent in predicting future spending on technology, the Commission recognizes that any estimate it makes may be subject to error. However, the Commission prefers to err on the side of over-predicting the amount of spending that will be necessary to ensure that VRS technology provides functionally equivalent service to consumers. While Sorenson projects a substantial increase in technology spending, that projection was made before the Commission issued its Report and Order and Proposed Rule on *Access to Video Conferencing,* which pose additional technology challenges to VRS providers. 88 FR 50053, August 1, 2023; 88 FR 52088, August 7, 2023. The Commission estimates that, in the first year of the new compensation period, each provider will need to increase spending on engineering and R&D by approximately 75% over the levels reported for 2022. Therefore, the Commission further adjusts each provider's estimated costs in these areas by adding 75% of the provider's reported 2022 level. As with CA costs, the Commission notes that it reserves the right to make adjustments in the compensation formulas, either upward based on a strong showing that additional technology expenditures are necessary, or downward, based on evidence that the increased technology expenditures described above have not been made.

37. *Estimated Expenses in Newly Allowable Cost Categories.* The Commission also adjusts estimated VRS costs to include certain expenses that were previously non-allowable and are now allowable. Newly allowable R&D costs are included in the estimates discussed above. However, R&D costs for user devices and proprietary user software remain non-allowable. Previously non-allowable expenses for numbering activities in 2022 are identified by each VRS provider in its annual cost report and are included in the Commission's cost estimates. Costs for customer support provided by field staff remain non-allowable to the extent that they are attributable to installation, maintenance, or customer assistance with provider-distributed devices or software for proprietary devices. The record indicates that Sorenson currently attributes service-related field staff costs to the Operations Support cost category. Thus, service-related field staff costs are already included in reported allowable costs.

38. *Outreach.* During the next compensation period, VRS provider expenditures on outreach may increase somewhat, building on the Commission's and other Federal initiatives to expand broadband access, and the expected increase in VRS availability to incarcerated persons. However, the Commission finds that such expenditures are unlikely to average $0.09 per minute, as ZP estimates. As a general matter, the Commission believes VRS providers are less likely to spend substantial sums on ''unbranded'' outreach than ''branded'' marketing, as unbranded communications are less likely to result in the registration of users generating additional compensation for that provider. No significant amount of outreach expenses have been reported by providers after 2020. Given the virtual absence of provider outreach at present and the relatively weak economic incentives for providers to engage in unbranded outreach rather than branded marketing, the Commission estimates that providers' outreach spending is unlikely to exceed one-quarter of their marketing expenses, on average.

39. Further, the Commission finds no justification for the view that providers will spend on outreach at a uniform per-minute rate. It seems more likely that outreach spending will represent a relatively uniform percentage of each provider's total expenses. Industry-wide, VRS providers' marketing costs (adjusted for recent inflation) average $0.13 per minute, or 3.1% of total expenses. If outreach expenses average one-quarter of the industry-wide average marketing cost, then each provider will devote approximately 0.8% of its total expenses to outreach. The Commission therefore adjusts each provider's estimated VRS cost by an amount equal to 0.8% of its total expenses.

40. *Estimated Costs of Video-Text Service.* With the decision of ASL Services Holding, LLC, dba GlobalVRS (GlobalVRS) to terminate its involvement with VRS, another VRS provider, Sorenson, has undertaken efforts to prepare to offer Video-Text Service for ASL users who are deafblind. Sorenson anticipates that it will incur a substantial amount of relatively fixed costs, which are unlikely to vary substantially with the number of minutes of service provided. Sorenson estimates these costs to include an initial capital expenditure and annually recurring costs for field support, maintenance, testing, software development, etc. The Commission finds that this cost estimate is reasonable, and increases Sorenson's adjusted annual expenses by this amount. Other VRS providers are not precluded from offering this type of service. However, in response to GlobalVRS's impending exit, only Sorenson has represented that it is actively preparing to provide this service. Therefore, the Commission adjusts Sorenson's costs to reflect these estimated expenditures. Sorenson's estimated variable cost of providing this service is not included in this adjustment. As discussed below, the Commission adopts a separate compensation formula to allow recovery of such costs through an additive payment for each minute of Video-Text Service.

41. *Operating Margin.* The Commission finds no reason to modify the range of reasonable VRS operating margins, currently defined as between 7.6% and 12.35%. The record does not support Sorenson's argument that the allowed operating margin is insufficient to encourage capital investment in VRS.

42. The Commission declines to adjust the operating margin to 22% to reflect average operating margins for competitive telecommunications firms or to 17.8% to reflect average operating margin for companies in the communications and information technologies sectors, as urged by Sorenson. The current range of reasonable operating margins for VRS is based on an average of the margins earned in analogous industries, including government contracting and the professional service sector that includes translation and interpretation services, as well as the information technology sector.

43. Sorenson does not provide a convincing explanation of its view that average margins for the competitive telecommunications firms, or for a mix of firms in the communications and information technologies sector would provide a more appropriate benchmark. As a preliminary matter, the Commission notes that Sorenson's initial filing was based on a study that included telecommunications carriers.

The operating margin approach was adopted in 2017 because the Commission recognized that VRS providers are *unlike* the telecommunications industry, in that VRS is not a capital intensive business. Any proposed benchmark that includes the operating margins of telecommunications carriers is clearly inappropriate.

44. While the most recent analysis submitted by Sorenson does purport to filter out capital-intensive companies from the sample of information and communications technology firms, the use of a benchmark based on the high technology sector remains flawed, for several reasons. First, while VRS certainly makes use of advanced technology, the bulk of VRS costs are labor costs, primarily salaries and benefits for interpreters, who need not be highly skilled in technology. This will remain the case despite the technology challenges that require VRS companies to increase spending on research and development and engineering. The economic profile of a VRS provider is quite different from the high technology companies analyzed in the study on which Sorenson relies.

45. Second, that analysis looks at a sample of companies with net profit of up to 100%. The Commission is not persuaded that these high-profit companies are comparable to TRS providers. Third, there are a number of important differences between the risks typically faced by IT companies and the risks involved in VRS. For example, while IT companies may be subject to unexpected, dramatic changes in demand for their products, demand for VRS has been remarkably stable over time. Further, while the prices that IT companies can expect to receive for their products are subject to variation based on, *e.g.,* changing demand and the pricing decisions of competitors, VRS providers can rely on government-established prices that are predetermined for a period of several years.

46. In short, neither Sorenson nor the study on which Sorenson relies persuasively explain why their operating margin analysis, relying on surveys of industry sectors that are markedly dissimilar to the VRS industry, should be deemed preferable to the Commission's 2017 determination of reasonable operating margins, based on data from a diverse set of industries analogous to VRS.

47. In addition, according to recent census figures, typical margins for companies in a number of professional service sectors, including the interpretation services sector, are substantially lower than the numbers cited by Sorenson and are relatively similar to or below the levels of operating margin relied upon in setting the range of reasonableness. The Census Bureau's survey of public companies' financial data for this sector, defined as ''Professional, Scientific, and Technical Services,'' but excluding legal, shows that average quarterly pre-tax operating margins between 2019 and 2022 ranged from −3.06% (in 1Q2020) to 3.58% (in 3Q2020), averaging 0.09% in the 2019–22 period as a whole and −1.78% in 2022 (the most recent year). The subsector that includes translation and interpretation services (but excludes various less analogous industry segments such as accounting, architectural and engineering, and computer systems design services) saw an average operating margin for the public firms included in the Census Bureau's survey ranging from 0.62% (in 1Q2020) to 11.56% (in 2Q2019) for the 2019–22 period and averaging 6.67% in the 2019–22 period as a whole and 6.11% in 2022. Sorenson's analysis does not address the relevant census data.

48. While the operating margins for public companies defined as ''Professional, Scientific, and Technical Services,'' but excluding legal, have fluctuated over time (and currently are lower than when the Commission adopted the reasonableness range of 7.6%–12.35%), the Commission does not believe it would be beneficial to revise the reasonable range of operating margins that has guided the Commission's TRS compensation methodology over the past decade. It is also beneficial to retain consistency in the reasonable operating margin range that participants in the TRS program should expect, absent a clearer indication that operating margins for companies providing comparable services have significantly changed. The record does not establish such a significant change to operating margins when considering the complete scope of industries comparable to VRS. Therefore, the Commission retains the current reasonableness range for the VRS operating margin.

49. Sorenson's argument that the operating margin should be reassessed to take account of a previously proposed increase in Federal corporate income tax applicable to the top tax bracket, from 21% to 28%, appears to be moot, as the proposed tax rate increase was not adopted. The Commission also notes that the current range of reasonable operating margins was established in 2017, based on estimates of average pre-tax operating margins for companies comparable to VRS providers. During the 2013–16 period from which the sample was drawn, corporate income tax for the top bracket was 35%—substantially higher than the current 21% and even higher than the 28% rate projected by Sorenson. Therefore, the corporate income tax burden that Sorenson claims is unfairly depressing its returns has actually decreased, not increased, since the reasonable range of margins was established by the Commission.

Compensation Structure and Formulas

50. The Commission adopts the tentative conclusion of the *Notice of Proposed Rulemaking* that the purposes of section 225 of the Act are best served by structuring VRS compensation to support multi-provider competition based on quality of service. The record supports the Commission's prior findings that, by offering VRS users a choice among multiple providers, the Commission can efficiently and effectively ensure that functionally equivalent VRS is available to all eligible users. The availability of multiple service offerings encourages VRS providers to compete for customers by exceeding minimum service quality standards. In addition, a multi-provider environment encourages diverse service offerings, including specialized services and features needed by sub-groups within the sign language-using population.

51. Therefore, the Commission has consistently sought to structure VRS compensation so as to maintain competitive choices for consumers while minimizing waste of TRS Fund resources. There is no simple recipe for achieving these objectives. However, the Commission has flexibility to adjust its approach as necessary to address changed circumstances.

Compensation for Large Providers

52. The record of this proceeding shows that circumstances have changed materially since 2017, when the current compensation plan was adopted. *See Structure and Practices of the Video Relay Services Program,* 82 FR 39673, August 22, 2017 (*2017 VRS Compensation Order*). Specifically, the cost structures of the largest VRS providers have come closer to parity. As a result, modifications are needed to avoid overcompensating one or both of these providers. To equitably allocate TRS Fund resources and ensure the availability of functionally equivalent VRS in the most efficient manner, the Commission modifies the current tier structure by eliminating the third tier.

53. The essential purpose of rate tiering is ''to compensate VRS providers

in a manner that best reflects the financial situation'' of providers with disparate cost structures. In the *Notice of Proposed Rulemaking,* the Commission proposed to maintain a tiered structure but sought comment on various possible modifications of that structure. The record now confirms that such modifications are needed. Since 2017, the cost gap between the two largest VRS providers, while still substantial, has progressively diminished. The reasons for the substantial decline in ZP's per-minute costs may not be easy to pinpoint, but they are likely a combination of ZP having successfully grown its call volume, allowing it to operate on a much larger scale, and having apparently completed the consolidation of the 2017 merger of its predecessor entities, enabling ZP to more fully realize the expected scale economies from that merger. As modified above to take account of inflation, newly allowable costs, and the Commission's expectation of increased CA wages, engineering and R&D, and certain other costs, the similarity in the estimated costs of the two providers persists.

54. These cost changes raise significant concerns about the continuing validity of the justification for tiering that the Commission relied on in 2017. While one provider continues to handle the majority of VRS minutes, its share of minutes has dwindled, and it appears to have lost its unique cost advantage. Since 2017, the second largest provider has increased its minutes and its market share, and its per-minute costs are now somewhat closer to those of the largest provider. Thus, the two largest providers now have somewhat similar per-minute costs, and yet there continues to be a substantial disparity in their shares of VRS minutes.

55. These changed circumstances warrant a reconsideration of the compensation structure. One alternative suggested in the record would involve compensating the two largest providers at a single rate. A single-rate plan (*e.g.,* based on the weighted average of the providers' costs) would be simple to administer. Arguably, a single-rate plan could distribute resources efficiently and equitably, ensuring that both providers earn reasonable operating margins above allowable expenses. And it would avoid the growth-incentive issues that can arise under a tiered structure, due to the reduction in compensation for additional minutes of service when a provider's minutes increase beyond a tier's upper boundary.

56. However, at this time the Commission concludes it would be premature to adopt a single-rate compensation plan. First, the record continues to be highly contested—and inconclusive—regarding the conditions under which tiering is or is not necessary. For example, the record contains widely varying estimates regarding the volume of minutes that a provider must achieve for economies of scale to be exhausted. Citing studies presented in previous proceedings, Sorenson continues to argue that relevant economies of scale are essentially exhausted at the level of 250,000 monthly minutes. The Commission has previously found Sorenson's evidence unconvincing, and Sorenson provides no new information that warrants revisiting this view. At the other extreme, ZP argues that relevant economies of scale continue to be significant until at least 5 million monthly minutes. That argument too is less than persuasive, given the limitations of the model used by ZP's expert. An assessment of ZP's model by Commission staff shows that a reliable estimate of industry cost functions through regression analysis is not possible on the basis of the data points provided by ZP's expert.

57. Second, setting TRS Fund compensation, like ratemaking in general, is far from an exact science. While the historical gap between the per-minute costs of the two largest providers has lessened over the last few years, it is only in the last year that their reported costs are actually similar. The Commission cannot rule out the possibility that the similarity is unique to this historical moment and may not be repeated in future years. If the apparent narrowing of the cost differential were to be reversed during the compensation period, applying a single rate to both providers could endanger the availability of competitive choices for VRS users. In analogous situations in prior proceedings, the Commission has adopted a similarly conservative approach when weighing the imponderables involved in VRS compensation methodology.

58. For these reasons, the Commission chooses to preserve a tiered compensation structure for the next period, while modifying it to reduce unnecessary inefficiency or inequity in the allocation of TRS Fund resources. Specifically, the Commission merges the current Tier II (applicable to monthly minutes between 1,000,001 and 2,500,000) and Tier III (applicable to monthly minutes in excess of 2,500,000). As a result, the new plan for VRS providers with more than 1 million monthly minutes will have two tiers:

- Tier I—applicable to a provider's 1st 1 million monthly minutes; and
- Tier II—applicable to a provider's monthly minutes in excess of 1 million.

Merging the current Tiers II and III allows the Commission to set a rate for the merged tier that is low enough to ensure that, in conjunction with the Tier I rate, providers are not over-compensated, *i.e.,* do not earn an operating margin above the reasonable range, but still provides an incentive to continue providing additional minutes of service.

59. *Compensation Rates.* Within this structure, as in 2017, the Commission seeks to set the rates for these tiers to limit the likelihood that any provider's total compensation will be insufficient to provide a reasonable margin over its allowable expenses. The Commission also seeks to avoid overcompensating any provider, *i.e.,* by allowing a provider to earn an operating margin above its total expenses that is outside the reasonable range. The Commission achieves this by setting per-minute compensation amounts of $6.27 for Tier I minutes and $3.92 for Tier II minutes. Together, these rates will enable providers subject to the tiered formula to recover their allowable expenses and earn an operating margin within the zone of reasonableness. In addition, because the Tier II rate is not substantially lower than the average per-minute expenses of any provider subject to that rate, setting the rate at this level is unlikely to deter a provider from increasing its VRS minutes.

60. The Commission does not agree with ZP's contention that the Commission should not seek to limit the operating margins of VRS providers. VRS is entirely funded by contributions from telecommunications and VoIP service providers, which are generally passed on to communications rate payers. The Commission has a statutory obligation to ensure that these funds are used efficiently. As with the Universal Service Fund, moreover, the Commission is the steward of the TRS Fund and is obligated to protect it from waste, fraud, and abuse. To the extent that a VRS provider's operating margin exceeds the reasonable range, the additional revenues paid from the TRS Fund (and the additional contributions exacted from telecommunications providers to cover them) are wasted. Further, to the extent that ZP's per-minute cost exceeds Sorenson's, manipulating rates to provide a higher operating margin for a higher-cost provider would be inconsistent with economic principles, as in competitive

markets, less-efficient providers are not rewarded for having higher costs.

61. Moreover, the limits the Commission sets to prevent overcompensation do not conflict with the Commission's policy in the *2017 VRS Compensation Order.* In that rulemaking, as in every recent TRS compensation proceeding, the Commission made clear that avoiding overcompensation of VRS providers is a necessary objective to ensure that TRS is provided in the most efficient manner. For example, a key benefit of the tier structure, cited in that decision, is that it allows the Commission to set rates that permit each provider an opportunity to recover its reasonable costs of providing VRS, without overcompensating those providers who have lower actual costs because, for example, they have reached a more efficient scale of operations. Further, the Commission stressed that the range of reasonable operating margins set in that decision was a range of ''allowable'' operating margins, cautioning that ''[the Commission does] not thereby authorize providers to recover additional 'markup' or profit that goes beyond such reasonable allowance.'' Indeed, there would have been little point in setting an upper limit on the reasonable range of operating margins, had the Commission intended to permit providers free rein to earn profits above that limit.

62. In 2017, while the Commission sought to reduce overcompensation, it stopped short of reducing compensation all the way down to cost. In that decision, the Commission sought to address a specific concern raised regarding tier structures: that they could limit providers' incentives to grow and increase their efficiency, especially if a provider's monthly minutes were about to cross the numerical threshold for the next tier. This theoretical risk often can be addressed by ensuring that tier boundaries are wide enough to cover a provider's likely growth during the life of the rate plan. However, it appears that the Commission was uncertain whether the tier boundaries it set actually would be wide enough to completely erase this risk. Therefore, it also sought to set the rate for the next tier high enough to ensure that, if a provider did grow large enough that it came close to a tier boundary, it would not be deterred from crossing that boundary. Under today's circumstances, by contrast, the Commission can set the tier boundaries wide enough to avoid this risk. By merging the existing Tiers II and III into a single tier, the Commission completely removes any tier boundary that could affect the growth incentives of the two largest providers. And by increasing the highest tier rate from $2.63 to $3.92, the Commission eliminates any realistic possibility of deterring any provider subject to that tier from serving additional minutes.

63. *Alternative Tiering Proposals.* The Commission declines to adopt the alternative tiering proposals proposed by ZP and Sorenson in this proceeding. None of the alternatives would ensure that all providers subject to tiered rates earn operating margins within the reasonable range. The initial ZP and Sorenson proposals—to expand Tier II without changing the current per-minute amounts for any tier—were made before the filing of the 2023 cost reports showing a substantial increase, as well as convergence, in these providers' costs. The proponents of these proposals no longer advocate their adoption.

64. As for the June 2023 proposals of ZP and Sorenson, they would do nothing to address the problems with the current tier structure, discussed above. In addition, both these proposals would result in excessive operating margins for one or both providers—even with providers' reported costs adjusted upward. Sorenson's September 2023 proposal also would result in excessive operating margins for both Sorenson and ZP.

Compensation for Small Providers

65. For VRS providers—including new entrants—that handle 1 million monthly minutes or less, the Commission maintains a separate compensation formula. When the Commission established such a separate formula (the ''emergent provider'' formula, then applicable to VRS providers with up to 500,000 monthly minutes) in 2017, it was intended as a temporary measure, to allow the small providers operating at that time a reasonable window of opportunity to grow. The two providers compensated under that formula during this most recent compensation period did not experience a substantial growth in traffic volume, and they incurred per-minute costs substantially higher than those of the two larger providers. Nevertheless, as the Commission recognized in 2017, the availability of additional, reliable service options from smaller VRS providers can effectively reinforce service quality incentives.

66. Further, maintaining a separate compensation formula for smaller providers encourages new entry into the VRS program by potentially innovative firms. Some small providers may advance the availability of TRS by focusing on specialized offerings to niche populations not served by larger providers. Rather than applying a single compensation formula to all providers, regardless of size and cost structure—with the likely result of driving out the remaining small provider, deterring new entry, and leaving only two VRS providers from which VRS users could choose—the Commission preserves a separate VRS formula for the next period. The Commission concludes that this approach is the most efficient way to maintain the availability of functionally equivalent VRS, including specialized services that may be needed by niche populations.

67. To avoid reducing any small provider's incentive to grow their business, the Commission also raises the upper limit for application of the small-provider formula from 500,000 to 1 million monthly minutes. The Commission is concerned that if it maintained the 500,000-minutes limit, a small provider growing its minutes above that limit may not have an opportunity to recover its allowable costs and earn a reasonable operating margin. Based on the record (which indicates that the current small provider has not grown substantially since 2017), it seems unlikely that any small provider or new entrant will approach the expanded limit of 1 million monthly minutes during the next compensation period. However, to address that possibility, the Commission provides that, during the next compensation period, if a provider handled 1 million or fewer monthly minutes in June 2023 (or in the first year of operation for a new entrant), and if such provider subsequently exceeds 1 million monthly minutes, the small-provider formula shall continue to apply to the provider's first 1 million monthly minutes, and the large-provider formula shall apply to all monthly minutes after the first million. This is comparable to the plan adopted by the Commission in 2017 to address analogous circumstances under the emergent-provider formula.

68. *Compensation Amount.* As in previous compensation proceedings, when the Commission sets compensation formulas for small VRS providers, there is no single ''right answer'' to the question; rather, the matter is inherently a question of administrative line-drawing. For VRS providers providing 1 million monthly minutes or fewer, the Commission adopts a compensation formula of $7.77 per minute, applicable to all minutes of such providers. This formula is based on the adjusted per-minute expenses of the remaining VRS provider handling 1 million monthly minutes or fewer, and

is designed to allow VRS providers with 1 million monthly minutes or fewer a reasonable opportunity to earn an operating margin within the range of reasonableness. In setting this per-minute formula, the Commission seeks to ensure that VRS providers that have demonstrated some ability to grow have an opportunity to recover their expenses and earn a reasonable operating margin. This formula also provides an opportunity for very small providers and new entrants to recover their reasonable fixed or start-up expenses. However, the Commission does not guarantee cost recovery for every such provider, regardless of their per-minute costs.

Additional Compensation for Video-Text Service

69. The Commission prescribes additional per-minute compensation for the provision of a specialized form of VRS to ASL users who are deafblind, applicable to any VRS provider that chooses to offer it. Such additional compensation will be paid, in addition to the otherwise applicable per-minute amount, for each compensable minute of this specialized form of VRS.

70. The Commission refers to this specialized form of VRS as Video-Text Service. In a typical VRS call, a deaf or hard-of-hearing person communicates in ASL to a CA, who then voices the message to the hearing party. The CA then signs the hearing party's voice response to the ASL user. Some ASL users who are deafblind, however, are able to sign to a CA but unable to see the signs from the CA well enough to understand them. For such users, there is a special variant of VRS, in which a CA converts the other party's side of the conversation to text (instead of ASL video), which the deafblind party can read using a refreshable braille display. A CA assigned to a Video-Text Service call must not only be fluent in ASL, but must also be a swift, accurate, and reliable typist.

71. Up to the present, only GlobalVRS has offered this specialized form of VRS. With GlobalVRS's announced exit from the VRS industry, Sorenson states it intends to provide Video-Text Service to users. Sorenson's cost estimates indicate that, while most of the costs involved in offering this service do not vary significantly with the number of minutes served, there are some variable costs due to the higher salaries Sorenson expects to pay for those CAs equipped with the additional skills described above.

72. Given the Commission's statutory responsibility to ensure the availability of TRS to persons who are deafblind and the additional costs involved in providing this Video-Text Service, the Commission concludes that additional per-minute compensation should be authorized for the provision of this service by any VRS provider choosing to offer it. As an interim measure, pending the availability of more precise cost data, the Commission estimates the variable cost of this service based on the estimate submitted by Sorenson plus an operating margin to incentivize the provision of this specialized service, resulting in an additive of $0.19 per minute. This amount shall be paid to a VRS provider for each compensable conversation minute of Video-Text Service, in addition to the per-minute amount otherwise payable to the provider under the applicable compensation formula for an ordinary VRS call. Sorenson's non-variable costs for this service will be recovered through the base compensation rate, as they are relatively unaffected by the number of minutes of Video-Text Service provided.

73. *Alternative Compensation Proposal.* In its comments, GlobalVRS proposes a ''Specialized Access Small Business'' (SASB) designation as an alternative compensation approach. To qualify for this compensation, providers would have to serve 5% or less of total program minutes and provide specialized language and modality. Each SASB-designated provider would be subject to an individualized payment formula, reset annually to compensate for that provider's reported allowable costs.

74. The Commission rejects this proposal for several reasons. First, it excludes larger VRS providers from receiving additional compensation for the provision of specialized services. The Commission has stated that offering VRS users a choice among multiple providers can most effectively carry out the Commission's statutory mandate to ensure that functionally equivalent VRS is available to all eligible individuals to the extent possible and in the most efficient manner. By adopting a formula that encourages only small providers to offer a specialized service, the Commission may prevent the service from being offered by a provider with greater access to the necessary resources and inputs, which may enable it to provide the service more effectively and at lower cost. Second, the method by which a provider would be compensated under GlobalVRS's proposal is more administratively burdensome (as it requires annual recalculation of the formula based on annual review of the provider's individual costs), and unlike the multi-year compensation plans generally preferred by the Commission provides no incentive for cost savings.

75. *Registration Process.* A VRS provider may provide Video-Text Service to any registered VRS user who states that they need to use the service. Registered VRS users need not have their identities re-verified by the Database administrator before using Video-Text Service. To enable the TRS User Registration Database administrator to review and pay compensation requests for this service, the Commission directs the administrator to design and execute a field in the User Registration Database to allow a VRS provider to register a new or existing user as a registered user of Video-Text Service. Once the field is implemented, VRS providers shall update User Registration Database registrations to identify existing users of this service and additional users when they begin using this service. The Commission directs the Consumer and Governmental Affairs Bureau to release a public notice announcing when the Database is ready to accept such updates and setting a 60-day deadline for such updates of existing VRS users. Once a user is registered in the Database, the TRS Fund administrator may presume that call detail records associated with that user are for Video-Text Service, but the administrator may review and verify payment claims in accordance with the Commission's rules.

76. At this time, the Commission does not establish additional identification requirements for Video-Text Service users. The Commission notes that the conversation process in Video-Text Service is slower than an ordinary VRS conversation—and a less satisfactory process for those VRS users who can see and understand video-transmitted signs. Therefore, the Commission believes VRS users that do not need to receive a return communication in text will be unlikely to use this service. Further, the Commission believes the additive rate for Video-Text Service is not so high as to significantly increase incentives for fraud and abuse, especially as the number of minutes of use of this service is very small.

77. Pending the implementation of this update, to allow Video-Text Service calls to be identified in call detail records submitted for payment, the Commission directs the TRS Fund administrator to accept from any VRS provider offering Video-Text Service a list of telephone numbers and IP addresses assigned to users who have requested Video-Text Service. VRS providers seeking compensation for Video-Text Service shall submit such

lists in accordance with instructions provided by the TRS Fund administrator. VRS providers shall provide additional information regarding such users and their Video-Text Service calls to the TRS Fund administrator, upon request, as necessary for the administrator to perform its data collection, auditing, payment claim verification, and TRS Fund payment distribution functions.

Other Specialized Services

78. Except in the case of Video-Text Service, the record is insufficient for the Commission to make a determination as to whether, and under what circumstances, a specialized service should be supported by additional compensation.

Effect of New Compensation Formulas

79. Looking to just the effect on the TRS Fund, in the first year of the new period the compensation plan adopted herein would result in an estimated $143 million increase in costs compared to maintaining the current compensation formulas. Based on available data, it will result in an industry average operating margin within the range of reasonableness and provide an opportunity for providers to recover their costs plus earn a reasonable operating margin.

Compensation Period and Adjustments

80. The Commission concludes that the compensation period should be five years, ending June 30, 2028. This period is long enough to give providers certainty regarding the applicable compensation formulas, provide incentives for providers to become more efficient without incurring a penalty, and mitigate any risk of creating the ''rolling average'' problem previously identified by the Commission regarding TRS. On the other hand, the period is short enough to allow timely reassessment of the compensation formulas in response to substantial cost changes and other significant developments.

81. The Commission finds commenters' proposal for a compensation period of 6–8 years incompatible with the need to periodically reassess compensation formulas in response to changes in provider cost structures, possible technological innovations, or other developments. Historically, the Commission has not set TRS Fund compensation periods longer than four years. Further, the VRS providers neither detail nor support their claims that increasing the compensation period to 6–8 years will affect providers' stability, opportunities to obtain loans or attract long-term investment. The Commission is unpersuaded that any potential benefits of a longer period outweigh the benefits from reassessing compensation formulas on a five-year schedule.

82. *Adjustments for exogenous costs.* Under the current methodology, an upward adjustment for well-documented exogenous costs is available for costs that belong to a category of costs that the Commission has deemed allowable, result from new TRS requirements or other causes beyond the provider's control, are new costs that were not factored into the applicable compensation formula, and if unrecovered, would cause a provider's current costs (allowable expenses plus operating margin) to exceed its revenues. The Commission maintains this approach to exogenous cost recovery and codifies these criteria in its rules. Any exogenous cost claims should be submitted to the TRS Fund administrator with the provider's annual cost report, so that the administrator can review such claims and make appropriate recommendations. The Commission delegates authority to the Consumer and Governmental Affairs Bureau to make determinations regarding timely submitted exogenous cost claims.

83. *Adjustments for future cost changes.* In the *Notice of Proposed Rulemaking,* the Commission sought comment on whether per-minute compensation amounts should be adjusted during the compensation period to reflect inflation and productivity. The Commission agrees with several commenters that there should be annual adjustments for cost changes. In the past, the trend of VRS costs has been generally downward. However, in light of recent developments, including increases in general inflation indices and reports of increased wages for VRS CAs, the Commission finds it reasonable to adopt an adjustment factor to ensure that the rates continue to fairly compensate providers if relevant costs continue to increase.

84. As a reference point for determining such annual adjustments, the Employment Cost Index appears best suited for tracking relevant cost changes. Specifically, the seasonally adjusted index of total compensation for private industry workers in professional, scientific, and technical services, which covers translation and interpreting services (including sign language services), can serve as a reasonable proxy for the annual change in VRS costs. As interpreters, CAs fall squarely in this labor cost category, and labor and related costs for CAs, non-CA professionals, and administrative personnel make up the bulk of VRS costs.

85. This index is better suited than the Producer Price Index or the Gross Domestic Product Chain-type Price Index (GDP–CPI). Both these indices reflect changes in the national economy as a whole, based on a broad array of data from various product and service sectors. While these indices may be useful inflation measures for the economy as a whole, reflecting the ups and downs of so many disparate industries may not ensure that annual adjustments are reasonable. A more reliable approach is one that tracks changes in a related industry sector. Commenters agree that labor is the primary expense incurred by VRS providers and the most likely to increase over time, and the Commission finds that labor costs are likely to be a key determinant of the quality of VRS as currently provided. While there is no index that focuses solely on the cost of VRS, the index the Commission adopts here measures employment cost for a sector that includes translation and interpreting services, and thus includes employee costs for VRS as well as other highly comparable services. Adopting such an index is more likely to provide a stable inflation adjustment that reflects cost changes providers are likely to incur, while excluding changes that are specific to unrelated sectors of the national economy.

86. As for productivity gains, the record provides no clear indication of the extent to which, if at all, recent VRS cost increases have been offset by productivity gains. Absent more specific data, the Commission finds it reasonable to presume no change to productivity over the rate period.

87. The Commission delegates authority to the Consumer and Governmental Affairs Bureau to approve annual inflation adjustments of each compensation formula, beginning with Fund Year 2024–25. The Commission directs the TRS Fund administrator to specify in its annual TRS Fund report, beginning with the report due May 1, 2024, the index values for each quarter of the previous calendar year and the last quarter of the year before that. The Commission also directs the TRS Fund administrator to propose adjustments for each per-minute amount by a percentage equal to the percentage change in the index between the first and fifth quarters specified in the report. Those adjusted compensation levels also should be used to calculate the recommended funding requirement for

VRS and the relevant contribution factor.

Accountability Concerns

88. In adopting VRS compensation formulas for the next five years, the Commission relies on estimates of future provider costs that, in total, exceed the most recent historical level by approximately $121.5 million, or 27%. In 2023–24, as a result, VRS compensation will be $142.5 million, or 29.5%, higher than it would be under the current formulas. This increase in compensation—which will require higher TRS Fund contributions from telecommunications and VoIP service providers—is premised on the Commission's belief that maintaining and improving VRS service quality requires a major increase in CA wages and technology spending by VRS providers. As stewards of the TRS Fund, the Commission needs to be able to assess the extent to which the increased TRS Fund support the Commission authorizes is achieving the intended results.

89. This requires the collection, review, and auditing of relevant cost data by the TRS Fund administrator. Therefore, the Commission delegates authority to the Consumer and Governmental Affairs Bureau, in coordination with the Office of the Managing Director, to work with the TRS Fund administrator to update the Interstate TRS Fund Annual Provider Data Request to align with the actions taken in this proceeding. The Commission directs these entities to focus special effort on ensuring the collection of accurate data quantifying CA wages and benefits, based on uniform definitions and methods of calculating key elements such as hourly CA compensation, and expenditures on improved technology. The Commission expects that annual provider cost reports shall include detailed descriptions of ongoing, planned, recently completed, and canceled engineering and R&D projects, the purpose and intended outcome of each project, and the current or projected timeline for each project.

90. By annually collecting such specific information, the administrator will enable the Commission to review whether the increased compensation authorized herein is having the intended results of enabling service improvements that enhance functional equivalence, and to make appropriate changes in compensation at the end of—or if necessary, during—the five-year compensation period. In addition, such information will help the Commission ensure that R&D supported by the TRS Fund is being used for TRS improvements, rather than projects of little or no benefit to TRS users. The inclusion of this additional information and data will also ensure the Commission may address the timing of cost changes and concerns of attempted regulatory arbitrage.

True-Up

91. *True-Up of Compensation.* The Commission directs the TRS Fund administrator to perform a true-up, after the effective date of document FCC 23–78, of the VRS compensation payments made pursuant to waivers granted by the Commission to extend the expiration date of the previously adopted compensation formulas until the effective date of the new compensation formulas. The revised compensation formulas adopted in document FCC 23–78 are based on estimates of the costs VRS providers will incur in the 2023–24 Fund Year. Overall, these revised formulas substantially increase provider compensation to reflect recent increases in reported costs, as well as the Commission's expectation of further increases in certain areas. To allow providers a reasonable opportunity to recover such increased costs, the Commission concludes that they should be compensated under the revised formulas for all services provided during the 2023–24 TRS Fund Year. The Commission finds that the benefits of ensuring full compensation for this Fund Year outweigh the minor administrative burden involved in such a true-up process. Accordingly, after document FCC 23–78 becomes effective, the Commission directs the TRS Fund administrator to make a supplemental payment to each VRS provider for all compensable minutes of service provided after June 30, 2023, for which compensation was paid under the extended formulas. Such supplemental payment shall consist of the difference between the compensation that would be applicable under document FCC 23–78 and the compensation actually paid to the provider.

Final Regulatory Flexibility Analysis

92. As required by the Regulatory Flexibility Act of 1980, as amended, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the *Notice of Proposed Rulemaking.* The Commission sought written public comment on the proposals in the *Notice of Proposed Rulemaking,* including comment on the IRFA. No comments were received in response to the IRFA.

93. *Need for, and Objectives of, the Report and Order.* In document FCC 23–78, pursuant to 47 U.S.C. 225, the Commission adopts a five-year compensation plan for VRS. To provide the appropriate compensation for the provision of, and continued availability of VRS, the Commission adopts a compensation plan that addressed increasing costs due to inflation and the effect of the COVID–19 pandemic. It also updates the inputs for reasonable cost criteria to improve the ability of VRS providers to provide and receive compensation for VRS that is functionally equivalent. The Commission also adopts a compensation formula for the provision of VRS to individuals who are deafblind, as a specialized service to help ensure the continued availability of this service to the extent possible for the individuals who use this service. Finally, to address changes in the cost structures of various VRS providers, the Commission transitions from a three-tiered rate structure to a two-tiered rate structure for larger VRS providers providing more than one million monthly minutes, while maintaining a separate compensation rate for providers providing one million or fewer monthly minutes.

94. *Description and Estimate of the Number of Small Entities to Which the Rules Will Apply.* The policies adopted in document FCC 23–78 will affect obligations of VRS providers. These services can be included within the broad economic category of All Other Telecommunications.

95. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.* The provider compensation plan will not create significant reporting, recordkeeping, or other compliance requirements for small entities. VRS providers that seek compensation for the provisioning of a specialized form of VRS to deafblind individuals must identify any users of that specialized service in the TRS User Registration Database. This minor database modification will be implemented through a new field in the TRS User Registration Database that will allow small and other VRS providers to identify users of that service. The Commission anticipates this modification to be of minimal impact to small and other VRS providers, as it is the addition of a single new field to a database VRS users are already using and will allow them to be fully compensated for providing VRS to deafblind users.

96. *Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The adopted compensation

structure and formulas will apply only to entities who are, or may become, certified by the Commission to offer VRS in accordance with its rules. The Commission adopted these multi-year compensation formulas to compensate providers for their reasonable cost of providing service, to reduce the burden on TRS Fund contributors and their subscribers, and to ensure that TRS is made available to the greatest extent possible and in the most efficient manner. The Commission adopted separate compensation structures for large and small providers to allow small entities the opportunity to recover their costs in providing VRS, which the record suggests are higher than for large providers who have achieved some level of economies of scale. This action by the Commission should minimize the economic impact for small entities who provide VRS.

97. The Commission considered various proposals for compensation methodologies and compensation structure and formulas from small and other entities, and the adopted rules reflect its best efforts to minimize significant economic impact on small entities. The Commission adjusted the allowable cost categories that it considers in determining the appropriate compensation formulas for the provisioning of VRS to allow small and other providers to recover costs and benefit economically from the increased compensation they will receive.

Ordering Clauses

98. Pursuant to sections 1, 2, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 225, document FCC 23–78 *is adopted* and the Commission's rules are hereby *amended* as set forth.

Congressional Review Act

99. The Commission sent a copy of document FCC 23–78 to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

Final Paperwork Reduction Act of 1995 Analysis

100. Document FCC 23–78 does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. Therefore, it also does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198. *See* 44 U.S.C. 3506(c)(4).

List of Subjects in 47 CFR Part 64

Individuals with disabilities, Telecommunications, Telephones.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

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

Authority: 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 255, 262, 276, 403(b)(2)(B), (c), 616, 617, 620, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

■ 2. The authority citation for subpart F continues to read as follows:

Authority: 47 U.S.C. 151–154; 225, 255, 303(r), 616, and 620.

■ 3. Amend § 64.601 by redesignating paragraphs (a)(52) through (55) as paragraphs (a)(53) through (56) and adding new paragraph (a)(52) to read as follows:

§ 64.601 Definitions and provisions of general applicability.

(a) * * *

(52) *Video-text service.* A specialized form of VRS that allows people who are deafblind who use sign language and text to communicate through a video link. The video link allows the communications assistant to view and interpret a party's sign language communication and the text functionality allows the communications assistant to send text to peripheral devices employed in connection with equipment, including software, to translate, enhance, or otherwise transform advanced communications services into a form accessible to people who are deafblind. The communications assistant relays the conversation using sign language, voice, and text between the participants of the call.

* * * * *

■ 4. Add § 64.643 to subpart F to read as follows:

§ 64.643 Compensation for Video Relay Service.

For the period from July 1, 2023, through June 30, 2028, TRS Fund compensation for the provision of Video Relay Service (VRS) shall be as described in this section.

(a) *First year.* For Fund Year 2023–24, TRS Fund compensation shall be paid in accordance with the following formulas.

(1) The Compensation Amount for VRS providers handling one million conversation minutes or less in a month shall be $7.77 per minute.

(2) The Compensation Amount for VRS providers handling more than one million conversation minutes in a month shall be:

(i) $6.27 per minute for the first 1,000,000 conversation minutes each month;

(ii) $3.92 per minute for monthly conversation minutes in excess of 1,000,000.

(3) For Video-Text Service, as defined in this subpart, in addition to the applicable Compensation Amount under paragraph (a)(1) or (2) of this section, an additional Compensation Amount of $0.19 per minute shall be paid for each conversation minute.

(b) *Succeeding years.* For each succeeding Fund Year through June 30, 2028, each per-minute Compensation Amount described in paragraph (a) of this section shall be redetermined in accordance with the following equation:

$$A_{FY} = A_{FY-1} * (1+IF_{FY})$$

Where:

A_{FY} is the Compensation Amount for the new Fund Year,

A_{FY-1} is the Compensation Amount for the previous Fund Year,

IF_{FY} is the Inflation Adjustment Factor for the new Fund Year.

(c) *Inflation Adjustment Factor.* The Inflation Adjustment Factor for a Fund Year (IF_{FY}), to be determined annually on or before June 30, is equal to the difference between the Initial Value and the Final Value, as defined herein, divided by the Initial Value. The Initial Value and Final Value, respectively, are the values of the Employment Cost Index compiled by the Bureau of Labor Statistics, U.S. Department of Labor, for total compensation for private industry workers in professional, scientific, and technical services, for the following periods:

(1) Final Value—The fourth quarter of the Calendar Year ending 6 months before the beginning of the Fund Year; and

(2) Initial Value—The fourth quarter of the preceding Calendar Year.

(d) *Exogenous cost adjustments.* In addition to L_{FY}, a VRS provider shall be paid a per-minute exogenous cost adjustment if claims for exogenous cost recovery are submitted by the provider and approved by the Commission on or before June 30. Such exogenous cost adjustment shall equal the amount of

such approved claims divided by the provider's projected minutes for the Fund Year. An exogenous cost adjustment shall be paid if a VRS provider incurs well-documented costs that:

(1) Belong to a category of costs that the Commission has deemed allowable;

(2) Result from new TRS requirements or other causes beyond the provider's control;

(3) Are new costs that were not factored into the applicable compensation formula; and

(4) If unrecovered, would cause a provider's current allowable-expenses-plus-operating margin to exceed its revenues.

[FR Doc. 2023–22936 Filed 10–18–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD276]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 610 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the annual 2023 total allowable catch of pollock for Statistical Area 610 in the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), October 17, 2023, through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Krista Milani, 907–581–2062.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR parts 600 and 679.

The annual 2023 total allowable catch (TAC) of pollock in Statistical Area 610 of the GOA is 26,958 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the annual 2023 TAC of pollock in Statistical Area 610 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 26,758 mt and is setting aside the remaining 200 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA.

While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, it would prevent NMFS from responding to the most recent fisheries data in a timely fashion, and would delay the closure of directed fishing for pollock in Statistical Area 610 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 15, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: October 16, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–23095 Filed 10–16–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 201
Thursday, October 19, 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–2023–1997; Project Identifier MCAI–2023–00383–T]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) 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 all Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. This proposed AD was prompted by the determination that reliance on DAL D software for flight critical fly-by-wire (FBW) rigging functions may result in undetected inaccurate positioning of the primary flight control surfaces. This proposed AD would require the use of specific issues of the aircraft maintenance publication (AMP) for electrical rigging procedures, and an electrical rigging confirmation check of primary flight control surfaces for certain airplanes, as specified in a Transport Canada AD, which is proposed for incorporation by reference (IBR). 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 December 4, 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–2023–1997; 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, 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 material that is proposed for IBR in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this material on the Transport Canada website at *tc.canada.ca/en/aviation.*
- You may view this material 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: William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7300; email: *9-avs-nyaco-cos@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–2023–1997; Project Identifier MCAI–2023–00383–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 William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7300; email: *9-avs-nyaco-cos@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

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2023–15, dated March 2, 2023 (Transport Canada AD CF–2023–15) (also referred to as the MCAI), to correct an unsafe condition for all Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. The MCAI states that during the airplane design review, it was discovered that the FBW electrical rigging functions rely in part on the primary flight control computer maintenance partition certified to design assurance level (DAL) D. The reliance on DAL D software for flight critical FBW rigging functions may result in undetected inaccurate

positioning of the primary flight control surfaces.

The FAA is issuing this AD to ensure accurate rigging of the aircraft primary flight control surfaces. Undetected inaccurate positioning of the primary flight control surfaces, in combination with an additional failure or extreme maneuvers, can lead to runway excursion or exceedance of the structure ultimate load.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1997.

Related Service Information Under 1 CFR Part 51

Transport Canada AD CF–2023–15 specifies using specific AMP issues for electrical rigging procedures for primary flight control surfaces, and, for certain airplanes, performing an electrical rigging confirmation check of primary flight control surfaces.

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 **ADDRESSES**.

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 NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in Transport Canada AD CF–2023–15 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 Transport Canada AD CF–2023–15 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF–2023–15 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by Transport Canada AD CF–2023–15 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1997 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 72 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
Up to 9 work-hours × $85 per hour = $765	$0	Up to $765	Up to $55,080.

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:

Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Docket No. FAA–2023–1997; Project Identifier MCAI–2023–00383–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 4, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus Canada Limited Partnership (Type Certificate previously held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Model BD–500–1A10 and BD–500–1A11 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Unsafe Condition

It is possible that the surface travel checks were not done after the electrical rigging of the ailerons, the elevators, and the rudder. If this occurs, it is possible that the ailerons, the elevators, and the rudder will not be able to reach their maximum travel or return to their neutral position. The FAA is issuing this AD to ensure accurate rigging of the aircraft primary flight control surfaces by adding physical travel and centering checks of primary flight control surfaces. The unsafe condition, if not addressed, could result in undetected inaccurate positioning of the primary flight control surfaces which in combination with an additional failure or extreme maneuvers can lead to runway excursion or structure ultimate load exceedance.

(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, Transport Canada AD CF–2023–15, dated March 2, 2023 (Transport Canada AD CF–2023–15).

(h) Exception to Transport Canada AD CF–2023–15

In Transport Canada AD CF–2023–15, instead of using the compliance time specified in Part II, comply with Part II at the later of the times specified in paragraphs (h)(1) and (2) of this AD.

(1) For airplanes on which the actions specified in Airbus Canada Limited Partnership A220 Service Bulletin BD500–270016 have not been done before the effective date of this AD: Within 930 flight hours after the effective date of this AD.

(2) For airplanes on which the actions specified in Airbus Canada Limited Partnership A220 Service Bulletin BD500–270016 have been done before the effective date of this AD: Within 4,900 flight hours after accomplishment of the actions specified in Airbus Canada Limited Partnership A220 Service Bulletin BD500–270016, or within 930 flight hours after the effective date of this AD, whichever occurs later.

(i) 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 (j)(1) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(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 Transport Canada; or Airbus Canada Limited Partnership's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Additional Information

(1) For more information about this AD, contact William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7300; email: *9-avs-nyaco-cos@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) of this AD.

(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 this AD specifies otherwise.

(i) Transport Canada AD CF–2023–15 dated March 2, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec J7N 3C6, Canada; telephone 450–476–7676; email *a220_crc@abc.airbus;* website *a220world.airbus.com.*

(4) You may view this material 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 material 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 October 5, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–22546 Filed 10–18–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

[NPS–CAHA–NPS0036286; 233P103601—PPSECAHAS0—PPMPSPD1Z.YM0000]

RIN 1024–AE83

Cape Hatteras National Seashore; Bicycling

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to amend the special regulations for Cape Hatteras National Seashore to allow for bicycle use on an approximately 1.6-mile multi-use pathway to be constructed in the Hatteras Island District of the Seashore.

DATES: Comments on the proposed rule must be received by 11:59 p.m. EDT on December 18, 2023.

ADDRESSES: You may submit comments, identified by Regulation Identifier Number (RIN) 1024–AE83, by either of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov/.* Follow the instructions for submitting comments.

(2) *By hard copy:* Mail to: Superintendent, Cape Hatteras National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954.

Document Availability: The Construct Multi-use Pathway in Hatteras Island District Environmental Assessment (EA), Finding of No Significant Impact (FONSI), and related project documents provide information and context for this proposed rule and are available online at *https://parkplanning.nps.gov/parkHome.cfm?parkID=358* by clicking the link entitled ''Construct Multi-Use Pathway in Hatteras Island District'' and then clicking the link entitled ''Document List.''

Instructions: Comments will not be accepted by fax, email, or in any way other than those specified above. All submissions received must include the words ''National Park Service'' or ''NPS'' and must include the docket number or RIN (1024–AE83) for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided.

Docket: For access to the docket to read comments received, go to *https://www.regulations.gov/* and search for ''1024–AE83.''

FOR FURTHER INFORMATION CONTACT: David Hallac, Superintendent, Cape Hatteras National Seashore; (252) 473–

2111; *david_hallac@nps.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. In compliance with the Providing Accountability Through Transparency Act of 2023, the plain language summary of the proposal is available on *Regulations.gov* in the docket for this rulemaking.

SUPPLEMENTARY INFORMATION:

Background

Purpose and Significance of Cape Hatteras National Seashore

In 1937, Congress authorized the establishment of Cape Hatteras National Seashore. Located in the Outer Banks in Dare County, North Carolina, the Seashore consists of more than 30,000 acres distributed along approximately 75 miles of ocean-facing shoreline. The purpose of the Seashore is to permanently preserve the wild and primitive character of the ever-changing barrier islands, protect the diverse plant and animal communities sustained by coastal island processes, and provide for recreational use and enjoyment that is compatible with preserving the distinctive natural and cultural resources of the Nation's first national seashore.

Located within a day's drive of several urban centers, the Seashore is a popular vacation destination that receives approximately three million visitors each year. Stretching about 75 miles from north to south, the Seashore encompasses Bodie, Hatteras, and Ocracoke islands, which are linked by North Carolina Highway 12 (NC12) and the Hatteras Inlet Ferry. Nine villages, including Nags Head, Rodanthe, Waves, Salvo, Avon, Buxton, Frisco, Hatteras, and Ocracoke, are located adjacent to or within the Seashore. Popular visitor activities include beachcombing, swimming, fishing, hiking, camping, and learning about the history and natural features of the unique barrier islands. Visitors can access the northern entrance via roadways and the southern entrance by ferry or air travel. The Seashore encompasses a mix of land uses with villages, residences, commercial uses, tourist attractions, and nationally important resources within and adjacent to NPS-managed areas.

Bicycle Use in the Seashore

Bicycle use has occurred in the Seashore for several decades. Bicycles are allowed on roads and in parking areas that are open to public motor vehicle traffic. Bicycle use is not allowed on any trails or pathways within the Seashore. Public roads and parking areas that are open to traditional bicycles are open to electric bicycles, which are defined in NPS regulations as two- or three-wheeled cycles with fully operable pedals and electric motors of not more than 750 watts that meet the requirements of one of three classes. See the definition of ''electric bicycle'' in 36 CFR 1.4(a).

New Multi-Use Pathway

Connectivity within and near the Seashore is important for realizing one purpose of the Seashore to provide access and opportunities for the benefit and enjoyment of visitors. The Seashore's 1984 General Management Plan (GMP) recognized the need for a ''bikeway'' within the Seashore and identified the area adjacent to Lighthouse Road as an appropriate location that would provide access from NC12 and the village of Buxton to popular visitor use areas within the Cape Hatteras Lighthouse District. Multiple modes of transportation use the Lighthouse Road corridor. These include passenger, recreational, and camping vehicles, as well as pedestrians and bicyclists, who either share the paved road with motor vehicles or use the grassy shoulders along the road. Although the shoulders are wide enough to physically accommodate pedestrians and bicyclists for most of Lighthouse Road, there is no designated and safe pathway for these groups of visitors.

In May 2022 the NPS initiated a 30-day public scoping process to inform the development of plans to construct a multi-use, paved pathway adjacent to Lighthouse Road, consistent with the recommendation in the GMP. Following the public scoping period, in February 2023 the NPS published the EA to analyze the potential environmental consequences of no-action and action alternatives. Under the action alternative, which is the NPS's preferred alternative, the NPS would construct a 10–12-foot-wide paved multi-use pathway in two phases. The pathway would be physically separated from but adjacent to Lighthouse Road, and then extend away from the road to the Trailhead at Cape Hatteras Lighthouse in one direction, and to the Trailhead at Buxton Beach Access in the other direction. The total length of the pathway would be approximately 1.6 miles. The project would include wayfinding signage, benches, bollards, and the reconfiguration of the Seashore entrance at the start of the pathway, including intersection improvements and connections to local sidewalks.

In addition to evaluating the potential consequences of constructing the pathway, the EA also evaluated the potential impacts of allowing bicycles and electric bicycles on the pathway. The EA evaluated the suitability of the trail surface and soil conditions for accommodating bicycle use; and life cycle maintenance costs, safety considerations, methods to prevent or minimize user conflict, and methods to protect natural and cultural resources and mitigate impacts associated with bicycle use.

The NPS accepted public comments on the EA for 30 days. In May 2023 following a recommendation by the Superintendent of the Seashore, the Regional Director for Interior Region 2, South Atlantic—Gulf, signed the FONSI identifying the action alternative in the EA as the selected alternative. As stated in the FONSI, the NPS believes the action alternative will greatly improve the quality of the experience for visitors travelling along Lighthouse Road by constructing a safe, resilient, and accessible off-road pathway for pedestrians and bicyclists. The NPS expects to complete construction of phase one of the pathway in the spring of 2024.

Proposed Rule

This proposed rule would implement part of the selected alternative in the FONSI by authorizing the Superintendent of the Seashore to allow bicycles on an approximately 1.6-mile multi-use pathway within the Hatteras Island District of the Seashore. This rulemaking would comply with NPS regulations at 36 CFR 4.30, which state that special regulations are required to designate new bicycle trails outside of developed areas. The proposed rule would add a new paragraph (d) to 36 CFR 7.58, which contains existing special regulations for the Seashore. After the pathway is constructed, the Superintendent could designate the pathway for bicycle use by notifying the public through one or more of the methods listed in 36 CFR 1.7. The Superintendent would be required to list the pathway as open to bicycle use in the Superintendent's compendium, which is a written compilation of designations, closures, permit requirements and visitor use restrictions that is available on the Seashore's website (*https://www.nps.gov/caha/*

index.htm). Maps showing the pathway as open to bicycle use would be available at Seashore visitor centers and on the Seashore's website. Finally, the proposed rule would state that the Superintendent may limit, restrict, or impose conditions on bicycle use, or close any trail to bicycle use, or terminate such conditions, closures, limits, or restrictions. This could occur after the Superintendent considers public health and safety, resource protection, and other management activities and objectives, as stated in 36 CFR 4.30(f). This rulemaking would not affect the use of any existing trails or pathways in the Seashore, all of which would remain closed to bicycle use.

NPS regulations at 36 CFR 4.30(i) give superintendents the discretionary authority to allow electric bicycles on park roads, parking areas, and administrative roads and trails that are otherwise open to bicycles. After the pathway is constructed, the Superintendent may designate it open to traditional bicycles as explained above. At that time, the Superintendent also could designate the pathway as open to some or all classes of electric bicycles. If, in the future, the Superintendent determines that electric bicycles or certain classes of electric bicycles should no longer be allowed on the pathway, or that conditions for use should change, the Superintendent could make such changes by updating the Superintendent's compendium and providing adequate public notice under 36 CFR 1.7.

Compliance With Other Laws, Executive Orders and Department Policy. Regulatory Planning and Review (Executive Orders 12866 and 13563 and 14094)

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that the proposed rule is not significant.

Executive Order 14094 amends Executive Order 12866 and reaffirms the principles of Executive Order 12866 and Executive Order 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with Executive Order 12866, Executive Order 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. Executive Order 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The NPS has developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act

This rulemaking would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the economic analyses found in the report entitled ''Cost-Benefit and Regulatory Flexibility Threshold Analyses: Proposed Rule to Designate a New Multi-Use Trail for Bicycle Use at Cape Hatteras National Seashore.'' The report may be viewed on the seashore's planning website at the uniform resource locator (URL) listed in **ADDRESSES**.

Congressional Review Act (CRA)

This rulemaking is not a major rule under 5 U.S.C. 804(2). This rulemaking:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rulemaking does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rulemaking does not have a significant or unique effect on State, local or Tribal governments or the private sector. It addresses public use of national park lands and imposes no requirements on other agencies or governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

This rulemaking does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, the rulemaking does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. This proposed rule only affects use of federally administered lands and waters. It has no direct effects on other areas. A federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rulemaking complies with the requirements of Executive Order 12988. This rulemaking:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175 and Department Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. The NPS has evaluated this rulemaking under the criteria in Executive Order 13175 and under the Department's Tribal consultation policy and has determined that Tribal consultation is not required because the proposed rule will have no substantial direct effect on federally recognized Indian Tribes. Nevertheless, in support of the Department of the Interior's and the NPS's commitment to government-to-government consultation, during the EA process, the NPS sent early notification letters to Tribal partners to invite participation in the planning process. The Tribes are the Absentee Shawnee Tribe, the Catawba Indian Nation, the Eastern Shawnee Tribe, the Shawnee Tribe, and the United Keetoowah Band of Cherokee Indians. The NPS notified

the Tribes of the project through correspondence dated May 20, 2022, and received a response from the Catawba Indian Nation in a letter dated July 7, 2022. The Catawba Indian Nation requested to be notified if Native American artifacts or human remains are located during the ground disturbance phase of the project.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required. The NPS may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

The NPS has prepared the EA to determine whether this rulemaking will have a significant impact on the quality of the human environment under the National Environmental Policy Act of 1969. This rulemaking would not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA is not required because of the FONSI. The EA contains a full description of the purpose and need for taking action, the alternatives considered, a map of the affected area, and the environmental impacts associated with the project. A copy of the EA and FONSI can be found online at the URL listed in **ADDRESSES**.

Effects on the Energy Supply (Executive Order 13211)

This rulemaking is not a significant energy action under the definition in Executive Order 13211; the rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the rulemaking has not otherwise been designated by the Administrator of OIRA as a significant energy action. A Statement of Energy Effects in not required.

Clarity of This Rule

The NPS is required by Executive Orders 12866 (section 1(b)(12)) and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule the NPS publishes must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use common, everyday words and clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that the NPS has not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help the NPS revise the rule, your comments should be as specific as possible. For example, you should identify the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Public Participation

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule by one of the methods listed in the **ADDRESSES** section of this document.

Public Availability of Comments

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.

List of Subjects in 36 CFR Part 7

National parks, Reporting and Recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as set forth below:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

■ 1. The authority citation for part 7 continues to read as follows:

Authority: 54 U.S.C. 100101, 100751, 320102; Sec. 7.96 also issued under D.C. Code 10–137 and D.C. Code 50–2201.07.

■ 2. Amend § 7.58 by adding paragraph (d) to read as follows:

§ 7.58 Cape Hatteras National Seashore.

* * * * *

(d) *Bicycle Use.* (1) The Superintendent may designate all or a portion of the following trails as open to bicycle use:

(i) Multi-use pathway in the Hatteras Island District (approximately 1.6 miles).

(ii) [Reserved]

(2) Maps showing the pathway as open to bicycle use will be available at Seashore visitor centers and posted on the Seashore website. The Superintendent will provide notice that the pathway is open to bicycle use in accordance with § 1.7 of this chapter, including in the superintendent's compendium (or written compilation) of discretionary actions referred to in 36 CFR 1.7(b).

(3) The Superintendent may limit, restrict, or impose conditions on bicycle use, or close any trail to bicycle use, or terminate such conditions, closures, limits, or restrictions in accordance with § 4.30 of this chapter. A violation of any such limit, restriction, condition, or closure is prohibited.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023–23077 Filed 10–18–23; 8:45 am]

BILLING CODE 4312–52–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2023–5]

Exemptions To Permit Circumvention of Access Controls on Copyrighted Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Copyright Office is conducting the ninth triennial rulemaking proceeding under the Digital Millennium Copyright Act (''DMCA''), concerning possible temporary exemptions to the DMCA's prohibition against circumvention of technological measures that control access to copyrighted works. In this proceeding, the Copyright Office is considering petitions for the renewal of exemptions that were granted during the eighth triennial rulemaking along with petitions for new exemptions to engage in activities not permitted by existing exemptions. On June 8, 2023, the Office published a Notification of Inquiry requesting petitions to renew existing exemptions and comments in response to those petitions, as well as petitions for new exemptions. Having carefully considered the renewal petitions and comments received, in this Notice of Proposed Rulemaking (''NPRM''), the Office announces its intention to recommend all but one of the existing exemptions for renewal. This NPRM also initiates three rounds of public comment on the newly proposed exemptions. Interested parties are

invited to make full legal and evidentiary submissions in support of or in opposition to the newly proposed exemptions, in accordance with the requirements set forth below.

DATES: Initial written comments (including documentary evidence) and multimedia evidence from proponents and other members of the public who support the adoption of a proposed exemption, as well as parties that neither support nor oppose an exemption but seek to share pertinent information, are due December 22, 2023. Written response comments (including documentary evidence) and multimedia evidence from those who oppose the adoption of a proposed exemption are due February 20, 2024. Written reply comments from supporters of particular proposals and parties that neither support nor oppose a proposal are due March 19, 2024.

ADDRESSES: The Copyright Office is using the *regulations.gov* system for the submission and posting of comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. The Office is accepting two types of comments. First, commenters who wish briefly to express general support for or opposition to a proposed exemption may submit such comments electronically by typing into the comment field on *regulations.gov.* Second, commenters who wish to provide a fuller legal and evidentiary basis for their position may upload a Word or PDF document, but such longer submissions must be completed using the long-comment form provided on the Office's website at *https://www.copyright.gov/1201/2024*. Specific instructions for submitting comments, including multimedia evidence that cannot be uploaded through *regulations.gov*, are also available on that web page. If a commenter cannot meet a particular submission requirement, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION:

On June 8, 2023, the Office published a Notification of Inquiry (''NOI'') requesting petitions to renew current exemptions, oppositions to the renewal petitions, and petitions for newly proposed exemptions in connection with the ninth triennial section 1201 rulemaking.[1] In response, the Office received thirty-eight renewal petitions, six comments in opposition to renewal of an exemption, and two comments supporting renewal of an exemption.[2] In addition, the Office received eleven petitions for new exemptions or expansion of previously granted exemptions.

This NPRM summarizes the renewal petitions and sets forth which exemptions the Office intends to recommend for renewal without the need for petitioners to further develop the administrative record. Separately, this NPRM outlines the proposed classes for new exemptions for which the Office is initiating three rounds of public comment.

I. Standard for Evaluating Proposed Exemptions

As the NOI explained, before the Office can recommend a temporary exemption from the prohibition on circumvention, the record must establish that ''persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under [title 17] of a particular class of copyrighted works.'' [3] When defining a ''class of copyrighted works,'' the Office generally uses the categories of works in 17 U.S.C. 102 as a starting point and then refines the class by other criteria, such as the technological protection measures (''TPMs'') used, distribution platforms, and/or types of uses or users.[4]

In evaluating the evidence, the Office weighs the statutory factors in section 1201(a)(1)(C): ''(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the [Office] considers appropriate.'' [5] After developing a comprehensive administrative record, the Register of Copyrights makes a recommendation to the Librarian of Congress concerning whether exemptions are warranted based on that record.

In considering whether to recommend an exemption, the Office follows the statutory text: ''*Are users of a copyrighted work adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works, or are users likely to be so adversely affected in the next three years?*'' [6] This inquiry breaks down into the following elements:

- Does the proposed class include at least some works protected by copyright?
- Are the uses at issue likely noninfringing under title 17?
- Are users currently, or likely to be, adversely affected in their ability to make such noninfringing uses during the next three years? [7]
- Is the statutory prohibition on circumventing access controls the cause of the adverse effects? [8]

To determine whether a proposed use is likely to be noninfringing, the Register considers the Copyright Act and relevant judicial precedents.[9] When

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[1] *Exemptions To Permit Circumvention of Access Controls on Copyrighted Works,* 88 FR 37486 (June 8, 2023) (''2023 NOI''). On July 5, 2023, the Office issued a Notice of Inquiry extending the comment submission period for petitions for new exemptions. *Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice and Request for Public Comment,* 88 FR 42891 (July 5, 2023).

[2] The comments received in response to the Notification of Inquiry are available at *https://www.regulations.gov/document/COLC-2023-0004-0002/comment* and on the Copyright Office website. Renewal petitions are available at *https://www.copyright.gov/1201/2024/petitions/renewal/,* and petitions for new exemptions are available at *https://www.copyright.gov/1201/2024/petitions/proposed/*. References to renewal petitions and comments are by party name (abbreviated where appropriate) and a brief identification of the previously granted exemption, followed by either ''Renewal Pet.,'' ''Supp.'' (for comments supporting an exemption), or ''Opp.'' (for comments opposing an exemption). References to petitions for new exemptions are by party name (abbreviated where appropriate), the Office's proposed class number, and ''Pet.''

[3] 17 U.S.C. 1201(a)(1)(C).

[4] *See* U.S. Copyright Office, Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 8–9 (2021) (''2021 Recommendation''); U.S. Copyright Office, Section 1201 of Title 17, at 26, 108–10 (2017), *https://www.copyright.gov/policy/1201/section-1201-full-report.pdf* (''Section 1201 Study''); *see also* H.R. Rep. No. 105–551, pt. 2, at 38 (1998) (''Commerce Comm. Report'') (''The Committee intends that the 'particular class of copyrighted works' be a narrow and focused subset of the broad categories of works of authorship than is identified in Section 102 of the Copyright Act (17 U.S.C. 102).'').

[5] 17 U.S.C. 1201(a)(1)(C).

[6] Section 1201 Study at 114.

[7] This element is analyzed in reference to section 1201(a)(1)(C)'s five statutory factors.

[8] Section 1201 Study at 115–27.

[9] *Id.* at 115–17. While controlling precedent directly on point is not required to justify an exemption, there is no ''rule of doubt'' favoring an exemption when it is unclear that a particular use is fair or otherwise noninfringing. *See* U.S. Copyright Office, Section 1201 Rulemaking: Sixth

considering whether such uses are being adversely impacted by the prohibition on circumvention, the rulemaking focuses on ''distinct, verifiable, and measurable impacts'' compared to ''*de minimis* impacts.'' [10] The Register examines the administrative record as a whole to consider whether the preponderance of the evidence shows that the conditions for granting an exemption have been met.[11]

II. Review of Petitions To Renew Existing Exemptions

In this proceeding, the Office is again using a streamlined process for recommending the renewal of exemptions previously issued by the Librarian of Congress. As the Office explained in its 2017 policy study, the ''Register must apply the same evidentiary standards in recommending the renewal of exemptions as for first-time exemption requests,'' and the statute requires that ''a determination must be made specifically for each triennial period.'' [12] The Office further determined that ''the statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.'' [13] The Office first instituted this streamlined renewal process in the seventh triennial rulemaking, which concluded in 2018.[14] In that rulemaking, the Office received requests to renew each of the exemptions from the previous proceeding, none of which were meaningfully contested.[15] As a result, it was able to recommend renewal of all previously granted exemptions.[16] The streamlined renewal process was praised by participants during the ensuing rulemaking,[17] and the Office has employed it in subsequent rulemakings.

The Office is following the same procedure in this rulemaking. Renewal petitions must be for exemptions as they are currently formulated, without modification. Petitions should support a determination by the Office that, due to a lack of legal, marketplace, or technological changes, the factors that led it to recommend adoption of the exemption in the prior rulemaking may still be relied on to renew the exemption.[18] To the extent that any renewal petition proposes uses beyond the current exemption, the Office disregards those portions of the petition for purposes of considering the renewal of the exemption, and instead focuses on whether the petition provides sufficient information to warrant renewal of the exemption in its current form.

In response to its current NOI, the Office received petitions to renew each existing exemption, except for one.[19] Each of the thirty-eight renewal petitions received included a summary of the continuing need and justification for the exemption. In each case, petitioners also signed a declaration stating that, to the best of their personal knowledge, there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record such that renewal of the exemption would not be justified.

The Office received eight comments in response to the renewal petitions, two of which support renewal of specific exemptions. Six comments oppose certain different aspects of the renewal petitions.[20]

As detailed below, after reviewing the petitions for renewal and comments in response, the Office concludes that each petition is sufficient to renew the corresponding existing exemption, and does not find sufficient opposition to any existing exemption that supports refusing renewal. Accordingly, the Office intends to recommend that the thirty-eight existing exemptions for which renewal petitions were received be renewed in their current form.[21]

A. Audiovisual Works—Criticism and Comment—Filmmaking

Multiple organizations petition to renew the exemption for motion pictures [22] for uses in documentary films or other films where the use is a parody or for a biographical or historically significant nature (codified at 37 CFR 201.40(b)(1)(i)(A)).[23] No oppositions were filed against renewal.

The petitions for renewal summarize the continuing need and justification for the exemption, and the petitioners demonstrate personal knowledge of and

Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 15 (2015) (''2015 Recommendation''). The rulemaking also generally ''is not an appropriate venue for breaking new ground in fair use jurisprudence.'' 2021 Recommendation at 10–11 (quoting Section 1201 Report at 116–17).

[10] Commerce Comm. Report at 37; *see also* Staff of H. Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4th, 1998, at 6 (Comm. Print 1998) (using the equivalent phrase ''substantial adverse impact''); *see also, e.g.,* Section 1201 Study at 119–21 (discussing same and citing application of this standard in five prior rulemakings).

[11] *See* 17 U.S.C. 1201(a)(1)(C) (asking whether users ''*are, or are likely to be* in the succeeding 3-year period, adversely affected by the prohibition [on circumvention] in their ability to make noninfringing uses'') (emphasis added); Section 1201 Study at 111–12; *see also Sea Island Broad. Corp.* v. *FCC,* 627 F.2d 240, 243 (D.C. Cir. 1980) (noting that ''[t]he use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings''); *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,* 70 FR 57526, 57528 (Oct. 3, 2005); 2021 Recommendation at 7–8; U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Acting Register of Copyrights 13 (2018) (''2018 Recommendation''); 2015 Recommendation at 13–14; U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 6 (2012) (''2012 Recommendation''); U.S. Copyright Office, Section 1201 Rulemaking: Second Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 19–20 (2003).

[12] Section 1201 Study at 142, 145.

[13] *Id.* at 143.

[14] 2018 Recommendation at 17.

[15] *Id.* at 22.

[16] *Id.* at 19.

[17] *See, e.g., id.* at 19 n.80 (collecting transcript testimony from 2018 rulemaking).

[18] *See* Section 1201 Study at 143–44.

[19] A renewal petition was not filed for the current exemption permitting circumvention of video games in the form of computer programs for the purpose of allowing an individual with a physical disability to use alternative software or hardware input methods. *See* 37 CFR 201.40(b)(21). The Office therefore will not recommend this exemption to the Librarian for renewal.

[20] *See, e.g.,* DVD Copy Control Ass'n (''DVD CCA'') & Advanced Access Content Sys. Licensing Adm'r (''AACS LA'') Noncom. Videos Opp.; DVD CCA & AACS LA AV Educ. TDM Opp.; Author Services, Inc. (''Author Services'') Device Repair Opp.; American Consumer Institute (''ACI'') Medical Device Repair Opp.; Medical Imaging & Technology Alliance (''MITA'') Medical Device Repair Opp.; Philips North America, LLC (''Philips'') Medical Device Repair Opp.

[21] Because a renewal petition was not filed for the current exemption found within 37 CFR 201.40(b)(21), the Office will not renew or consider this exemption during the rulemaking proceeding. *See Exemptions to Permit Circumvention of Access Controls on Copyrighted Works,* 82 FR 29804, 29805 (June 30, 2017) (''[T]he statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.'' (quoting Section 1201 Study at 142–43)); *see also id.* (requiring those seeking renewal to use the Office's form to summarize the ''existence of a continuing need and justification for the exemption'' and attest that ''there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record . . . that originally demonstrated the need for the selected exemption, such that renewal of the exemption would not be justified'').

[22] Unless otherwise noted, all references to motion pictures as a category include television programs and videos.

[23] International Documentary Association and Kartemquin Educational Films (collectively ''Joint Filmmakers'') Documentary Films Renewal Pet.; New Media Rights (''NMR'') Documentary Films Renewal Pet.

experience with this exemption. For example, the International Documentary Association and Kartemquin Educational Films (collectively ''Joint Filmmakers'')—which represent thousands of independent filmmakers across the nation—state that TPMs such as encryption continue to prevent filmmakers from accessing needed material, and that this is ''especially true for the kind of high fidelity motion picture material filmmakers need to satisfy both distributors and viewers.'' [24] Petitioners state that filmmakers have found it necessary to rely on this exemption and will continue to do so.[25]

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

B. Audiovisual Works—Criticism and Comment—Noncommercial Videos

Two organizations petition to renew the exemption for motion pictures for use in noncommercial videos (codified at 37 CFR 201.40(b)(1)(i)(B)).[26] The petitions argue for the continuing need and justification for the exemption, and the petitioners demonstrate personal knowledge of and experience with this exemption. For example, one of the petitioners, OTW, has advocated for the noncommercial video exemption in past triennial rulemakings, and has heard from ''a number of noncommercial remix artists'' who have used the exemption in the past and anticipate needing to use it in the future.[27] OTW includes an account from an academic stating that footage ripped from DVDs and Blu-ray was preferred for ''vidders'' (noncommercial remix artists) because ''it is high quality enough to bear up under the transformations that vidders make to it—which now routinely include changes of color, speed, cropping and zooming, masking, animations and other cgi, and even explorations of the z-axis and 3D.'' [28] Similarly, NMR notes ''a continuing need for the exemption'' and a purported reliance by filmmakers to make these types of uses in the next triennial period.[29] No oppositions were filed to renewal of the exemption as currently formulated.

The Office did, however, receive opposition to OTW's renewal petition to the extent it seeks to modify the regulatory language of this exemption. Specifically, in its renewal petition, OTW proposes the Office ''us[e] the relatively simple language defining the exempted class from the 2008 rulemaking,'' rather than the language in the current exemption, which was adopted in the 2021 rulemaking.[30] DVD CCA and AACS LA object to the proposed change in the language sought by OTW, noting that the Office's streamlined proceedings for renewals is ''only'' for exemptions ''as they are currently written in the Code of Federal Regulations, without modification.'' [31] The Office agrees. OTW's proposed modifications must instead be addressed as part of the full rulemaking proceeding, and therefore this request is included as one of the proposed new classes discussed below.[32]

Based on the information provided in the renewal petitions and the lack of opposition to renewal of the exemption as it currently exists, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

C. Audiovisual Works—Criticism and Comment—Multimedia E-Books

Authors Alliance, the American Association of University Professors (''AAUP''), and independent documentary producer and screenwriter, Bobette Buster, filed a joint petition to renew the exemption for the use of motion picture excerpts in nonfiction multimedia e-books (codified at 37 CFR 201.40(b)(1)(i)(C)).[33] No oppositions were filed against renewal.

The petition states that there is a continuing need and justification for the exemption by pointing to Professor Buster's continuing work on an e-book series titled ''Deconstructing Master Filmmakers,'' where the ''use of high-resolution video is essential'' to the project and would not be available ''without the circumvention of technological protection measures.'' [34] The petition notes that Professor Buster's project has been discussed during the three previous rulemakings and its continuation justifies renewal of the current exemption.

The Office agrees. Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period.[35] Accordingly, it intends to recommend renewal.

D. Audiovisual Works—Criticism and Comment—Universities and K–12 Educational Institutions

Several organizations petition to renew the exemption for motion pictures for educational purposes by college and university faculty, students, or employees acting at the direction of faculty, or K–12 educators and students (codified at 37 CFR 201.40(b)(1)(ii)(A)).[36] No oppositions were filed against renewal.

The petitions argue for the continuing need and justification for the exemption, stating that educators and students continue to rely on excerpts from digital media for class presentations and coursework. Peter Decherney, Michael Delli Carpini, Library Copyright Alliance (''LCA''), and Society for Cinema and Media Studies (''SCMS'') (collectively ''Joint Educators'') provide several examples of professors using DVD clips in the classroom. For example, University of

[24] Joint Filmmakers Documentary Films Renewal Pet. at 3.

[25] *Id.;* NMR Documentary Films Renewal Pet. at 3.

[26] NMR Noncom. Videos Renewal Pet.; Organization for Transformative Works (''OTW'') Noncom. Videos Renewal Pet.

[27] OTW Noncom. Videos Renewal Pet. at 3.

[28] *Id.*

[29] NMR Noncom. Videos Renewal Pet. at 3.

[30] OTW describes its requested change to the exemption language as ''not . . . an expansion of the existing exemption, but a more understandable restatement.'' OTW Noncom. Videos Renewal Pet. at 4.

[31] DVD CCA & AACS LA Noncom. Videos Opp. at 2 (emphasis omitted) (quoting 2023 NOI at 37487).

[32] *See* 2023 NOI at 37487. As the Office previously noted, much of the language that has been added to the exemption since 2008 was sought by exemption proponents. *See* 2012 Recommendation at 105, 110.

[33] Buster, Authors Alliance & AAUP Nonfiction Multimedia E-Books Renewal Pet.

[34] *Id.* at 3.

[35] The Office notes that petitioners have filed highly similar renewal petitions in the 2018 and 2021 rulemaking proceedings, testifying generally that Professor Buster has continued to work on her e-book series without additional specifics about that work or progress. *See* 2018 Bobette Buster et al. Nonfiction Multimedia E-Books Renewal Pet. at 3 (''Ms. Buster continues to work on an e-book series, based on her lecture series, 'Deconstructing Master Filmmakers: The Uses of Cinematic Enchantment,' that relies on the availability of high-resolution video not available without circumvention of technological protection measures''); 2021 Bobette Buster et al. Nonfiction Multimedia E-Books Renewal Pet. at 3 (''Ms. Buster continues to work on an e-book series, based on her lecture series, 'Deconstructing Master Filmmakers: The Uses of Cinematic Enchantment,' that relies on the availability of high-resolution video not available without circumvention of technological protection measures.''). If petitioners seek renewal in future proceedings, the Office suggests that they provide additional information about Professor Buster's progress or point to other individuals relying on the exemption.

[36] Decherney, Delli Carpini, Library Copyright Alliance (''LCA''), and Society for Cinema and Media Studies (''SCMS'') (collectively ''Joint Educators'') AV Educ. Renewal Pet.; Brigham Young Univ.—Idaho Intellectual Property Office (''BYU-Idaho'') AV Educ. Renewal Pet.

Pennsylvania Medieval Literature Professor David Wallace ''frequently uses film and television clips to compare medieval poetry with the style of popular contemporary film'' and ''uses the clips to focus on historical detail.'' [37] In addition, co-petitioner Peter Decherney declares that he ''continues to rely heavily on this exemption in teaching his course on Multimedia Criticism'' where his students ''produce short videos analyzing media.'' [38] Indeed, Joint Educators broadly suggest that the ''entire field'' of video essays or multimedia criticism ''could not have existed in the United States without fair use and the 1201 educational exemption.'' [39] Similarly, BYU-Idaho assert that access to films on streaming platforms ''are not available for institutions due to limited licensing agreements that limit uses to residential or personal use.'' [40] Through these submissions, petitioners demonstrate personal knowledge of and experience with regard to this exemption based on their representation of thousands of digital and literacy educators and/or members supporting educators and students, combined with past participation in the section 1201 triennial rulemaking.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

E. Audiovisual Works—Criticism and Comment—Massive Open Online Courses (''MOOCs'')

Peter Decherney, Michael Delli Carpini, LCA, and SCMS (collectively ''Joint Educators'') jointly petition to renew the exemption for motion pictures for educational uses in MOOCs (codified at 37 CFR 201.40(b)(1)(ii)(B)).[41] No oppositions were filed against renewal.

The petition cites a continuing need and justification for the exemption, stating that instructors continue to rely on the exemption to ''develop, provide, and improve MOOCs,'' as well as increase the number of (and therefore access to) MOOCs, particularly in the field of film and media studies.[42] Specifically, Joint Educators note that Professor Decherney's History of Hollywood class ''offers close readings of Hollywood classics like King Kong (1933) and Casablanca (1942) and analyzes digital special effects, sound design, and other elements of filmmaking.'' [43] The petition also states that the ''exemption has become even more vital since the COVID–19 pandemic and the continuing shift of our education systems to include online learning,'' highlighting the increase in MOOCs and increased enrollment.[44]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

F. Audiovisual Works—Criticism and Comment—Digital and Media Literacy Programs

LCA and Professor Renee Hobbs petition to renew the exemption for motion pictures for educational uses in nonprofit digital and media literacy programs offered by libraries, museums, and other nonprofits (codified at 37 CFR 201.40(b)(1)(ii)(C)).[45] No oppositions were filed against renewal.

The petition provides testimony as to the continuing need and justification for the exemption, and petitioners demonstrate personal knowledge of and experience with this exemption. For example, the petition states that librarians, museums, and other nonprofit entities across the country have relied on the current exemption and will continue to do so for their digital and media literacy programs.[46] The petition also notes that Professor Hobbs has testified in several previous rulemakings and has personal experience with the relevant standards and evidence underpinning the current exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

G. Audiovisual Works—Captioning and Audio Description

The Association of Transcribers and Speech-to-Text Providers (''ATSP'') and LCA jointly petition to renew the exemption for motion pictures for the provision of captioning and/or audio description by disability services offices or similar units at educational institutions for students, faculty, or staff with disabilities (codified at 37 CFR 201.40(b)(2)).[47] No oppositions were filed against renewal.

The petition contains testimony that the exemption continues to be relied on by its beneficiaries. For example, petitioners assert that they ''have used the exemption to address the requests and concerns of students with disabilities in attendance at their respective educational institutions to create equitable educational experiences,'' which ''enables disability services offices and similar units to ensure that students with disabilities have access to the same advantages as their peers in the pursuit of education.'' [48] ''Based on their regular interaction with those affected by the exemption,'' which demonstrates personal knowledge of the exemption, petitioners believe that the circumstances justifying the exemption currently exist and will persist for the next three years.[49]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

H. Audiovisual Works—Preservation or Replacement—Library, Archives, and Museum

LCA petitions to renew the exemption for motion pictures for preservation or the creation of a replacement copy by an eligible library, archives, or museum (codified at 37 CFR 201.40(b)(3)).[50] No oppositions were filed against renewal.

The petition provides testimony as to the continuing need and justification for the exemption. For example, the petition states that ''[c]ultural heritage institutions across the country have relied on the exemption . . . to make preservation and replacement copies of the motion pictures in their collections stored on DVDs and Blu-ray discs,'' as many motion pictures in the collections ''are unavailable for purchase or streaming'' or ''continue to deteriorate.'' [51] LCA also demonstrates personal knowledge of the exemption based on its past participation with this particular exemption in the previous section 1201 triennial rulemaking.

[37] Joint Educators AV Educ. Renewal Pet. at 3.
[38] *Id.*
[39] *Id.*
[40] BYU-Idaho AV Educ. Renewal Pet. at 3.
[41] Joint Educators AV Educ. MOOCs Renewal Pet.
[42] *Id.* at 3.
[43] *Id.*
[44] *Id.*
[45] LCA & Hobbs AV Educ. Nonprofits Renewal Pet.
[46] *Id.* at 3.
[47] ATSP & LCA Captioning Renewal Pet.
[48] *Id.* at 3.
[49] *Id.*
[50] LCA Preservation Renewal Pet.
[51] *Id.* at 3.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

I. Audiovisual Works—Text and Data Mining—Scholarly Research and Teaching

Authors Alliance, AAUP, and LCA jointly petition to renew the exemption for text and data mining of motion pictures by researchers affiliated with a nonprofit institution of higher education, or at the direction of such researchers, for the purpose of scholarly research and teaching (codified at 37 CFR 201.40(b)(4)).[52] As discussed further below, DVD CCA & AACS LA submitted a comment in opposition.

The petition argues that there is a continuing need for the exemption and includes examples of researchers actively relying on the exemption. For example, as part of ''researching depictions'' of climate changes, Professor James Lee at the University of Cincinnati, is using the exemption ''to build a corpus of . . . films to then conduct text and data mining, searching for climate change markers across those materials.'' [53] According to the petition, there is a continued need for the exemption because ''this type of research requires substantial computing resources and institutional coordination'' and, as a result, ''many of these projects are just now taking shape'' as ''a wide range of researchers . . . are actively planning projects that would rely on the TDM exemption.'' [54] The petition further states that the Office can rely on the record from the previous rulemaking because the relevant case law has not changed and there have been no developments in the market that would allow petitioners to obtain the works they need without circumvention.[55] Finally, the petition states that ''[c]ommercially licensed text and data mining products continue to be made available to research institutions, as they were at the time of the 2021 exemption and as is reflected in the existing record, but these licensed products do not allow researchers to license the full array of texts and films that are needed to engage in the research they seek to do.'' [56]

DVD CCA and AACS LA filed an objection to renewal on the grounds that the previous rulemaking record is no longer reliable. According to DVD CCA and AACS LA, during the last rulemaking petitioners ''contended that there was no evidence of the availability of licenses for motion pictures for their desired use'' and the Office's recommendation of the exemption was based on the fact that ''there [were] no [existing] large-scale libraries of digital motion pictures available for text and data mining.'' [57] DVD CCA and AACS LA argue that ''because proponents' own petition indicates they are aware of the emergence of licensed access to motion pictures for data mining purposes, then such facts should be developed in the full rulemaking as such licensing opportunities could be a reasonable alternative to circumvention.'' [58] DVD CCA and AACS LA did not, however, provide affirmative evidence of new licensing options for the text and data mining activities covered by the current exemption.

After reviewing the renewal petition, the opposition comment, and the record from the previous rulemaking for this exemption, the Office concludes that the exemption may be renewed by relying on the prior record. DVD CCA and AACS LA are correct that the **Register** concluded in 2021 that ''there are no existing large-scale libraries of digital motion pictures available for text and data mining.'' [59] Contrary to the opposition's assertion, however, the **Register** did not find that licensed text and data mining products were ''nonexistent.'' [60] Opponents of the exemption, including from DVD CCA and AACS LA, asserted in the previous rulemaking that ''[i]n fact, licenses are available'' for text and data mining.[61] For example, the Motion Picture Association, Alliance for Recorded Music, and Entertainment Software Association, filed a joint submission arguing that an exemption was unnecessary because ''copyright owners of motion pictures already license other educational uses, such as remote streaming, and could potentially license the uses at issue.'' [62] Ultimately, the Office concluded that while there may have been a ''nascent, but growing'' market for licenses,[63] proponents were unable to obtain the ''large-scale'' licenses they claimed were needed for the quantity of audiovisual works necessary to engage in text and data mining.[64] The statement in the current renewal petition that ''licensed products do not allow researchers to license the full array of texts and films that are needed to engage in the research they seek to do'' [65] is thus a summary of the previous rulemaking record; not an admission that the relevant facts have changed. For this reason, the opposition filed by DVD CCA and AACS LA does not preclude renewal of this exemption.[66]

Based on the information provided in the renewal petition and the lack of sufficient opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

J. Literary Works—Text and Data Mining—Scholarly Research and Teaching

Authors Alliance, AAUP, and LCA also jointly petition to renew the

[52] Authors Alliance, AAUP & LCA AV Text and Data Mining Renewal Pet.

[53] *Id.* at 3. Additionally, the petition described how John Bell, Director of the Data Experiences and Visualizations Studio and Digital Humanities Program Manager at Dartmouth Research Computing, uses the exemption in his ''Deep Screens XR Project,'' which ''extracts video files from 800+ DVDs of commercial narrative films, stores those videos in a secure compute environment, and processes them using machine learning-based methods to establish 3D body pose data on the actors in those films.'' *Id.*

[54] *Id.*

[55] *Id.* at 4

[56] *Id.*

[57] DVD CCA & AACS LA AV Text and Data Mining Opp. at 2, 3 n.1 (quoting 2021 Recommendation at 119).

[58] *Id.* at 3.

[59] 2021 Recommendation at 119.

[60] DVD CCA & AACS LA AV Text and Data Mining Opp. at 2.

[61] 2021 DVD CCA & AACS LA Class 7 Opp. at 14–15 (pointing to testimony by Professor Lauren Tilton as ''suggesting research groups need financial resources to license [ ] works'' for text and data mining but as ''not say[ing] that licenses are not available, that rightsholders are unwilling to license the works, or even that the fees for such licenses are unreasonable'').

[62] 2021 Joint Creators Class 7 Opp. at 6.

[63] 2021 Recommendation at 112–13 (quoting 2021 Ass'n of American Publishers Class 7 Opp. at 9–10).

[64] *See id.* at 119 (''For researchers interested in studying motion pictures, there are no existing large-scale libraries of digital motion pictures available for text and data mining.''); *see also* 2021 Hearing Tr. at 415:22–416:07 (Apr. 7, 2021) (Professor David Bamman, University of California, Berkeley) (stating that ''licensing for movies'' was a problem for text and data mining because such activities could not be ''carr[ied] out if there's any single studio that doesn't allow the licenses for those terms'').

[65] Authors Alliance, AAUP & LCA AV Text and Data Mining Renewal Pet. at 4.

[66] The Office also notes that the opposition did not provide affirmative evidence of ''new legal or factual developments that implicate 'the reliability of the previously-analyzed administrative record,' '' as required by the Notice of Inquiry. 2023 NOI at 37488 (quoting *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works,* 85 FR 65293, 65295 (Oct. 15, 2020)). As the Office explained in June, ''[u]nsupported conclusory opinion and speculation'' will ''not be enough'' for the Office ''to refuse to recommend renewing an exemption it would have otherwise recommended in the absence of any opposition.'' *Id.* It is not enough to point to a single sentence offered by renewal petitioners arguing that the record remains unchanged.

exemption for text and data mining of literary works that were distributed electronically by researchers affiliated with a nonprofit institution of higher education, or at the direction of such researchers, for the purpose of scholarly research and teaching (codified at 37 CFR 201.40(b)(5)).[67] No oppositions were filed against renewal.

The petition largely echoes the same petitioners' joint petition for text and data mining of audiovisual works. Petitioners state that they ''have continued to work with researchers, . . . many of whom are now actively relying on the TDM exemption in their research or developing plans to do so in the very near future.'' [68] For example, they point to Professor Lee's use of the exemption to research depictions of climate change, where he ''build[s] a corpus of novels . . . to then conduct text and data mining, searching for climate change markers across those materials.'' [69] Because researchers are actively relying on the current exemption, and because ''there are no material changes in facts, law, technology, or other circumstances'' from the previous rulemaking, petitioners seek to renew the exemption in this cycle.[70]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

K. Literary Works—Assistive Technologies

The American Council of the Blind (''ACB''), American Foundation for the Blind (''AFB''), HathiTrust, and LCA jointly petition to renew the exemption for literary works or previously published musical works that have been fixed in the form of text or notation, distributed electronically, whose technological measures interfere with assistive technologies (codified at 37 CFR 201.40(b)(6)).[71] No oppositions were filed against renewal.

The petition provides evidence regarding the continuing need and justification for the exemption stating that individuals who are blind, visually impaired, or print disabled are significantly disadvantaged with respect to obtaining accessible e-book content because TPMs interfere with the use of assistive technologies.[72] Specifically, petitioners assert that ''many e-books have built-in security software that prevents purchasers and other third parties from utilizing them outside of publisher-designated e-book reader platforms.'' [73] Petitioners also note that the record underpinning the exemption ''has stood and been re-established in the past seven triennial reviews dating back to 2003'' and that the ''accessibility of e-books is frequently cited as a top priority'' by its members.[74] Finally, they demonstrate personal knowledge of and experience with the assistive technology exemption, as organizations that have participated in past rulemaking proceedings regarding this exemption and advocate for individuals with print disabilities.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

L. Literary Works—Medical Device Data

The Coalition of Medical Device Patients and Researchers petition to renew the exemption covering access to patient data on medical devices or monitoring systems (codified at 37 CFR 201.40(b)(7)).[75] No oppositions were filed against renewal.

The petition states that patients continue to need access to data output from their medical devices to manage their health and react to their medical data in real-time, which the current exemption facilitates.[76] One member of the Coalition, who has personal knowledge of and experience with this exemption through participation in past rulemakings, attests that he needed access to the data output from his medical device.[77] Another member describes how an inability to get her defibrillator interrogated by an authorized representative within a three-day window ''potentially put[ ] her health at serious risk.'' [78]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

M. Computer Programs—Unlocking

The Institute of Scrap Recycling Industries, Inc. (''ISRI'') petitions to renew the exemption for computer programs that operate wireless devices, to allow connection of the device to an alternative wireless network (''unlocking'') (codified at 37 CFR 201.40(b)(8)).[79] No oppositions were filed against renewal.

The petition offers evidence of the continuing need and justification for the exemption by explaining that ISRI's members continue to receive wireless products that are locked to a particular wireless carrier.[80] Moreover, ISRI notes that the number of 5G-enabled devices has continued to grow since the previous rulemaking, meaning that there are more devices that may require unlocking for the reasons discussed in previous rulemakings.[81] For example, ISRI states that its members continue to purchase or acquire donated cell phones, tablets, and other wireless devices and try to reuse them, but that wireless carriers still lock devices to prevent them from being used on other carriers.[82] ISRI has personal knowledge of and experience with this exemption because it represents companies that rely on the ability to unlock cellphones and has participated in ''several cycles'' of triennial rulemakings addressing device unlocking.[83]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

N. Computer Programs—Jailbreaking

The Office received multiple petitions to renew the four exemptions that permit enabling electronic devices to interoperate with or to remove software applications (''jailbreaking'') (codified at 37 CFR 201.40(b)(9)–(12)).[84] No oppositions were filed against renewal.

[67] Authors Alliance, AAUP & LCA LW Text and Data Mining Renewal Pet.

[68] *Id.* at 3.

[69] *Id.*

[70] *Id.* at 4.

[71] ACB, AFB, HathiTrust & LCA Assistive Technologies Renewal Pet.

[72] *Id.* at 3.

[73] *Id.*

[74] *Id.* at 3, 4.

[75] Coalition of Medical Device Patients and Researchers Medical Devices Renewal Pet.

[76] *Id.* at 3, 4.

[77] *Id.* at 3.

[78] *Id.*

[79] ISRI Unlocking Renewal Pet.

[80] *Id.* at 3.

[81] *Id.* The petition also notes that the increased number of devices does not implicate the reliability of the factual record, as new devices continue to use modems by a single chipset vendor—Qualcomm—which was the basis for the Office's expansion of this exemption to all wireless devices in the last rulemaking. *See* 2021 Recommendation at 161–63 (explaining that ''proponents have provided sufficient evidence for the Register to conclude that the 2015 fair use analysis applies with equal force to unlocking all types of wireless devices'' because most wireless devices in the United States use modems manufactured by Qualcomm).

[82] ISRI Unlocking Renewal Pet. at 3.

[83] *Id.*

[84] These exemptions permit circumvention for the purpose of jailbreaking (1) smartphones and other

Continued

The renewal petitions provide evidence of the continuing need and justification for the four jailbreaking exemptions. Regarding smartphones and other portable all-purpose mobile computing devices specifically, EFF asserts that they ''spoke to many device users who currently rely on the jailbreaking exemption and anticipate continuing to rely on the exemption in the future'' for uses such as installing an alternative operating system, keeping older devices functional, and customizing application functionality.[85] For smart TVs, SFC asserts that ''the majority of Smart TV platforms ship to the consumer in 'locked' formats, which prevent users from loading third-party software to enable interoperability.'' [86] For voice assistant devices, EFF points to voice assistant devices, such as the Lenovo smart display, that are no longer supported but whose users wish to expand their functionality and install updated software.[87] And for routers, SFC states that based on its observations, there is a continued need to install alternative firmware and security updates to networking devices.[88]

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of these exemptions are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

O. Computer Programs—Repair of Motorized Land Vehicles, Marine Vessels, or Mechanized Agricultural Vehicles or Vessels

Both iFixit and MEMA, The Vehicle Suppliers Association (''MEMA'') filed petitions to renew the exemption for computer programs that control motorized land vehicles, marine vessels, or mechanized agricultural vehicles or vessels for purposes of diagnosis, repair, or modification of the vehicle or vessel function (codified at 37 CFR 201.40(b)(13)).[89] No oppositions were filed against renewal.

Both petitions attest that the current exemption remains necessary. For example, MEMA states that ''seemingly every year vehicle computer programs become more important and essential to today's motor vehicles'' and that its membership ''continues to see firsthand that the exemption is helping protect consumer choice and a competitive market, while mitigating risks to intellectual property and vehicle safety.'' [90] iFixit states ''the software measures manufacturers deploy for the purpose of controlling access to vehicle software . . . prevent[s] consumers and independent repair shops from lawfully diagnosing, maintaining, repairing, and upgrading their vehicles.'' [91] Both petitioners have personal knowledge of and experience with this exemption; both have participated in previous rulemakings and either represent or have gathered information from individuals or professionals conducting repairs or businesses that manufacture, distribute, and sell motor vehicle parts.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

P. Computer Programs—Repair of Devices Designed Primarily for Use by Consumers

EFF petitions to renew the exemption for computer programs that control devices designed primarily for use by consumers for diagnosis, maintenance, or repair of the device (codified at 37 CFR 201.40(b)(14)).[92] The Office received one opposition from Author Services, discussed further below.

The petition asserts a for the continuing need and justification for the exemption, stating that ''[m]anufacturers of these devices continue to implement technological protection measures that inhibit lawful repairs, maintenance, and diagnostics, and they show no sign of changing course.'' [93] The petition also reports that the Federal Trade Commission has identified '' 'unjustified software locks, digital rights management, and technological protection measures' as one form of anticompetitive repair restriction,'' and that the few state laws pertaining to the right to repair ''have important gaps,'' such as not encompassing certain devices covered by the current exemption.[94] EFF has personal knowledge of and experience with this exemption due to its prior advocacy for the exemption in past proceedings.

Author Services, an organization that represents the works of L. Ron Hubbard, filed an opposition to renewal of this exemption ''in its present form.'' [95] While Author Services states that it has ''no objection'' with consumers repairing products sold ''in the open market to ordinary consumers,'' it objects to the extent that the exemption may encompass devices that ''can only be purchased and used by someone who possess[es] particular qualifications or has been specifically trained in the use of the device.'' [96] Author Services asserts that the Office did not consider these types of devices when granting the exemption in the previous proceeding, and contends that applying the exemption to such devices undermines manufacturers' abilities to control their software and ''directly contradict[s]'' negotiated licenses.[97]

After reviewing the renewal petition, the opposition comment, and the record from the previous rulemaking, the Office concludes that the exemption may be renewed by relying on the prior record. Author Services' opposition is limited to devices available ''only'' to individuals with qualifications and training, and they therefore would not qualify as ''primarily designed for use by consumers'' within the scope of the existing exemption.[98] This exemption was crafted to cover consumer devices because proponents in the previous rulemaking had shown ''common characteristics such that users of the proposed exemption are likely to be similarly situated.'' [99] In its prior rulemaking, the Office declined to recommend an exemption covering commercial and industrial devices because it was ''unclear'' from the record whether they shared the same common traits.[100] The devices described

portable all-purpose computing devices, (2) smart televisions, (3) voice assistant devices, and (4) routers and dedicated networking devices. *See* Electronic Frontier Foundation (''EFF'') Smartphone and Portable All-Purpose Mobile Computing Device Jailbreaking Renewal Pet.; NMR Smartphone and Portable All-Purpose Mobile Computing Device Jailbreaking Renewal Pet.; EFF Smart TVs Jailbreaking Renewal Pet.; Software Freedom Conservancy (''SFC'') Smart TVs Jailbreaking Renewal Pet.; EFF Voice Assistant Devices Jailbreaking Renewal Pet.; SFC Routers and Dedicated Network Devices Jailbreaking Renewal Pet.

[85] EFF Smartphone and Portable All-Purpose Mobile Computing Device Jailbreaking Renewal Pet. at 3.

[86] SFC Smart TVs Jailbreaking Renewal Pet. at 3.

[87] EFF Voice Assistant Devices Jailbreaking Renewal Pet. at 3.

[88] SFC Routers and Dedicated Network Devices Jailbreaking Renewal Pet. at 3.

[89] iFixit Vehicle or Vessel Repair Renewal Pet.; MEMA Vehicle or Vessel Repair Renewal Pet.

[90] MEMA Vehicle or Vessel Repair Renewal Pet. at 3.

[91] iFixit Vehicle or Vessel Repair Renewal Pet. at 3.

[92] EFF Device Repair Renewal Pet.

[93] *Id.* at 3.

[94] *Id.* (quoting Federal Trade Commission, Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers 1 (2021), *https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-repair-restrictions-imposed-manufacturers-sellers*).

[95] Author Services Device Repair Opp. at 1.

[96] *Id.* at 1–2.

[97] *Id.* at 2.

[98] 37 CFR 201.40(b)(14) (limiting the exemption to ''a lawfully acquired device that is primarily designed for use by consumers'').

[99] 2021 Recommendation at 197.

[100] *Id.*

by Author Services appear to fall into the latter category, and therefore the opposition does not show that the previous rulemaking record is no longer reliable.

Based on the information provided in the renewal petition and the lack of opposition to renewal, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

Q. Computer Programs—Repair of Medical Devices and Systems

Five organizations filed petitions to renew the exemption to access computer programs that are contained in and control the functioning of medical devices or systems, and related data files, for diagnosis, maintenance, or repair (codified at 37 CFR 201.40(b)(15)).[101] The Office received three comments opposing renewal, discussed further below.

Four of the petitions provide evidence of the continuing need and justification for the exemption.[102] For example, Avante states that ''the use of TPMs in medical systems and devices is widespread among the types of systems and devices'' and that manufacturers ''have developed new systems that further restrict access to use of necessary software tools.'' [103] TTG Imaging Solutions asserts that the exemption is ''crucial to ensure the availability, affordability, and timely repair of medical devices, which directly impacts patient care and healthcare accessibility.'' [104] And both Metropolis International and TriMedx testify that they relied on the current exemption to refurbish and repair medical systems.[105] The petitioners have personal knowledge of and experience with this exemption; each either repairs, maintains, services, or sells medical systems and devices for entities in the healthcare industry.

The Office received opposition comments from the nonprofit American Consumer Institute (''ACI''), the Medical Imaging & Technology Alliance (''MITA''),[106] and Philips North America, LLC (''Philips'').[107] Opponents assert that the repair exemption ''undermines the maintenance and repair standards laid out by the U.S. Food Drug Administration (FDA) for the equipment employed in patient care'' because independent servicers conducting repairs are ''neither regulated nor monitored'' by the FDA.[108] MITA further asserts that ''Congress and the FDA have announced new policies on medical device cybersecurity that directly conflict with the 2021 Exemption.'' [109] In addition, MITA and Philips both argue that the Supreme Court's recent decision in *Andy Warhol Found. for the Visual Arts* v. *Goldsmith* (*Warhol*) [110] constitutes a new legal development that undermines the validity of the previous rulemaking's analysis due to the Court's holding that commercial, non-transformative uses are, in general, less likely to qualify as fair.[111] As applied to medical device repair, MITA and Philips contend that because the repair services at issue can be and are commercialized, with petitioners and others similarly situated profiting from the use of manufacturers' software to repair devices, this weighs against fair use.[112] We address each of these arguments below.

Opponents' arguments concerning FDA regulation of medical devices were raised and addressed in the last rulemaking, and therefore are not evidence that the factual or legal situation justifying the exemption has changed.[113] During the last rulemaking, the FDA submitted comments in which the agency expressed no objection to the proposed exemption to allow circumvention of TPMs on medical devices for repair-related purposes.[114] In its comments, the FDA pointed to its 2018 report on independent medical device repair in which it ''concluded that the continued availability of ISOs to service and repair medical devices is critical to the functioning of the healthcare system in the United States.[115] Similarly, the FDA indicated that it ''does not share [opponents'] view that an exemption from liability under 17 U.S.C. 1201 for circumvention conducted solely for the purpose of diagnosis, maintenance, or repair of medical devices would necessarily and materially jeopardize the safety and effectiveness of medical devices in the United States with respect to cybersecurity.'' [116] Although the FDA

[101] *See* Avante Health Solutions, Avante Diagnostic Imaging, Avante Ultrasound (collectively ''Avante'') Medical Device Repair Renewal Pet.; Crothall Facilities Management, Inc. (''Crothall'') Medical Device Repair Renewal Pet.; Metropolis Int'l Medical Device Repair Renewal Pet.; TriMedx Holdings, LLC (''TriMedx'') Medical Device Repair Renewal Pet.; TTG Imaging Solutions, LLC (''TTG Imaging Solutions'') Medical Device Repair Renewal Pet.

[102] A fifth petition, submitted by Crothall, did not meet the Office's requirements for renewal petitions. While the Office requires ''a brief explanation summarizing the basis for claiming a continuing need and justification for the exemption,'' 2023 NOI at 37488, Crothall's petition contains only two brief sentences stating that is ability to service medical devices ''can be impacted'' by software restrictions. *See* Crothall Medical Device Repair Renewal Pet. at 3 (''Crothall's ability to service a device without using the installed software and data files can be impacted by software access. Access to software error logs is a critical function in the optimal diagnosis, maintenance, and repair of devices.''). Because other petitioners provide the required information for renewal, Crothall's petition is not discussed further.

[103] Avante Medical Device Repair Renewal Pet. at 3. Avante proposed this exemption in the previous rulemaking and was referred to as ''Transtate'' in the Register's Recommendation. *See* 2021 Register's Recommendation at 190.

[104] TTG Imaging Solutions Medical Device Repair Renewal Pet. at 3.

[105] *See* Metropolis Int'l Medical Device Repair Renewal Pet. at 3 (testifying that it is a dealer of refurbished medical imaging systems and has faced legal threats for its repair activities); TriMedx Medical Device Repair Renewal Pet. at 3 (testifying that the current exemption ''allows TRIMEDX and other third-party servicers to overcome, and in some cases, avoid the anti-competitive tactics of the [original equipment manufacturers], while ensuring third-party service organizations have the necessary access to medical devices and information to repair and maintain the equipment on behalf of hospital customers'').

[106] MITA is currently challenging the original adoption of exemption for medical devices and systems repair. *See MITA* v. *Library of Congress,* 2023 WL 2387760 (D.D.C. Mar. 7, 2023). The district court granted summary judgment in favor of the Library of Congress, and the case is now on appeal before the D.C. Circuit.

[107] ACI Medical Device Repair Opp.; MITA Medical Device Repair Opp.; Philips Medical Device Repair Opp.

[108] ACI Medical Device Repair Opp. at 1–2.

[109] MITA Medical Device Repair. Opp. at 6 (citing U.S. Food & Drug Admin., Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions (Sept. 2023), *https://www.fda.gov/media/119933/download;* Consolidated Appropriations Act, 2023, sec. 3305, 136 Stat. 4459, 5832–34).

[110] 143 S. Ct. 1258 (2023).

[111] MITA Medical Device Repair Opp. at 2–6; Philips Medical Device Repair Opp. at 5–8.

[112] MITA Medical Device Repair Opp. at 5–6; Philips Medical Device Repair Opp. at 6–8; *Warhol,* 143 S. Ct. at 1275 (explaining that while ''the commercial nature of the use is not dispositive,'' ''it is relevant'' and ''is to be weighed against the degree to which the use has a further purpose or different character'').

[113] *See* 2021 Recommendation at 228–29 (noting that opponents argued ''that the potential consequences of unauthorized circumvention on patient safety should factor into if not decisively tilt the analysis against an exemption'' and concluding that those concerns ''while significant, do not provide a basis for denying the requested exemption'').

[114] *See id.* at 229 (citing Letter from Suzanne B. Schwartz, Dir., Office of Strategic P'ships & Tech. Innovation, FDA, to Kevin R. Amer, Acting Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office (Aug. 13, 2021)).

[115] Letter from Suzanne B. Schwartz, Dir., Office of Strategic P'ships & Tech. Innovation, FDA, to Kevin R. Amer, Acting Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office at 3 (Aug. 13, 2021) (citing U.S. Food & Drug Admin., FDA Report on the Quality, Safety, and Effectiveness of Servicing of Medical Devices 23 (May 2018), *https://www.fda.gov/media/113431/download*).

[116] Letter from Suzanne B. Schwartz, Dir., Office of Strategic P'ships & Tech. Innovation, FDA, to Kevin R. Amer, Acting Gen. Counsel & Assoc.

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indicated that it was ''evaluating [its] approach to cybersecurity and medical device servicing'' and, as MITA points out, has since issued updated cybersecurity guidance, and although Congress has imposed additional cybersecurity requirements on medical device manufacturers, these developments do not change the Office's 1201 analysis.

The Office addressed these same concerns in the last rulemaking, stating that ''the Register generally does not consider other regulatory schemes as part of the adverse effects analysis because the focus of this proceeding is on copyright-related considerations.'' [117] Further, a user availing themselves of the temporary exemption for medical device repair is not absolved from noncompliance with other laws and regulations, including any promulgated by the FDA. Accordingly, the Office concludes that opponents' renewed safety and cybersecurity arguments do not demonstrate that the relevant legal or factual circumstances justifying the exemption have changed.

As to the argument that the decision in *Warhol* constitutes a change in the law that supports refusal of the renewal petition, MITA and Philips point to the Court's analysis of the first fair use factor, in which it explained that the ''central'' question is ''whether and to what extent the use at issue has a purpose or character different from the original.'' [118] They argue that medical device repair is not transformative under the first factor because the device's software is ''not transformed—at all—during or after the maintenance or repair work'' and thus has the ''the exact same purpose—to enable the device to function.'' [119]

These fair use arguments assert are largely identical to those raised by opponents, including MITA and Philips, in the prior rulemaking.[120] They were rejected in the 2021 Register's Recommendation, which found that ''opponents overstate the significance of the commercial purpose element to the fair use analysis'' and that repair of medical devices and equipment, like other forms of repair, was likely transformative under the first fair use factor.[121] The Recommendation explained that repair ''supports—rather than displaces—the purpose of the embedded programs that control the device.'' [122] In other words, the purpose of the use of software in repair is to render a non-functional device functional again, while the original purpose of the software is to operate a device that functions as designed. Because this analysis is part of the record that justified recommending the exemption in 2021, opponents must show that the decision in *Warhol* constitutes intervening legal precedent that renders the Office's prior fair use analysis no longer valid.

After reviewing the opposition comments, the record from the previous rulemaking, and the Supreme Court's decision, the Office concludes that its fair use analysis for repair of medical devices and systems remains sound. The *Warhol* decision does not, as MITA and Philips suggest, substantially change how the Office would analyze the particular uses at issue—diagnosis, maintenance, and repair of medical devices and systems—under the first factor. The opposition comments point to language in the Court's decision explaining that uses that ''share the same or highly similar purposes'' as the copyrighted work weigh against fair use.[123] But this statement echoes the Court's earlier finding in *Campbell* v. *Acuff-Rose Music, Inc.* that the first factor focuses on whether a use ''supplant[s] the original'' or ''instead add something new, with a further purpose or different character.'' [124] It also mirrors the Court's discussion in *Google LLC* v. *Oracle America, Inc.,* where it cited *Campbell* and explained that the first factor asks whether the use ''add[s] something new, with a further purpose or different character,'' and that ''the word 'transformative' [ ] describe[s] a copying use that adds something new and important'' and is therefore more likely to be fair.[125] The *Warhol* opinion did not overrule these prior decisions, but rather built upon them.[126] Nothing in the opinion changes the Office's evaluation of the differences in purpose between the uses covered by the exemption and the intended use of the software. Accordingly, the decision is not a basis to question the reliability of the 2021 rulemaking record that resulted in the exemption for repair of medical devices and systems.

Based on the information provided in the renewal petitions and the lack of evidence in the opposition comments that the factual or legal record has changed in relevant ways, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

R. Computer Programs—Security Research

Multiple organizations and security researchers submitted four petitions to renew the exemption permitting circumvention for purposes of good-faith security research (codified at 37 CFR 201.40(b)(16)).[127] No oppositions

Register of Copyrights, U.S. Copyright Office at 3 (Aug. 13, 2021) (citing U.S. Food & Drug Admin., Cybersecurity in Medical Devices: Challenges and Opportunities (June 2021), *https://www.fda.gov/media/150144/download*).

[117] *See* 2021 Recommendation at 229; *see also id.* at 228–29 (noting that opponents argued ''that the potential consequences of unauthorized circumvention on patient safety should factor into if not decisively tilt the analysis against an exemption'' and concluding that those concerns ''while significant, do not provide a basis for denying the requested exemption'').

[118] MITA Medical Device Repair Opp. at 3–4 (quoting *Warhol,* 143 S. Ct. at 1274–75); *see also* Philips Medical Device Repair Opp. at 5–6 (quoting *Warhol,* 143 S. Ct. at 1273, where the Court held the first fair use factor focuses on ''whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism'').

[119] MITA Medical Device Repair Opp. at 4 (emphasis omitted).

[120] In the 2021 rulemaking, MITA argued there was ''nothing transformative about an unregulated [Independent Service Organization] accessing and copying medical imaging device software and materials for a commercial purpose'' (2021 MITA Class 12 Opp. at 9), and Philips argued that repair of medical devices and equipment was not fair use because it is ''commercial—and thus, presumptively unfair'' and because repair does ''not transform the copyrighted material,'' such as by modifying the software contained in medical devices and systems (2021 Philips Class 12 Opp. at 8).

[121] *See* 2021 Recommendation at 208–09 (citing 2015 Recommendation at 234–35 (concluding that repair of vehicles was likely to be transformative because ''proposed uses for diagnosis and repair would presumably enhance the intended use of [the embedded] computer programs'')).

[122] *Id.* at 201 (quoting U.S. Copyright Office, Software-Enabled Consumer Products 40 (2016), *https://www.copyright.gov/policy/software/software-full-report.pdf*). And the Office's previous fair use analyses of repair explained, ''a finding of fair use is not necessarily precluded when the new use coincides generally with the original use of a work.'' 2015 Recommendation at 234.

[123] MITA Medical Device Repair Opp. at 4 (quoting *Warhol,* 143 S. Ct. at 1277).

[124] 510 U.S. 569, 579 (1994). Further, to the extent to which opponents read *Campbell* to require that a new use add ''new expression, meaning or message'' to be considered fair, *see* MITA Medical Device Repair Opp. at 4, the Court in *Warhol* clarified that ''meaning or message [i]s simply relevant to whether the new use serve[s] a purpose distinct from the original, or instead supersede[s] its objects,'' not determinative or required. *Warhol,* 143 S. Ct. at 1282–83 (citing *Campbell,* 510 U.S. at 579).

[125] 141 S. Ct. 1183, 1202–03 (2021) (quoting *Campbell,* 510 U.S. at 579).

[126] For this reason, the Eleventh Circuit recently denied a motion for rehearing in a case involving fair use decided prior to the *Warhol* opinion—that court concluded that the intervening Supreme Court opinion did not affect its analysis of transformativeness under the first fair use factor or the ''balance of the four factors.'' *Apple Inc.* v. *Corellium, Inc.,* No. 21–12835, 2023 U.S. App. LEXIS 22252, at *3 (11th Cir. Aug. 23, 2023) (denying petition for rehearing and rehearing en banc).

[127] Blaze & Bellovin Security Research Renewal Pet.; Halderman & Green Security Research Renewal Pet.; MEMA Security Research Renewal Pet.; SFC Security Research Renewal Pet.

were filed against renewal, and one comment was received in support filed by ''A Group of Hackers at DEF CON.'' [128]

The petitions include statements regarding the continuing need and justification for the exemption based on personal knowledge. For example, a petition from Professor J. Alex Halderman and Associate Professor Matthew D. Green states that security research ''play[s] a vital role in [cybersecurity],'' as ''vulnerability disclosure and remediation are key to securing existing infrastructure.'' [129] The petition from Professors Matt Blaze and Steven Bellovin asserts that the exemption remains necessary because in the past three years ''one of us has continued to receive threats of prospective litigation from copyright holders in connection with his security research on software in voting systems.'' [130] Additionally, the vehicle suppliers association MEMA states that its membership ''has seen firsthand that the exemption is helping encourage innovation in the automotive industry while mitigating risks to intellectual property and vehicle safety.'' [131] Finally, SFC asserts that the exemption continues to be used by ''privacy and security researchers who investigate and publish information about privacy flaws in computing devices; and individual consumers and hobbyists who wish to prevent their private data from being disclosed by the devices they own.'' [132]

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

S. Computer Programs—Video Game Preservation

The Software Preservation Network (''SPN'') and LCA jointly petition to renew the exemption for individual play by gamers and preservation of video games by a library, archives, or museum for which outside server support has been discontinued, and preservation by a library, archives, and museum, of discontinued video games that never required server support (codified at 37 CFR 201.40(b)(17)).[133] No oppositions were filed against renewal, and one individual filed a comment in support of the petition.[134]

The petition states that libraries, archives, and museums continue to need the exemption to preserve video games, which is ''an ongoing [and] iterative process.'' [135] For example, it cites The Strong National Museum of Play, which has a ''substantial number of TPM-encumbered video games in its collections that will need preservation treatment that requires circumvention in the coming years.'' [136] In addition, the petition asserts that video game collection librarians ''report a similar ongoing need,'' which ''has become a crucial tool in their ongoing efforts to save digital game culture before it disappears.'' [137] The petitioners have personal knowledge of and experience with this exemption through their past participation in the triennial rulemaking proceedings, as well as through their representation of members that have relied on this exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

T. Computer Programs—Software Preservation

SPN and LCA jointly petition to renew the exemption for computer programs, other than video games, for the preservation of computer programs and computer program-dependent materials by libraries, archives, and museums (codified at 37 CFR 201.40(b)(18)).[138] No oppositions were filed against renewal, and one individual supported the petition.[139]

Petitioners state that libraries, archives, and museums continue to need the exemption to preserve and curate software and materials dependent on software, which is ''an ongoing [and] iterative process.'' [140] For example, a software preservation analyst found ''remote access to digital collections [a]s an increasingly explicit directive to fulfill cultural heritage institutions' missions to support research, analysis, and other scholarly re-use of the historical record (and to do so equitably and inclusively).'' [141] The petition also asserts that SPN's members are providing an off-site researcher with ''access to born-digital materials using remote access to legacy software.'' [142] The petitioners have personal knowledge of and experience with this exemption through their past participation in the triennial rulemaking proceedings, as well as through their representation of members that have relied on this exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

U. Computer Programs—3D Printing

Michael Weinberg petitions to renew the exemption for computer programs that operate 3D printers to allow use of alternative material (codified at 37 CFR 201.40(b)(19)).[143] No oppositions were filed against renewal.

The petition states that there is a continuing need and justification for the exemption, and the petitioner has personal knowledge of and experience with this exemption as the individual who participated in previous rulemakings. Mr. Weinberg declares that he is a member of the 3D printing community and has been involved with this exemption request during each cycle it has been considered by the Office.[144] In addition, he states that while 3D printers ''continue to use TPMs to limit the types of materials used in printers,'' since the last rulemaking proceeding, there has been ''an expansion of third-party materials available for 3D printers'' due to the current exemption.[145]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

V. Computer Programs—Copyright License Investigation

SFC petitions to renew the exemption for computer programs, for the purpose of investigating potential infringement of free and open source computer

[128] A Group of Hackers at DEFCON Security Research Supp. (noting that the exemption has led to ''the creation of software to fix vulnerabilities, as well as papers and presentations on security research'').

[129] Halderman & Green Security Research Renewal Pet. at 3.

[130] Blaze & Bellovin Security Research Renewal Pet. at 3.

[131] MEMA Security Research Renewal Pet. at 3.

[132] SFC Security Research Renewal Pet. at 3.

[133] SPN & LCA Abandoned Video Game Renewal Pet.

[134] Burt Abandoned Video Game Supp.

[135] SPN & LCA Abandoned Video Games Renewal Pet. at 3.

[136] *Id.*

[137] *Id.*

[138] SPN & LCA Software Preservation Renewal Pet.

[139] Burt Software Preservation Supp.

[140] SPN & LCA Software Preservation Renewal Pet. at 3.

[141] *Id.*

[142] *Id.*

[143] Weinberg 3D Printers Renewal Pet.

[144] *Id.* at 3.

[145] *Id.*

programs (codified at 37 CFR 201.40(b)(20)).[146] No oppositions were filed against renewal.

The petition argues that there is a continuing need and justification for the exemption, including by discussing how technological protection measures, such as encryption, ''prevent[ ] the investigation of computer programs'' within various devices that use free and open source software (''FOSS'') to operate.[147] The petition also evidences personal knowledge of the exemption. For example, it describes how SFC is informed of suspected non-compliance with the FOSS license, which it investigates on behalf of its members. Due to the ''pervasive[ness]'' of infringement through license non-compliance, however, ''SFC can only pursue a fraction of the suspected infringements reported to it.'' [148] SFC also participated in the previous rulemaking and provided the rulemaking record that led to the Office recommending the exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

III. Analysis and Classification of Proposed New or Expanded Exemptions

In addition to petitions to renew existing exemptions, the Office received eleven petitions for new or expanded exemptions.[149] The Office has reviewed and consolidated related and/or overlapping proposed exemptions to simplify the rulemaking process and encourage joint participation among parties with common interests (although collaboration is not required).[150] This has resulted in seven proposed classes of works.

Each proposed class is briefly described below, and additional information can be found in the underlying petitions posted on the Office website. As explained in the NOI, the proposed classes represent '' 'only a starting point for further consideration in the rulemaking proceeding,' and will be subject to 'further refinement based on the record.' '' [151] The description of each class also includes preliminary legal and factual areas of interest that the Office hopes commenters will address in their submissions. These early observations are offered without prejudice to the Office's ability to raise other questions or concerns at later stages of the proceeding, and commenters should offer all legal arguments and evidence they believe necessary to create a complete record. Finally, the Office reminds exemption proponents that ''where an exemption request resurrects legal or factual arguments that have been previously rejected, the Office will continue to rely on past reasoning to dismiss such arguments in the absence of new information.'' [152]

Proposed Class 1: Audiovisual Works—Noncommercial Videos

OTW filed a renewal petition requesting that the exemption for circumvention of access controls protecting motion pictures on DVDs, Blu-ray discs, and digitally transmitted video for purposes of criticism and comment, for use in noncommercial videos be amended to align with the language of the 2010 exemption for clarity.[153] OTW contends that ''[t]he complexity of the current [exemption] provisions substantially increases the difficulty of communicating and implementing the exemptions in practice,'' and that reverting to the 2010 language would not expand the scope of the existing exemption, but merely help ''clarify [it] for ordinary users.'' [154] Since 2010, the exemption has been expanded to encompass works on a Blu-ray disc or received via a digital transmission, and to clarify it includes ''videos produced for a paid commission if the commissioning entity's use is noncommercial.'' [155]

OTW made the same request to amend the language of the exemption in the previous rulemaking.[156] The Office ultimately concluded that modification of the language was unnecessary,[157] based on statements by OTW to that effect.[158] The Office seeks comment on whether there are legal or factual circumstances that have changed and warrant altering the determination from the prior rulemaking.

Proposed Class 2: Audiovisual Works—Online Learning

Peter Decherney, Sarah Banet-Weiser, Shiv Gaglani, and SCMS (collectively ''Joint Educators'') petition to expand the existing exemption for circumvention of access controls protecting motion pictures on DVDs, Blu-ray discs, and digitally transmitted video for educational purposes in massive open online courses (''MOOCs'') by faculty and employees acting at the direction of faculty of accredited nonprofit educational institutions.[159] In their petition, Joint Educators request that the exemption be extended to cover other online learning platforms that offer ''supplemental education, upskilling, retraining and lifelong learning,'' such as Khan Academy, LinkedIn Learning, *Osmosis.org,* and *Code.org.*[160] Joint Educators propose allowing ''educators and preparers of online learning materials offered by educational entities to use short excerpts of motion pictures (including television shows and videos) for the purpose of criticism, comment, illustration and explanation in offerings to registered learners of online learning platforms when use of the excerpts will contribute significantly to learning.'' [161] Joint Educators contend that, since the last proceeding, the demand for online learning has ''continued to skyrocket,'' with educational institutions using a variety of online learning platforms to supplement their curricula.[162] They note that the current exemption for online learning only applies to a limited scope of learning settings (*i.e.,* MOOCs developed at accredited educational institutions).

The Office notes, that in the last two rulemakings, it received proposals to expand the existing exemption for online learning to for-profit entities (including ''online learning platforms'') and unaccredited educational institutions. During those rulemakings, the Office considered and ultimately recommended against these proposals.[163] The Office seeks comment on whether any changed legal or factual circumstances warrant altering that

[146] SFC Copyright License Investigation Renewal Pet.

[147] *Id.* at 3.

[148] *Id.*

[149] The Office received ten petitions for new classes. As discussed above, the Office has treated OTW's renewal petition proposing amended regulatory language as the eleventh petition.

[150] 2023 NOI at 37489.

[151] *Id.* (quoting *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works,* 85 FR 37399, 37402 (June 22, 2020).

[152] Section 1201 Study at 147; *see also Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,* 79 FR 55687, 55690 (Sept. 17, 2014).

[153] OTW Class 1 Pet. at 4 (discussing rulemaking cycle that began in 2008 and concluded in 2010).

[154] *Id.*

[155] 37 CFR 201.40(b)(1). *See* 2015 Recommendation at 103–06 (expanding the exemption to include Blu-ray and digital transmission).

[156] *See* 2021 OTW Class 1 Pet.

[157] *See* 2021 Recommendation at 40–42.

[158] *See id.* at 42 (''[W]e actually don't think that any change is necessary'' to the exemption requirement that motion pictures used under the exemption be ''lawfully made and acquired.'' (quoting 2021 Hearing Tr. at 245:21–24 (Apr. 6, 2021) (Betsy Rosenblatt, OTW))).

[159] Joint Educators Class 2 Pet.

[160] *Id.* at 2.

[161] *Id.*

[162] *Id.*

[163] *See* 2021 Recommendation at 49–52; 2018 Recommendation at 53–55.

determination and whether, or to what extent, commenters believe the proposed language should be adopted. As part of this analysis, commenters should discuss the extent to which the evidence submitted in prior rulemakings may be relied upon to support the expansion.

Proposed Classes 3(a): Motion Pictures and 3(b): Literary Works—Text and Data Mining

Authors Alliance, AAUP, and LCA filed two petitions to expand the exemptions for text and data mining on a corpora of motion pictures and literary works for the purpose of scholarly research and teaching.[164] Petitioners propose expanding each exemption to permit ''researchers to share corpora with researchers affiliated with different nonprofit institutions of higher education for purposes of conducting independent text data mining research and teaching, where those researchers are in compliance with the [current] exemption.'' [165] Petitioners explain that, under their petitions, all provisions of the current exemptions would remain the same with the only change being the expansion of the types of users who would have access to motion pictures and literary works.[166]

For reasons of administrative efficiency, the Office has grouped these proposals into one category that encompasses two proposed classes pertaining to motion pictures and literary works, respectively (*i.e.,* Classes 3(a) and 3(b)). Commenters addressing these proposals may submit a single comment addressing both motion pictures and literary works, but the supporting evidence must be sufficient to establish an adverse effect on noninfringing uses with respect to each. To the extent commenters believe the relevant factual and legal issues are similar as to the two classes of works, the supporting comments should describe them in detail. For example, commenters may wish to address the extent to which there is overlap with respect to the types of TPMs applied to these works, the nature of the proposed research activities, the relevant markets for the works, and the availability of potential alternatives to circumvention. Commenters may also wish to discuss whether this exemption should be analyzed as a request to engage in new circumvention activities not permitted by the current exemption or as a modification to post-circumvention limitations, and to what extent the Office's previous analysis of noninfringement and adverse effects apply to this class.

Proposed Class 4: Computer Programs—Generative AI Research

Jonathan Weiss proposes a new exemption to circumvent technological measures that control access to ''copyrighted generative AI models, solely for the purpose of researching biases'' within the models.[167] The proposed exemption would permit sharing the research, techniques, and methodologies that ''expose and address biases,'' and ensure, among other reasons, fairness and transparency within AI models and their development.[168] The petition does not cabin the proposed exemption to a specific set of users, only describing them as ''researchers'' and does not discuss how TPMs prohibit, or are likely to prohibit, researchers from accessing the software within the generative AI models.[169] Instead, Weiss submits three guardrails to prevent misuse of the proposed exemption: the exemption applies only where the ''primary intention is to identify and address biases, and not to exploit them;'' any research ''prioritize[s] data privacy, ensuring that no personal or sensitive data is compromised;'' and researchers should ''actively engage with AI developers and stakeholders to address discovered biases.'' [170]

In general, the Office seeks comment on whether the proposed exemption should be adopted, including any proposed regulatory language. Commenters should describe with specificity the relevant TPMs and whether their presence is adversely affecting noninfringing uses, including identifying whether eligible users may access the software through alternate channels that do not require circumvention and the legal basis for concluding that the proposed uses are likely to be noninfringing.

Proposed Class 5: Computer Programs—Repair

Two organizations jointly petition for an expanded exemption relating to the diagnosis, maintenance, and repair of computer programs that control devices designed primarily for use by consumers.[171] Public Knowledge and iFixit petition for an expansion to ''include commercial industrial equipment such as automated building management systems and industrial equipment (*i.e.,* soft serve ice cream machines and other industrial kitchen equipment).'' [172] The petition includes examples of how ''service passwords and digital locks'' are preventing diagnosing, maintaining, and repairing the software within the devices.[173]

The Office notes that in the last rulemaking, it declined to include commercial and industrial devices and systems within the scope of the proposed repair class due to a lack of evidence of adverse effects for such uses and because ''it [was] not apparent from the record that users of commercial and industrial systems are similarly situated to users of consumer products.'' [174] The Office invites comment on whether users of commercial and industrial equipment are similarly situated to or distinct from users of software-enabled consumer devices; whether commercial and industrial devices and systems can be the basis of an exemption for a single ''class of works;'' whether diagnosis, maintenance, and repair of such devices and systems are likely to be noninfringing uses of their firmware; and whether TPMs are adversely affecting those uses.

Proposed Classes 6(a): Computer Programs and 6(b): Video Games—Preservation

Three petitions seek to expand the current exemptions for preservation of software and video games, and one petition seeks a new exemption for preservation of video games.[175] As with the proposed text and data mining exemptions, the Office has grouped these petitions into a single category encompassing two proposed classes. Commenters addressing these proposals may submit a single comment addressing both computer programs and video games, but the supporting evidence must be sufficient to establish

[164] Authors Alliance, AAUP & LCA Class 3(a) Pet.; Authors Alliance, AAUP & LCA Class 3(b) Pet.

[165] Authors Alliance, AAUP & LCA Class 3(a) Pet. at 2; Authors Alliance, AAUP & LCA Class 3(b) Pet. at 2.

[166] Authors Alliance, AAUP & LCA Class 3(a) Pet. at 2–3; Authors Alliance, AAUP & LCA Class 3(b) Pet. at 2–3.

[167] Weiss Class 4 Pet.

[168] *Id.* at 2.

[169] *Id.*

[170] *Id.* at 3.

[171] Public Knowledge and iFixit Class 5 Pet.

[172] *Id.* at 2.

[173] *Id.*

[174] 2021 Recommendation at 194–98 (''Without a more developed record concerning devices designed primarily for commercial and industrial use, the Register cannot properly evaluate the purported similarities to consumer devices or analyze the claimed adverse effects.'' (citing FTC, Nixing the Fix: An FTC Report to Congress on Repair Restrictions 51 (May 2021), *https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf*)).

[175] SPN & LCA Class 6(a) Pet.; Austin Class 6(b) Pet.; SPN & LCA Class 6(b) Pet.; Sullivan Class 6(b) Pet.

the statutory requirements with respect to each category of works.

SPN and LCA filed a petition to expand the current exemption for preservation of software by eligible libraries, archives, and museums by removing the current requirement that electronic distribution, display, or performance of software be made to ''only . . . one eligible user at a time.'' [176] SPN and LCA and Thomas Sullivan filed petitions to expand the current exemption for preservation of video games by eligible libraries, archives, and museums by removing the current requirement that video games ''not be distributed or made available outside of the physical premises of an eligible [library, archives, or museum].'' [177] Finally, Ken Austin petitions for a new exemption that would permit circumvention by ''individual owners of video games which have DRM (digital rights management) that no longer function[ ] due to incompatibility'' with modern computers' operating systems.[178] Mr. Austin provides an example of the Windows 10 operating system preventing individuals from playing an old video game because the game's technological protection measures are flagged as a security threat.[179]

The Office notes that it has previously considered and rejected many of these requests. In the last rulemaking, it rejected removing the one-user limit on software preservation out of concern with substitution risk,[180] and declined to recommend removing the on-premises limitation for video game preservation.[181] The Office therefore seeks comment on whether there have been new factual or legal developments since the last rulemaking that would support a new recommendation for the preservation exemptions. Separately, it invites comment on the proposed exemption for individuals whose video games are no longer functional due to incompatibility with their computer's operating systems. Specifically, the Office seeks comment on the relevant TPMs and whether their presence is adversely affecting noninfringing uses, including identifying whether eligible users may access the software through alternate channels that do not require circumvention and the legal basis for concluding that the proposed uses are likely to be noninfringing.

Proposed Class 7: Computer Programs—Vehicle Operational Data

MEMA petitions for a new exemption to ''access, store, and share vehicle operational data, including diagnostic and telematics data'' from ''a lawfully acquired motorized land vehicle or marine vessel such as a personal automobile or boat, commercial vehicle or vessel, or mechanized agricultural vehicle or vessel.'' [182] The petition limits circumvention to ''lawful vehicle owners and lessees, or those acting on their behalf.'' [183]

The Office encourages proponents to develop the legal and factual administrative record in their initial submissions, including describing with specificity the relevant TPMs and whether their presence is adversely affecting noninfringing uses, whether eligible users may access such data through alternate channels that do not require circumvention, and the legal basis for concluding that the proposed uses are likely to be noninfringing. In general, the Office seeks comment on whether the proposed exemption should be adopted, including any proposed regulatory language.

IV. Future Phases of the Ninth Triennial Rulemaking

As in prior rulemakings, the Office will solicit public engagement to create a comprehensive record through receipt of written comments, public hearings, post-hearing questions, and *ex parte* meetings. Each future phase of the administrative process is described below.

A. Submission of Written Comments

Parties wishing to address proposed exemptions in written comments should familiarize themselves with the substantive legal and evidentiary standards for the granting of an exemption under section 1201(a)(1), which are described in more detail on the Office's form for submissions of longer comments, available on its website. In addressing factual matters, commenters should be aware that the Office favors specific, ''real-world'' examples supported by evidence over hypothetical observations. In cases where the technology at issue is not apparent from the requested exemption, it is helpful for commenters to describe the TPM(s) that control access to the work and the method of circumvention.

Commenters' legal analysis should explain why the proposal meets or fails to meet the criteria for an exemption under section 1201(a)(1), including, without limitation, why the uses sought are or are not noninfringing as a matter of law. The legal analysis should also discuss statutory or other legal provisions that could impact the necessity for or scope of the proposed exemption. Legal assertions should be supported by statutory citations, relevant case law, and other pertinent authority. In cases where a class proposes to expand an existing exemption, participants should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption. As discussed above, the Office currently is inclined to recommend all but one current temporary exemption for renewal.[184]

To ensure a clear and definite record for each of the proposals, separate submissions must be submitted for each proposed class and not combined. Accordingly, the same party may submit multiple written comments on different proposals. The Office acknowledges that the requirement of separate submissions may require commenters to repeat certain information across multiple submissions, but the Office believes that the administrative benefits of creating a self-contained, separate record for each proposal justify the modest amount of added effort.

The first round of public comment is limited to submissions from proponents (*i.e.,* those parties who proposed new exemptions during the petition phase) and other members of the public who support the adoption of a proposed exemption, as well as any members of the public who neither support nor oppose an exemption but seek only to share pertinent information. Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support.

[176] SPN & LCA Class 6(a) Pet. at 2; 37 CFR 201.40(b)(18).

[177] SPN & LCA Class 6(b) Pet.; Sullivan Class 6(b) Pet.; 37 CFR 201.40(b)(17). Sullivan's petition also proposes an expansion of those permitted to engage in preservation, such as ''[c]olleges, [u]niversities, . . . and any institution dedicated to the preservation of video games.'' Sullivan Class 6(b) Pet. at 2.

[178] Austin Class 6(b) Pet at 2.

[179] *Id.*

[180] 2021 Recommendation at 268–73, 279 (''[T]he inclusion of single user and limited time restrictions will minimize the risk of substitutional use of the software.'' (citing U.S. Copyright Office, Section 108 of Title 17: A Discussion Document of the Register of Copyrights 38–39 (2017), *https://www.copyright.gov/policy/section108/discussion-document.pdf*)).

[181] *See id.* at 271–275, 279; *see also* 2018 Recommendation at 271–75, 278; 2015 Recommendation at 340–44, 351–52.

[182] MEMA Class 7 Pet.

[183] *Id.* at 2.

[184] The Office will not recommend renewal of the current exemption permitting circumvention of video games in the form of computer programs for the purpose of allowing an individual with a physical disability to use alternative software or hardware input methods within 37 CFR 201.40(b)(21).

The second round of public comment seeks comments from members of the public who oppose an exemption. As with the first round, commenters during the second round should present the full legal and evidentiary basis for their opposition. Finally, the third round of public comment will be limited to supporters of particular proposals and those who neither support nor oppose a proposal, who seek to reply to points made in the earlier rounds of comments. Reply comments should not raise new issues, but should instead be limited to addressing arguments and evidence presented by others during prior rounds.

B. Public Hearings

After the three rounds of comments are completed, the Copyright Office will hold virtual public hearings in spring 2024. The hearings will allow for participation by videoconference and will be streamed online. A separate notice providing details about the hearings and how to participate will be published in the **Federal Register** at a later date. The Office will identify specific items of inquiry to be addressed during the hearings.

C. Post-Hearing Questions

As with previous rulemakings, following the hearings, the Office may request additional information with respect to particular classes from rulemaking participants, to supply missing information for the record or otherwise resolve issues that it believes are material to particular exemptions. Such requests for information will take the form of a letter from the Office, will be addressed to individual parties involved in the proposal as to which more information is sought, and will provide a deadline for submission. Responding to such a request will be voluntary. After the receipt of all responses, the Office will post the questions and responses on the Office's website as part of the public record.

D. Ex Parte Communication

In the last two proceedings, in response to stakeholder requests, the Office provided written guidelines under which interested non-governmental participants could request informal communications with the Office during the post-hearing phase of the proceeding. In this proceeding, the Office will permit *ex parte* communications, but participating parties will be required to follow its regulations on *ex parte* communications, codified at 37 CFR 201.1(d) and 205.24.[185] In accordance with the regulations, and similar to the last two proceedings, no *ex parte* communications with the Office regarding this proceeding will be permitted prior to the post-hearing phase.

Dated: October 12, 2023,

Suzanne V. Wilson,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2023–22949 Filed 10–18–23; 8:45 am]

BILLING CODE 1410–30–P

[185] *See* 37 CFR 201.1(d), 205.24.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2022–0707; FRL–9603–01–OAR]

RIN 2060–AV65

Protection of Stratospheric Ozone: Updates Related to the Use of Ozone-Depleting Substances as Process Agents

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes to establish recordkeeping and reporting requirements for uses of ozone-depleting substances as process agents and to update definitions to reflect current practice. Codified recordkeeping and reporting requirements would provide clear and consistent notice each year of information EPA collects, aggregates, and reports as a party to the Montreal Protocol on Substances that Deplete the Ozone Layer; effectively monitor these narrow uses in a more routine and consistent manner under the Clean Air Act; and enhance understanding of emissions of substances harmful to the ozone layer.

DATES: Comments on this notice of proposed rulemaking must be received on or before December 4, 2023. Under the Paperwork Reduction Act (PRA), comments on the proposed information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 20, 2023. Any party requesting a public hearing must notify the contact listed below under **FOR FURTHER INFORMATION CONTACT** by 5 p.m. Eastern Time on October 24, 2023. If a public hearing is held, it will take place on or before November 3, 2023 and further information will be provided at *https://www.epa.gov/ods-phaseout.*

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2022–0707, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *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 operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

You may find the following suggestions helpful for preparing your comments: direct your comments to specific sections of this proposed rulemaking and note where your comments may apply to future separate actions where possible; explain your views as clearly as possible; describe any assumptions that you used; provide any technical information or data you used that support your views; provide specific examples to illustrate your concerns; offer alternatives; and, make sure to submit your comments by the comment period deadline. Please provide any published studies or raw data supporting your position. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*e.g.,* on the web, cloud, or other file sharing system).

EPA recognizes that given the nature of this proposed rulemaking, potentially affected entities may wish to submit Confidential Business Information (CBI) or other confidential information. CBI should not be submitted through *https://www.regulations.gov.* For submission of confidential comments or data, please work with the person listed in the **FOR FURTHER INFORMATION CONTACT** section. 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://www.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: John Feather, U.S. Environmental Protection Agency, Stratospheric Protection Division, telephone number: 202–564–1230; or email address: *feather.john@epa.gov*. You may also visit EPA's website at *https://www.epa.gov/ozone-layer-protection* for further information.

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' ''the Agency,'' or ''our'' is used, we mean EPA. Acronyms that are used in this rulemaking that may be helpful include:

ASME—American Society of Mechanical Engineers
CAA—Clean Air Act
CBI—confidential business information
CFC—chlorofluorocarbon
EPA—U.S. Environmental Protection Agency
FOIA—Freedom of Information Act
GHGRP—Greenhouse Gas Reporting Program
HCFC—hydrochlorofluorocarbon
ICR—Information Collection Request
NAICS—North American Industry Classification System
NARA—National Archives and Records Administration
ODP—ozone depletion potential
ODS—ozone-depleting substances
PRA—Paperwork Reduction Act
RFA—Regulatory Flexibility Act
SISNOSE—Significant Economic Impact on a Substantial Number of Small Entities
TRI—Toxics Release Inventory
UMRA—Unfunded Mandates Reform Act

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I. General Information

A. Does this proposed action apply to me?

You may be potentially affected by this proposal if you use ozone-depleting substances [1] (ODS) as process agents. Potentially affected categories, North American Industry Classification System (NAICS) codes, and examples of potentially affected entities include Industrial Gas Manufacturing (NAICS code 325120), Other Basic Inorganic Chemical Manufacturing (NAICS code 325180), and All Other Basic Organic Chemical Manufacturing (NAICS code 325199).

This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this section could also be affected. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What action is the Agency proposing?

This action is narrow in scope and proposes to codify recordkeeping and reporting requirements for a limited number of chemical manufacturing facilities and to make minor revisions to definitions under 40 CFR part 82. EPA annually collects process agent consumption and emissions information. The Agency is proposing to codify reporting requirements to collect this information, including a methodology to calculate emissions. EPA also proposes to add a definition of ''process agent'' and to revise definitions of ''plant'' and ''facility'' to better reflect current practice.

Included in the docket is a description of the procedures EPA is seeking comment on to implement the proposed emission reporting requirements (see the memorandum titled *Proposed Procedures for ODS Process Agent Emission Reporting* (EPA–HQ–OAR–2022–0707)). The remaining regulatory changes proposed in this action are included in this document.

C. What is EPA's authority for this proposed action?

Several sections of the Clean Air Act (CAA) provide authority for this proposed action. In particular, section 603 provides authority to establish monitoring and reporting requirements for controlled substances. EPA also relies on its authority under section 114 of the CAA, which authorizes the EPA Administrator to establish recordkeeping and reporting requirements in carrying out any provision of the CAA (with certain exceptions that do not apply here). Section 604 and 605 provide the authority to phase out the production and consumption of class I and II substances, to restrict the use of class I and II controlled substances, and to promulgate regulations associated with the production of class I and II substances. EPA's regulations implementing the production and consumption controls for class I and II substances, including provisions implementing exceptions to those controls, can be found at 40 CFR part 82, subpart A. Additional authority for electronic reporting, as required under provisions in 40 CFR 82.13(c) and 40 CFR 82.24(a)(1) comes from the Government Paperwork Elimination Act (44 U.S.C. 3504), which provides ''(1) for the option of the electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper; and (2) for the use and acceptance of electronic signatures, when practicable.''

II. Background

A. EPA's Phaseout of ODS

In 1987, the United States joined 23 other countries and the European Union to sign the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol) and the United States ratified the Montreal Protocol on April 21, 1988. This international treaty protects and restores the ozone layer by phasing out the production and consumption of certain ODS including chlorofluorocarbons (CFCs), halons, methyl bromide, and hydrochlorofluorocarbons (HCFCs). The

[1] For the purposes of this preamble, EPA uses ''ozone-depleting substance'' and ''controlled substance'' interchangeably. Both terms are intended to have the same meaning as ''controlled substance'' as defined in 40 CFR 82.3.

Protocol, which has been joined by all countries of the United Nations, and its parent treaty, the *Vienna Convention for the Protection of the Ozone Layer,* are the first international treaties to ever achieve this distinction. The Clean Air Act Amendments of 1990 (CAA or the Act) added Title VI on Stratospheric Ozone Protection. Under the CAA and EPA's regulations at 40 CFR part 82, controls are in place that restrict the production and consumption of ODS to implement the phaseout of these substances. Title VI establishes two classes of controlled ODS: class I and class II control substances. Class I controlled substances, *i.e.,* CFCs, halons, carbon tetrachloride, methyl chloroform, methyl bromide, and hydrobromofluorocarbons, have a higher ozone depletion potential (ODP) and were phased out ahead of class II controlled substances. Class II controlled substances consist only of HCFCs that have lower ODPs than class I substances, and in many cases acted as transitional substitutes for many class I substances. While existing regulations allow for limited production and consumption of two HCFCs (HCFC–123 and HCFC–124) until 2030, all others have been phased out in the United States. For both class I and class II ODS, there are limited exceptions, such as the exclusion from the definition of ''production'' in 40 CFR 84.3 for controlled substances that are either manufactured and subsequently transformed, *i.e.,* for feedstock uses,[2] or destroyed by approved destruction technologies.[3]

B. ODS Used as Process Agents

Process agents are generally understood to be used to create an environment for another process to occur, without themselves being transformed or destroyed during said process. The process agent is not consumed in the reaction, though trace quantities of the process agent may remain in the final product. For the purposes of this rulemaking, EPA uses the terms ''controlled substance used as a process agent'', ''ODS process agent'', and ''process agent'' interchangeably. The Agency also uses the term ''consumed'' in this context to mean ''used up'' or transformed.

Process agents may be reused or recycled or may subsequently be used in transformation reactions or destroyed. While process agents are generally reused or recycled, additional process agents may need to be introduced to replenish losses due to transformation, destruction, emission, or being present in trace quantities in the chemical substance being manufactured. Emissions can be reduced through limiting process agent losses (*e.g.,* mitigate fugitive emissions or capture process agents for further use or destruction) and by directly abating process agent emissions. Technology resulting in zero-emission uses of process agents have increasingly been adopted over time as well.[4]

C. EPA's Treatment of ODS Process Agents

On August 4, 1998, EPA proposed certification requirements for class I controlled substances to be used as process agents (63 FR 41652). The Agency also proposed to interpret the definition of controlled substances in 40 CFR 82.3, to mean that ''production of controlled substances for use as a process agent is not included in the definition of controlled substances in the regulation.'' While EPA decided not to finalize the proposed certification requirements or interpretation that ODS used as process agents are not controlled substances, on July 18, 2003, EPA published a rule (68 FR 42883) which discussed that the Agency had determined a use of a class I controlled substance as a process agent to be exempt from restrictions on controlled substances. EPA recognizes that there are some legacy uses of ODS as process agents, in particular where substitutes or alternative processes may not be viable yet, and the Agency has continued to annually request, collect, and review information on these process agent uses. This is in line with decisions under the Montreal Protocol to allow the continued use of ODS as process agents under specified situations. The parties to the Montreal Protocol agreed in decision X/14 to except quantities of ODS produced or imported for use as process agents from the general requirements to phase out production and consumption of controlled ODS.[5] EPA prepares information derived from submissions to the Agency on process agent uses in the United States and submits this information to the Montreal Protocol's Ozone Secretariat on behalf of the United States, consistent with decisions taken by the parties to the Montreal Protocol.

III. Proposed Recordkeeping and Reporting Requirements

EPA proposes in this section to require one-time, annual, and situational reporting from entities that use ODS as process agents, add associated recordkeeping requirements, and determine how to treat the collected data. These requirements would ensure an initial understanding of the process agent uses, support efforts to monitor changes that occur over time, enable the Agency to anticipate future changes, and allow EPA to confirm relevant records as appropriate. Codified recordkeeping and reporting requirements would provide clear and consistent notice each year of the information EPA would collect in order to report information consistent with decisions taken by the parties to the Montreal Protocol. These requirements would also provide additional clarity to industry concerning how to treat and report ODS process agent uses. The Agency is proposing these reporting requirements for both class I and class II controlled substances that may be used as process agents. Consistent with existing requirements in 40 CFR 82.13(c) for class I controlled substances and 40 CFR 82.24(a)(1) for class II controlled substances for reports available for submission, these reports would be submitted electronically through the Central Data Exchange or, as proposed in this action, another format specified by EPA.

It is EPA's understanding that uses in the United States of ODS as process agents are primarily for purposes of maintaining legacy production processes at existing facilities which cannot feasibly transition to processes that do not use ODS as process agents. The United States is one of a few countries that continue to report use of controlled substances as process agents. The additional recordkeeping and reporting requirements proposed in this action also would support EPA's efforts to assess use of controlled substances as process agents, prepare and report associated information supporting continued need for excepted uses where appropriate, and ensure there is clarity and consistency in reporting on emissions of ODS used as process agents.

Requiring this reporting will allow EPA to effectively monitor these narrow process agent uses in a more routine and consistent manner under CAA section 603, and ensure the Agency is accurately documenting production and consumption of class I and II controlled

[2] EPA considers terms related to ''transformation'' and ''feedstock uses'' to be interchangeable for the purposes of this proposal.

[3] Approved destruction technologies are listed at 40 CFR 82.3 ''Destruction.''

[4] United Nations Environment Programme, Medical and Chemicals Technical Options Committee, 2022 Assessment Report. *https://ozone.unep.org/system/files/documents/MCTOC-Assessment-Report-2022.pdf.*

[5] *https://ozone.unep.org/treaties/montreal-protocol/meetings/tenth-meeting-parties/decisions/decision-x14-process-agents.*

substances consistent with the limits established under CAA sections 604 and 605.

A. One-Time Report

EPA proposes that any facility that uses a controlled substance as a process agent must submit a one-time report within 120 days of publication of the final rule, or within 120 days of the date that a facility first uses a controlled substance as a process agent, whichever is later. These one-time reports would be required regardless of whether an entity has provided this information to EPA previously. We propose that this one-time report include information concerning the process agent being used; a mass balance describing where, how, and how much of the controlled substance is used and emitted; if relevant, where, how, and how much of the controlled substance is transformed, destroyed, or otherwise captured; data on how much controlled substance was used in the last year and what it was used to produce (*e.g.,* another chemical or product); air emissions from stack point sources, fugitive sources, and total air emissions; actions taken or under evaluation to phase out use of ODS as a process agent (*e.g.,* by transitioning to a non-ozone depleting alternative); actions taken or under evaluation to minimize process agent use or emissions; and the location of the facility using the process agent. Such information would establish a baseline set of information from which EPA can monitor potential changes over time.

For total, fugitive, and stack point air emissions, EPA is proposing to require that entities using controlled substances as process agents report emissions using a methodology similar to the emissions reporting requirements found at 40 CFR part 98, subpart L (40 CFR 98.120 through 98.128). EPA is proposing that acceptable testing methods for measuring process vent emissions of controlled substances would include EPA Method 18 in appendix A–1 to 40 CFR part 60, EPA Method 320 in appendix A to 40 CFR part 63, EPA 430–R–10–003, ASTM D6348–03 (Reapproved 2020), or other analytical methods validated using EPA Method 301 at 40 CFR part 63, appendix A. The regulations at 40 CFR part 98, subpart L, include ''some other scientifically sound validation protocol'' as an acceptable alternative method to measure emissions, but EPA is not proposing to include that in the regulations created through this rulemaking due to potential lack of consistency in reporting emissions in the limited set of remaining process agent applications. However, EPA Method 301 provides a process to validate and approve other analytical methods as appropriate. The Agency expects that the approaches to determining fluorinated GHG emissions from process vents (continuous or batch) and equipment leaks for fluorinated gas production would also be applicable to the process agent applications and their associated industry sectors.[6] EPA is proposing that the units of measure for determining emissions and the method to calculate emissions would be in kilograms of controlled substance emitted. EPA has included a memo describing these proposed emission reporting procedures in the docket for this rulemaking.

EPA requests comment on whether there are distinctions between controlled substance emissions, process agent applications, or industry sectors that would require specific adjustments from the proposed generally applicable requirements, and if so, what those adjustments may be. The Agency also requests comment on whether there are potential gaps in the proposed approaches to determining emissions from process agent applications and whether alternative approaches, such as a mass balance method as described in appendix A to 40 CFR part 98, subpart L, may be suitable in those particular cases. EPA also requests comment on the advantages and disadvantages of specifying one testing method instead of several options (*e.g.,* EPA Method 18 as the analytical method and EPA Method 21 monitoring procedures for leak detection). EPA seeks comment on whether finalizing the use of one method, instead of multiple methods, would improve the consistency of emissions data reported across the facilities using ODS as process agents.

EPA considered whether to require that entities report emissions information consistent with the approach used by the Toxics Release Inventory (TRI) at 40 CFR part 372, but is proposing to use an approach similar to the Greenhouse Gas Reporting Program (GHGRP)'s 40 CFR part 98, subpart L, instead. Under 40 CFR 372.85(b)(14)(i), these requirements include an estimate of total releases of: (1) Fugitive or non-point air emissions, (2) stack or point air emissions, (3) discharges to receiving streams or water bodies including an indication of the percent of releases due to stormwater, (4) underground injection on site, and (5) releases to land on site. Based on a review of available data, we expect all facilities that would be subject to this rule already report this information annually or that this information would be reasonably available. TRI emissions data are aggregated by chemical across an entire facility; therefore, these data do not by themselves allow EPA to determine particular product or production-line contributions. For example, currently available TRI data would not differentiate between process agent emissions from use in a process agent application and emissions from production or transformation of that same ODS or other unrelated processes at the same facility. The list of chemicals reported under TRI also does not include all ODS. Notably, at least one of the ODS process agents used in the United States, bromochloromethane, is not reported under TRI. A requirement that entities specifically report process agent emissions consistent with the approach used by TRI would be intended to ensure that EPA can fully account for the emissions of all process agents attributable to all process agent applications from each subject facility and distinguish those emissions from ODS emissions associated with other uses.

However, the Agency has concerns with applying the general TRI reporting requirements to this limited set of ODS process agent pollutants, industry sectors, and types of operations for the purposes of this action. The TRI requirements are designed to apply to a wide variety of pollutants and sectors and require facilities to report emissions using their best available information, although the source of such information or any calculations are not prescribed. TRI requires facilities to report and record information concerning emissions and the basis of estimate used. For example, to estimate emissions an entity may use engineering judgment or emissions factors, depending on that facility's available information. The facility reports the quantity of emissions and the basis of the estimate used (*e.g.,* published emissions factor, mass balance calculation) and maintains documentation of supporting calculations. However, the facility does not report which emissions factor was used. The potential for varying emission estimation methodologies between reporting entities complicates the Agency's ability to assess and ensure data quality for these particular process agent applications. While some may

[6] Uses of controlled substances as process agents in the United States include elimination of nitrogen trichloride in chlor-alkali production, recovery of chlorine by tail gas absorption from chlor-alkali production, production of synthetic fiber sheet, bromination of a styrenic polymer, and production of high modulus polyethylene fiber, among others globally.

argue using the TRI approach is less burdensome given nearly all ODS process agent users are reporting under TRI already, EPA is concerned these requirements would not provide the consistency and validation necessary for the Agency's needs in preparing and reporting information to the Ozone Secretariat consistent with the decisions the parties have taken. It also makes it difficult to compare emission rates across facilities.

In contrast, 40 CFR part 98, subpart L, prescribes specific methodologies for estimating vent-specific emissions and includes associated recordkeeping and reporting requirements that would support EPA's efforts to validate the reported information. For example, each process vent with significant emissions must use the process-vent-specific emission factor method, which requires emission tests with process activity parameters measured for either each operating scenario or the operating scenario with the largest overall emissions. All emissions test data and procedures used in developing emission factors must be documented. Process vents with less emissions may use the process-vent-specific emission calculation factor method, which prescribes certain procedures to calculate emissions for each operating scenario but does not require testing. All data, assumptions, and procedures used in the calculations or engineering assessment must be documented. In both cases the reported information follows specified methodologies and EPA may assess detailed recorded information if there are questions or concerns about the reported data. For these reasons, EPA sees the proposed approach in this rule as better suited for monitoring process agent emissions.

EPA requests comment on this assessment. In particular, EPA requests comment on why it would be appropriate to apply the TRI reporting requirements to the narrow set of process agent pollutants, industry sectors, and types of operations and on how EPA may ensure a complete and consistent set of reports and record. The Agency also requests comment on whether there are advantages or disadvantages of such requirements as compared to a methodology similar to those found at 40 CFR part 98, subpart L, and what those may be. EPA also requests comment on potential challenges in implementing these emissions estimates for emissions of ODS from process agent applications.

B. Annual Report and Significant Process Changes

As part of a continuing effort to monitor potential changes over time, EPA proposes to require that each entity with a facility that uses a controlled substance as a process agent must submit for each applicable facility an annual report by February 14 of each year concerning process agent uses for the previous calendar year (*i.e.,* January 1 through December 31). This date coincides with the existing fourth quarter and annual deadlines for existing ODS reporting requirements, including all quarterly importer and producer reports and the annual reports under 40 CFR 82.13(m) for second party transformation and destruction of class I controlled substances. If there are facilities that employ more than one process agent use, the facility would need to report data individually for each process that uses an ODS process agent. We propose that these annual reports include information concerning process agent sourcing, amounts reused, recycled, transformed. and destroyed, and inventory over the previous calendar year; air emissions from stack point sources, fugitive sources, and total air emissions; and a description of emission reduction actions currently in use, planned, or currently under evaluation since the last one-time or annual report. This information will help enable the Agency to develop an annual report regarding uses of process agents in the United States and to effectively monitor production and consumption of ODS used for process agents consistent with domestic requirements.

EPA also proposes to require that each facility with a significant process change, including an increase in the quantity of the final output manufactured using an ODS process agent, submit a report specifying changes at least 180 days prior to implementing the change. We propose that this prior notification requirement apply to any process changes anticipated to result in increases by the next annual report of greater than 20 percent of the amount of controlled substance initially introduced for or emitted during use as a process agent by a facility, as compared to the corresponding data in the previous calendar year. EPA understands that facility operations change over time, and the Agency can monitor such changes through the annual reporting mechanism. However, there is potential for significant changes in facility operations over a short period which can have significant impacts on the environment, conformance with domestic regulatory requirements, and our commitment to international agreements. Annual reports represent a delayed view into past actions and may not provide sufficient lead time for an appropriate response. This notification requirement would provide EPA the opportunity to assess potential implications in advance of a change at the facility.

C. Recordkeeping

As described below in this section, entities are obligated under existing requirements to record information in accordance with 40 CFR 82.13 and 82.24, including information concerning ODS used as process agents. In this action EPA proposes to add recordkeeping requirements specifically for uses of ODS as process agents. Under 40 CFR 82.13(d), entities must retain the records and copies of reports required for at least three years. The Agency currently requires in 40 CFR 82.13 and 82.24 that entities, including producers and importers, record information that applies to controlled substances in general, including those used as process agents, but the current regulations do not require that controlled substances intended for process agent use be differentiated from the wider uses. Similar to how EPA requires differentiating recordkeeping requirements in 40 CFR 82.13 and 82.24 by whether the controlled substances were intended for use in processes resulting in their transformation or destruction, EPA proposes to also require that entities using process agents record information that documents what would be reported to the Agency, which includes information concerning sourcing, production, and reuse, recycling, transformation, and destruction for ODS intended to be used for process agent applications.

Specifically, the Agency is proposing to add requirements that companies that use process agents maintain: dated records of the quantity of each process agent produced at each facility; records identifying the producer or importer of process agents received; copies of invoices or receipts documenting the sale or other transfer of ownership of process agents; dated records identifying the quantity of each product manufactured within each facility by using process agents; dated records of the quantity of process agent spills or releases greater than or equal to 100 pounds; dated records of information used to calculate emissions; dated records of the quantity of process agents which are subsequently transformed or destroyed; and a copy of the

transformation or destruction verification in the case that a process agent is subsequently sold or distributed to another entity for transformation or destruction. This additional information would provide further distinctions of information already required to be recorded.

IV. How does EPA propose to treat ODS process agent data collected under this action?

EPA has reviewed the data elements that are proposed to be reported under this rule. This proposal identifies certain information categories that must be submitted to the Agency that will be subject to disclosure to the public without further notice because the information has been determined to be either ''emission data'' under 40 CFR 2.301(a), or EPA has found that the information does not meet the standard for confidential treatment under Exemption 4 of the Freedom of Information Act (FOIA). The Agency is also proposing to identify certain other categories of information that may be entitled to confidential treatment. For information not addressed in this rulemaking, the Agency will apply the 40 CFR part 2 process for establishing case-by-case confidentiality determinations. The emission data and confidentiality determinations in this proposed action are intended to encourage consistency, compliance with EPA's general ODS phaseout, and to meet the United States' reporting commitments under the Montreal Protocol. Establishing these determinations through this rulemaking will provide predictability for both information requesters and submitters.

A. Background on Determinations of Whether Information Is Entitled to Treatment as Confidential Information

1. Confidential Treatment of Reported Information

Regulated entities that must submit information to EPA frequently claim that some or all of that information is entitled to confidential treatment and therefore exempt from disclosure under Exemption 4 of the FOIA. Exemption 4 exempts from disclosure ''trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'' In order for information to meet the requirements of Exemption 4, EPA must find that the information is either: (1) A trade secret, or (2) commercial or financial information that is: (a) obtained from a person, and (b) privileged or confidential.

Generally, when EPA has information that the Agency intends to disclose publicly that is covered by a claim of confidentiality under FOIA Exemption 4, EPA has a process to make case-by-case or class determinations under 40 CFR part 2 to evaluate whether such information qualifies for confidential treatment under the exemption. In this action, EPA is proposing to make categorical emission data and confidentiality determinations in advance through this notice and comment rulemaking for some information that would be submitted to EPA under the proposed requirements. If EPA finalizes these determinations, that information would be subject to disclosure to the public without further notice.

The U.S. Supreme Court decision in *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019) (*Argus Leader*) addresses the meaning of ''confidential'' within the context of FOIA Exemption 4. The Court held that ''[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4.'' The Court identified two conditions ''that might be required for information communicated to another to be considered confidential.'' Under the first condition, ''information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it.'' The second condition provides that ''information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.'' The Court found the first condition necessary for information to be considered confidential within the meaning of Exemption 4, but did not address whether the second condition must also be met.

Following the issuance of the Court's opinion in *Argus Leader,* the U.S. Department of Justice issued guidance concerning the confidentiality prong of Exemption 4, articulating ''the newly defined contours of Exemption 4'' post-*Argus Leader*. Where the Government provides an express or implied indication to the submitter prior to or at the time the information is submitted to the Government that the Government would publicly disclose the information, then the submitter generally cannot reasonably expect confidentiality of the information upon submission, and the information is not entitled to confidential treatment under Exemption 4. In this rule, EPA is proposing to clearly assert that certain information is not confidential and would be disclosed publicly, if it is determined to not be entitled to confidential treatment in the final version of this rule. This assertion aligns with the Supreme Court's decision and the subsequent guidance that the government's assurances that a submission will be treated as not confidential should dictate the expectations of submitters. If EPA were to finalize these determinations, submitters are on notice before they submit any information that EPA has determined by the identified data elements discussed below, as well as in the addendum provided in the docket for this action, will not be entitled to confidential treatment upon submission and may be released by the Agency without further notice. As a result, submitters will not have a reasonable expectation that the information will be treated as confidential; rather, they should have the expectation that the information will be disclosed.

As described further below, EPA is proposing to make categorical confidentiality determinations as some of the proposed data elements that would be submitted to EPA contain information that is not entitled to confidential treatment because either: it is not the type of information that submitters customarily keep private or closely held; it is already publicly available; or it is discernible information that is self-evident or readily observable through reverse engineering by a third party.

2. Emissions Data Under Section 114 of the CAA

The CAA states that ''[a]ny records, reports or information obtained under [section 114] shall be available to the public.'' [7] Thus, the CAA begins with a presumption that the information submitted to EPA will be available to be disclosed to the public. It then provides a narrow exception to that presumption for information that ''would divulge methods or processes entitled to protection as trade secrets.'' The CAA then narrows this exception further by excluding ''emission data'' from the category of information eligible for confidential treatment. While the CAA does not define ''emission data,'' EPA has done so by regulation at 40 CFR 2.301(a)(2)(i). EPA releases, on occasion, some of the information submitted under CAA section 114 to parties outside of the Agency of its own volition, through responses to requests

[7] CAA section 114(c); 42 U.S.C. 7414(c).

submitted under the FOIA,[8] or through civil litigation. As noted in the prior section, generally, when we have information that we intend to disclose publicly that is covered by a claim of confidentiality under FOIA Exemption 4, EPA has a process to make case-by-case or class determinations under 40 CFR part 2. This process includes evaluation whether such information is or is not emission data, and whether it otherwise qualifies for confidential treatment under FOIA Exemption 4.

The regulations at 40 CFR 2.301 define emission data to include the following:

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

In this proposal, we are applying the regulatory definition of ''emission data'' in 40 CFR 2.301(a)(2)(i) to propose that certain categories of source certification and compliance information are not entitled to confidential treatment because they qualify as emissions data. If EPA finalizes these determinations, that information would be subject to disclosure to the public without further notice. As relevant to this proposal, a ''source'' for purposes of the definition in 40 CFR 2.301 is generally the equipment covered by a proposed regulatory requirement, such as process equipment in a plant or facility and any related emission units. EPA's broad general definitions of emissions data also exclude certain information related to products still in the research and development phase or products not yet on the market except for limited purposes. Thus, for example, 40 CFR 2.301(a)(2)(ii) excludes information related to ''any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.'' This specific exclusion from the definition of emissions data is limited in time. EPA does not believe data related to this exclusion are implicated in this proposed rulemaking because these data generally relate to equipment that EPA understands are primarily for purposes of maintaining legacy production processes at existing facilities.

B. Data Elements Proposed To Be Reported to EPA Under This Action

Consistent with EPA's commitment to transparency in program implementation, EPA has reviewed the data reporting elements proposed in this action to see if information under the umbrella of those data elements could be considered entitled to confidential treatment. EPA is proposing to treat certain data elements as not entitled to confidential treatment. Later in this section, EPA outlines individual data elements and proposes whether they will be handled as confidential, not confidential or undetermined, as well as whether they are emission data and are therefore releasable. There may be additional reasons not to release individual data elements determined to not be entitled to confidential treatment, for example if it is personally identifiable information (PII). EPA proposes to make confidentiality determinations and treat data concerning process agent uses similarly to the process under the HFC Phasedown Program as codified in 40 CFR 84.31(k). Some data may be released in different contexts, including to the general public to encourage transparency, to ensure compliance with EPA's general ODS phaseout, and to meet the United States' reporting commitments under the Montreal Protocol. Emission data, including data used as inputs to emissions equations, would generally be releasable under CAA section 114(c), which provides that emission data shall be available to the public. ''Inputs to emission equations'' refers to data necessary to determine the identity, amount, frequency, or concentration of the emission emitted by the reporting facilities. Inputs to emission equations include equipment parameters, measured data, supporting calculations, and other rationale used to calculate reported emission quantities. Some aggregated data would also be released to the Ozone Secretariat in line with past practices and existing commitments, which could include a list of the specific ODS used as process agents and the applications those specific ODS are used in, the levels of emissions from those uses in metric tons and ODP-weighted metric tons, and the specific containment technologies used to minimize emissions of controlled substances. EPA also intends to release the aggregate consumption of ODS used in process agents in metric tons and ODP-weighted metric tons. Finally, EPA would include production, import, export, and destruction of ODS used as process agents by chemical in data reported to the Montreal Protocol's Ozone Secretariat as part of the United States' annual report submitted under Article 7 of the treaty. At this time, this aggregated data would comprise data from three or more entities. Release of this information documents U.S. conformance with commitments under an international agreement, so even if the number of entities with process agent uses decreases in future, EPA is still proposing to determine that process agent data reported by the United States in accordance with commitments under the Montreal Protocol would not be confidential.

Some of the data elements EPA is proposing to collect may be similar to or the same as those required to be reported under the existing requirements associated with the GHGRP, particularly for entities subject to 40 CFR part 98, subpart L. The regulatory reporting requirements are separate and the Agency is not proposing any changes to 40 CFR part 98 in this rulemaking. To the extent relevant, data elements submitted in accordance with requirements established through this rulemaking and determined to not be confidential under 40 CFR part 82, subpart A, would not be provided confidential treatment regardless of whether they have previously been determined to be confidential under the GHGRP.

Specifically, EPA proposes that the identity of byproducts manufactured in the process agent application; contact information for facilities that use controlled substances as process agents; emission data, including reported emission factors and the proposed ODS process agent monitoring plan; and technologies currently being used and actions taken to minimize use or emissions of controlled substances used as process agents would also not be considered confidential. The Agency proposes to determine the following information concerning ODS process agents as confidential: process agent sourcing; internal facility processes such as the quantity of process agent use, recycling and reuse, products, and

[8] 5 U.S.C. 552.

byproducts; and emission reduction technologies and actions planned or currently under evaluation. As noted previously, the Agency expects to release aggregated data to the Ozone Secretariat, including ODS process agent information concerning process agent applications currently used in the United States, consumption, emissions, and emission reduction technologies and actions undertaken. Further, EPA would begin reporting emissions data in metric tons instead of ODP-weighted metric tons.

In addition, EPA proposes to revise provisions in 40 CFR 82.14(a), 82.13(c) for class I controlled substances, and 82.24(a)(1) for class II controlled substances to specify that there may be future ways to submit reports electronically. Under current requirements, reports available for submission must be submitted electronically through the Central Data Exchange. In this action the Agency proposes to extend these requirements to allow the use of another electronic format specified by EPA. This revision is intended to provide flexibility in the event that the Agency designates a successor system to the Central Data Exchange for reporting requirements under the ODS phaseout in 40 CFR part 82, subpart A, and would align with similar provisions for the HFC Phasedown Program in 40 CFR 84.31(a)(2).

V. Proposed Definitions

EPA also proposes to add a definition of ''process agent'' and revise two definitions to better reflect current EPA and international practices. EPA proposes to define ''process agent'' in 40 CFR part 82 similarly to the existing definition in 40 CFR part 84, with the key difference being that 40 CFR part 82 addresses ODS controlled substances and 40 CFR part 84 addresses HFC regulated substances. EPA is proposing in this action to define the term ''process agent'' for the purposes of 40 CFR part 82 as ''the use of a controlled substance to form the environment for a chemical reaction or inhibiting an unintended chemical reaction (*e.g.,* use as a solvent, catalyst, or stabilizer) where the controlled substance is not consumed in the reaction, but is removed or recycled back into the process and where no more than trace quantities remain in the final product. A feedstock, in contrast, is entirely consumed during the reaction.'' We expect this definition will provide greater clarity of what is considered process agent use. In 40 CFR 82.3, the Agency defines ''facility'' to mean ''any process equipment (*e.g.,* reactor, distillation column) used to convert raw materials or feedstock chemicals into controlled substances or consume controlled substances in the production of other chemicals'' and ''plant'' to mean ''one or more facilities at the same location owned by or under common control of the same person.'' These definitions are inverted from how they would typically be understood and applied. EPA proposes to switch the two definitions, such that a plant is a subset of a facility, similar to how 40 CFR part 84 considers a production line to be one component of a facility. The definition of ''plant'' in 40 CFR part 82 would be similar to the definition of ''production line'' in 40 CFR part 84, and definitions of ''facility'' would accordingly correspond. We do not expect this to result in any material impacts, but this revision may increase clarity and consistency.

VI. Costs and Benefits

The proposed recordkeeping and reporting requirements concerning uses of ODS as process agents are intended in general to codify existing practices and do not represent substantive additional effort on the part of affected entities. EPA is aware of six potentially affected entities, and expects that these entities are already able to meet most of the proposed requirements under existing practices. The reported information would support U.S. efforts to more easily report information consistent with Montreal Protocol decisions and to better understand potential implications of uses of ODS as process agents under the CAA.

EPA expects that entities that would be affected by this action are already subject to recordkeeping and reporting requirements under 40 CFR part 82 and that the requirements proposed in this action would not result in significant increased burden. In 40 CFR 82.13 and 82.24 the Agency currently requires producers of controlled substance to record and report related information, including requirements in 40 CFR 82.13(f)(2)(vii) and 82.24(b)(2)(vi) to maintain records of any controlled substance used as a feedstock, destroyed in the manufacture of another substance, used in the manufacture of any other substance, or introduced into the production process of the same controlled substance. EPA also requires additional documentation and reporting concerning uses of ODS in processes that result in their transformation or destruction. The Agency understands that subject entities have already reported similar information to EPA concerning uses of ODS as a process agent in the past on a voluntary basis, report similar information concerning production of ODS and feedstock uses, and already have available process knowledge and experience necessary to meet the recordkeeping and reporting requirements proposed in this action. EPA also believes that codified requirements will reduce potential uncertainty about EPA's recordkeeping and reporting expectations.

EPA expects that this action will result in costs for each subject entity to prepare an initial one-time report, submit annual reports and notifications of significant changes as warranted, and recordkeeping. However, with regards to the annual reports, the Agency already solicits information from the affected entities via annual requests. Therefore, any associated change in burden would be limited relative to current practice. The Agency conservatively estimates these requirements to result in costs of approximately $13,000 per facility for the first year, with the higher costs due to initial preparation of the one-time report, and $1,000 per facility in following years for continued compliance with the other recordkeeping and reporting requirements. As noted in section II.B. of this preamble, we do not anticipate the establishment of new processes or facilities using ODS as process agents, but request comment on that assumption.

The Agency estimates that the proposal to require an emissions reporting methodology similar to 40 CFR part 98, subpart L, would result in additional costs of approximately $190,000 per facility in the first year due to initial planning and additional sampling, analysis, monitoring and calculations. EPA estimates compliance costs of approximately $17,000 in subsequent years for continued sampling, analysis, monitoring, and calculations. The total estimated costs for all requirements are approximately $1.8 million in the first year and $160,000 annually in subsequent years. The costs are discussed in a draft technical support document and the supporting statement for the information collection request (ICR).

VII. Statutory and Executive Order Review

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 proposed rule have been submitted for approval to OMB under the PRA. The ICR document that EPA prepared has been assigned EPA ICR number 1432.39. You can find a copy of the ICR in the docket for this proposed rule, and it is briefly summarized here.

EPA is proposing requirements for both one-time, annual, and situational reporting and for recordkeeping to support international agreements concerning the use of controlled substances as process agents, and to provide relevant information to EPA concerning implications of these uses and emissions. Recordkeeping, one-time reports, and annual reporting requirements are consistent with the existing importer and producer reporting requirements in 40 CFR 82.13 for class I controlled substances and 40 CFR 82.24 for class II controlled substances. These requirements are also consistent with existing practice of these facilities providing similar information concerning these uses of controlled substances as process agents to EPA on a voluntary basis. The ICR addresses the incremental changes to the existing reporting and recordkeeping programs that are approved under OMB control number 2060–0170.

Respondents/affected entities: Respondents and affected entities that use controlled substances as process agents.

Respondent's obligation to respond: Mandatory—sections 603(b) and 114 of the CAA.

Estimated number of respondents: 6.

Frequency of response: One-time, annual, and as needed.

Total estimated burden: 5,883 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $719,593 (per year), including $28,245 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to EPA using the docket identified at the beginning of this proposed rule. EPA will respond to any ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *https://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. OMB must receive comments no later than November 20, 2023.

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 small entities because none of the identified affected entities are small entities.

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. EPA is not aware of Tribal businesses engaged in activities that would be directly affected by this action. Based on the Agency's assessments, as discussed in section VI of this preamble, EPA also does not believe that potential effects, even if direct, would be substantial. Accordingly, this action will not have substantial direct effects on Tribal governments, the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action. The Agency periodically updates Tribal officials on air regulations through the monthly meetings of the National Tribal Air Association.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

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.

EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples because it does not impact emissions from subject facilities. This regulatory action proposes recordkeeping and reporting requirements that do not impact human health or the environment, but provide additional insight into the uses and emissions of ODS used as process agents.

List of Subjects in 40 CFR Part 82

Environmental protection, Chemicals, Emissions, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

For the reasons set out in the preamble, 40 CFR part 82 is proposed to be amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

■ 1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

■ 2. Amend § 82.3 by revising the definitions for ''Facility'' and ''Plant'' and adding the definition ''Process agent'' in alphabetical order to read as follows:

§ 82.3 Definitions for class I and class II controlled substances.

* * * * *

Facility means one or more plants at the same location owned by or under common control of the same person.

* * * * *

Plant means any process equipment (*e.g.,* reactor, distillation column) used to convert raw materials or feedstock chemicals into controlled substances or consume controlled substances in the production of other chemicals.

* * * * *

Process agent means the use of a controlled substance to form the environment for a chemical reaction or inhibiting an unintended chemical reaction (*e.g.,* use as a solvent, catalyst, or stabilizer) where the controlled substance is not consumed in the reaction, but is removed or recycled back into the process and where no more than trace quantities remain in the final product. A feedstock, in contrast, is consumed during the reaction.

* * * * *

■ 3. Amend § 82.13 by:

■ a. In paragraph (c), adding ''or another format specified by EPA'' after the words ''Central Data Exchange''; and

■ b. Adding paragraph (ee).

The addition reads as follows:

§ 82.13 Recordkeeping and reporting requirements for class I controlled substances.

* * * * *

(ee) *Process agents.* Any entity that uses a class I controlled substance as a process agent must comply with the following recordkeeping and reporting requirements for each facility that uses a class I controlled substance as a process agent:

(1) *Reporting—one-time report:* By [date 120 days after publication of a final rule in the **Federal Register**], or within 120 days of the date that an entity first uses a class I controlled substance as a process agent, whichever is later, any entity that uses a class I controlled substance as a process agent must submit to the Administrator a report containing the following information for each use of a class I controlled substance as a process agent:

(i) The name and address of each facility and plant, and each responsible person's name, email address, and phone number;

(ii) The name, purpose, and final product manufactured of each process agent application that uses a class I controlled substance;

(iii) The start-up date of each facility and plant that uses a class I controlled substance as a process agent;

(iv) For each facility, the names and amounts of each product and byproduct manufactured in the process agent application during the previous control period, including amounts destroyed or used as a feedstock;

(v) For each facility, the total air, fugitive air, and stack point air emissions of class I controlled substances used as a process agent during the previous control period;

(vi) For each facility, a description of technologies currently being used and actions taken or currently under evaluation to minimize use or emissions of class I controlled substances used as process agents (including estimated emissions reductions associated with each); and

(vii) For each facility, a description that includes details of the percentages of class I controlled substances used as a process agent and retained within the process agent application, recovered after the process agent application, and emitted or entrained in the final product.

(2) *Annual reports:* Any entity that uses a class I controlled substance as a process agent must provide by February 14 of each year an annual report for the previous control period containing the following information for each use of the class I controlled substance as a process agent:

(i) For each facility, contact information including email address and phone number for a primary and alternate contact person;

(ii) For each facility, the name and amount of each class I controlled substance initially introduced into the process agent application for use as a process agent, specified independently for paragraphs (ee)(2)(ii)(A) through (G) of this section by whether the class I controlled substance was:

(A) Obtained as virgin;

(B) Obtained as used;

(C) Produced by the entity;

(D) Purchased from a U.S. producer;

(E) Imported;

(F) Reclaimed by the entity from a different use; and

(G) Reclaimed by another entity;

(iii) For each facility, the name and amount of each class I controlled substance used as a process agent and reused or recycled by the entity for continued use in the same process agent application at the same facility;

(iv) For each facility, the name and amount of each class I controlled substance used as a process agent that was ultimately:

(A) Transformed;

(B) Reused or recycled for use in a different process agent application; or

(C) Destroyed by approved destruction technologies;

(v) For each facility, the total air, fugitive air, and stack point air emissions of each class I controlled substance used as a process agent;

(vi) For each facility, the names and amounts of each product and byproduct manufactured in the process agent application during the previous control period, including amounts destroyed or used as a feedstock;

(vii) For each facility, a description of emission reduction actions for class I controlled substances used as a process agent taken since the last one-time or annual report, planned, or currently under evaluation; and

(viii) For each facility, any significant process agent application changes anticipated to result in increases for the next annual report of greater than 20 percent of the amount of class I controlled substance initially introduced for or emitted during use as a process agent by an entity, as compared to the previous control period, must be specified in a report submitted to EPA at least 180 days prior to implementing the change.

(3) *Recordkeeping:* Every person who uses a class I controlled substance as a process agent during a control period must maintain the following records, as applicable:

(i) Dated records of the quantity of each class I controlled substance produced at each facility for use as a process agent;

(ii) Records identifying the producer or importer of the class I controlled substance received at each facility for use as a process agent by the person;

(iii) For each facility, copies of the invoices or receipts documenting the sale or other transfer of ownership of

each class I controlled substance for use as a process agent to the person;

(iv) Dated records identifying the quantity of each product manufactured within each facility by using a class I controlled substance as a process agent;

(v) For each facility, records of the date and the estimated quantity of any spill or release of each class I controlled substance used as a process agent that equals or exceeds 100 pounds;

(vi) For each facility, a description of the methodology used to measure and calculate emissions, and dated records of equipment parameters, measured data, supporting calculations, and other rationale used to validate reported emission quantities;

(vii) For each facility, dated records of the quantity of each class I controlled substance used as a process agent which is subsequently transformed or destroyed;

(viii) In the case where class I controlled substances used as a process agent were ultimately transformed by an entity other the entity which last used the class I controlled substances as a process agent, a copy of the Internal Revenue Service Certificate showing that the purchaser or recipient of the controlled substance, in the United States or in another country that is a Party, certifies the intent to transform the controlled substance, or sell the controlled substance for transformation; and

(ix) In the case where class I controlled substances used as a process agent were ultimately destroyed by an entity other the entity which last used the class I controlled substances as a process agent, a copy of the destruction verification (as in paragraph (k) of this section), showing that the purchaser or recipient of a controlled substance, in the United States or in another country that is a Party, certifies the intent to destroy the controlled substance, or sell the controlled substance for destruction.

(4) Reports are no longer required for process agent use in the year after an entity notifies the Administrator that they have permanently ceased use of all process agents, but the entity must continue to comply with all applicable recordkeeping requirements.

§ 82.14 [Amended]

■ 4. Amend § 82.14, in paragraph (a), by adding ''or another format specified by EPA'' after the words ''Central Data Exchange.''

■ 5. Amend § 82.24 by:

■ a. In paragraph (a)(1), adding ''or another format specified by EPA'' after the words ''Central Data Exchange''; and

■ b. Adding paragraph (g).

The addition reads as follows:

§ 82.24 Recordkeeping and reporting requirements for class II controlled substances.

* * * * *

(g) *Process agents.* Any entity that uses a class II controlled substance as a process agent must comply with the following recordkeeping and reporting requirements for each facility that uses a class II controlled substance as a process agent:

(1) *Reporting—one-time report:* By [date 120 days after publication of a final rule in the **Federal Register**], or within 120 days of the date that an entity first uses a class II controlled substance as a process agent, whichever is later, any entity that uses a class II controlled substance as a process agent must submit to the Administrator a report containing the following information for each use of a class II controlled substance as a process agent:

(i) The name and address of each facility and plant, and each responsible person's name, email address, and phone number;

(ii) The name, purpose, and final product manufactured of each process agent application that uses a class II controlled substance;

(iii) The start-up date of each facility and plant that uses a class II controlled substance as a process agent;

(iv) For each facility, the names and amounts of each product and byproduct manufactured in the process agent application during the previous control period, including amounts destroyed or used as a feedstock;

(v) For each facility, the total air, fugitive air, and stack point air emissions of class II controlled substances used as a process agent during the previous control period;

(vi) For each facility, a description of technologies currently being used and actions taken or currently under evaluation to minimize use or emissions of class II controlled substances used as process agents (including estimated emissions reductions associated with each); and

(vii) For each facility, a description that includes details of the percentages of class II controlled substances used as a process agent and retained within the process agent application, recovered after the process agent application, and emitted or entrained in the final product.

(2) *Annual reports:* Any entity that uses a class II controlled substance as a process agent must provide by February 14 of each year an annual report for the previous control period containing the following information for each use of the class II controlled substance as a process agent:

(i) For each facility, contact information including email address and phone number for a primary and alternate contact person;

(ii) For each facility, the name and amount of each class II controlled substance initially introduced into the process agent application for use as a process agent, specified independently for paragraphs (g)(2)(ii)(A) through (G) of this section by whether the class II controlled substance was:

(A) Obtained as virgin;

(B) Obtained as used;

(C) Produced by the entity;

(D) Purchased from a U.S. producer;

(E) Imported;

(F) Reclaimed by the entity from a different use; and

(G) Reclaimed by another entity;

(iii) For each facility, the name and amount of each class II controlled substance used as a process agent and reused or recycled by the entity for continued use in the same process agent application at the same facility;

(iv) For each facility, the name and amount of each class II controlled substance used as a process agent that was ultimately:

(A) Transformed;

(B) Reused or recycled for use in a different process agent application; or

(C) Destroyed by approved destruction technologies;

(v) For each facility, the total air, fugitive air, and stack point air emissions of each class II controlled substance used as a process agent;

(vi) For each facility, the names and amounts of each product and byproduct manufactured in the process agent application during the previous control period, including amounts destroyed or used as a feedstock;

(vii) For each facility, a description of emission reduction actions for class II controlled substances used as a process agent taken since the last one-time or annual report, planned, or currently under evaluation; and

(viii) For each facility, any significant process agent application changes anticipated to result in increases for the next annual report of greater than 20 percent of the amount of class II controlled substance initially introduced for or emitted during use as a process agent by an entity, as compared to the previous control period, must be specified in a report submitted to EPA at least 180 days prior to implementing the change.

(3) *Recordkeeping:* Every person who uses a class II controlled substance as a process agent during a control period must maintain the following records, as applicable:

(i) Dated records of the quantity of each class II controlled substance

produced at each facility for use as a process agent;

(ii) Records identifying the producer or importer of the class II controlled substance received at each facility for use as a process agent by the person;

(iii) For each facility, copies of the invoices or receipts documenting the sale or other transfer of ownership of each class II controlled substance for use as a process agent to the person;

(iv) Dated records identifying the quantity of each product manufactured within each facility by using a class II controlled substance as a process agent;

(v) For each facility, records of the date and the estimated quantity of any spill or release of each class II controlled substance used as a process agent that equals or exceeds 100 pounds;

(vi) For each facility, a description of the methodology used to measure and calculate emissions, and dated records of equipment parameters, measured data, supporting calculations, and other rationale used to validate reported emission quantities;

(vii) For each facility, dated records of the quantity of each class II controlled substance used as a process agent which is subsequently transformed or destroyed;

(viii) In the case where class II controlled substances used as a process agent were ultimately transformed by an entity other the entity which last used the class II controlled substances as a process agent, a copy of the person's transformation verification as provided under paragraph (e)(3) of this section; and

(ix) In the case where class II controlled substances used as a process agent were ultimately destroyed by an entity other the entity which last used the class II controlled substances as a process agent, a copy of the person's destruction verification, as provided under paragraph (e)(5) of this section.

(4) Reports are no longer required for process agent use in the year after an entity notifies the Administrator that they have permanently ceased use of all process agents, but the entity must continue to comply with all applicable recordkeeping requirements.

■ 6. Add § 82.25 to read as follows:

§ 82.25 Treatment of data submitted under this subpart.

(a) Sections 2.201 through 2.215 and 2.301 of this chapter do not apply to data submitted under this subpart that EPA has determined through rulemaking to be either of the following:

(1) Emission data, as defined in § 2.301(a)(2) of this chapter, determined in accordance with section 114(c) and 307(d) of the Clean Air Act; or

(2) Data not otherwise entitled to confidential treatment.

(b) Except as otherwise provided in paragraph (d) of this section, §§ 2.201 through 2.208 and 2.301(c) and (d) of this chapter do not apply to data submitted under this part that EPA has determined through rulemaking to be entitled to confidential treatment. EPA shall treat that information as confidential in accordance with the provisions of § 2.211 of this chapter, subject to paragraph (d) of this section and § 2.209 of this chapter.

(c) Upon receiving a request under 5 U.S.C. 552 for data submitted under this part that EPA has determined through rulemaking to be entitled to confidential treatment, the relevant Agency official shall furnish the requestor a notice that the information has been determined to be entitled to confidential treatment and that the request is therefore denied. The notice shall include or cite to the appropriate EPA determination.

(d) A determination made through rulemaking that information submitted under this part is entitled to confidential treatment shall continue in effect unless, subsequent to the confidentiality determination through rulemaking, EPA takes one of the following actions:

(1) EPA determines through a subsequent rulemaking that the information is emission data or data not otherwise entitled to confidential treatment; or

(2) The Office of General Counsel issues a final determination, based on the requirements of 5 U.S.C. 552(b)(4), stating that the information is no longer entitled to confidential treatment because of change in the applicable law or newly discovered or changed facts. Prior to making such final determination, EPA shall afford the business an opportunity to submit comments on pertinent issues in the manner described by §§ 2.204(e) and 2.205(b) of this chapter. If, after consideration of any timely comments submitted by the business, the Office of General Counsel makes a revised final determination that the information is not entitled to confidential treatment, the relevant agency official will notify the business in accordance with the procedures described in § 2.205(f)(2) of this chapter.

[FR Doc. 2023–22182 Filed 10–18–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 231013–0247]

RIN 0648–BL70

Magnuson-Stevens Act Provisions; Prohibition of Commercial Fishing in the Northeast Canyons and Seamounts Marine National Monument

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

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes regulations for the Northeast Canyons and Seamounts Marine National Monument (the Monument). This action is necessary to conform U.S. fishing regulations consistent with Presidential Proclamations 9496 and 10287, which prohibited commercial fishing in the Northeast Canyons and Seamounts Marine National Monument and directed the Secretaries of Commerce and Interior to promulgate regulations necessary for the proper care and management of the Northeast Canyons and Seamounts Marine National Monument. The measures herein are intended to define the boundary coordinates of the Monument area and reflect the prohibition on commercial fishing in the Magnuson-Stevens Act regulations.

DATES: Comments must be received on or before November 20, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0093, by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0093 in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information

submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, 978–281–9184.

SUPPLEMENTARY INFORMATION:

Background

On September 15, 2016, the Monument was designated in the waters of the North Atlantic (Presidential Proclamation 9496; 81 FR 65161; September 21, 2016) to include both a Canyons unit and a Seamounts Unit. This Proclamation prohibited commercial fishing within the Monument, with a 7-year exemption for the American lobster and Atlantic deep-sea red crab fisheries. In June 2020, Monument prohibitions were revised via Proclamation 10049 (85 FR 35793, June 11, 2020) removing commercial fishing from the list of prohibited activities set forth in the 2016 Proclamation. Most recently, in October 2021, Proclamation 10287 (86 FR 57349; October 15, 2021) restored commercial fishing to the list of prohibited activities, providing ''for the prohibition of all commercial fishing in the Monument, except for red crab and American lobster commercial fishing, which may be permitted until September 15, 2023.''

Proposed Measures

Consistent with Proclamation 10287 (68 FR 57349; October 15, 2021) and the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), this action proposes to define the boundary coordinates of the Monument area in the Magnuson-Stevens Act regulations at 50 CFR 600.10. Tables 1 and 2 below include coordinates for the Canyons and Seamounts Units.

TABLE 1—CANYONS UNIT COORDINATES

Point	N latitude	W longitude
1	40°31.62′	68°16.08′
2	40°36.00′	67°37.68′
3	40°12.42′	67°34.68′
4	40°7.32′	68°12.72′
1	40°31.62′	68°16.08′

TABLE 2—SEAMOUNTS UNIT COORDINATES

Point	N latitude	W longitude
1	40°2.64′	67°43.32′
2	39°56.34′	[a]
3	38°51.90′	[b]
1	40°2.64′	67°43.32′

[a] U.S. exclusive economic zone (EEZ) longitude, approximately 65°56.58′.

[b] U.S. EEZ longitude, approximately 66°55.86′.

This rule also proposes to reflect the Proclamation's prohibition on commercial fishing within the boundaries of the Monument in the Magnuson-Stevens Act prohibitions at § 600.725 and clarify that commercial fishermen may transit through the Monument area if fishing gear is stowed and not available for immediate use during passage through the Monument.

We are soliciting public comments on the proposed regulations, as summarized in this rule.

Classification

NMFS is issuing this rule pursuant to section 305(d) of the Magnuson-Stevens Act to carry out section 303(a)(1)(C). This action is necessary to promulgate regulations (at § 600.10 and § 600.725) to ensure that all fishery management plans implemented by the Secretary of Commerce are consistent with, and conform to, the Proclamations and the Antiquities Act by ensuring clearly articulated measures that apply to all commercial fishing vessels operating in the EEZ. The NMFS Assistant Administrator has determined that this proposed rule is consistent with other applicable law, subject to further consideration after public comment.

Because this action serves to bring the Magnuson-Stevens Act regulations into compliance with Presidential Proclamations 9496 and 10287, there is no decision-making process for NMFS. NMFS has no discretion. As a result, there is no decision-making process, no alternatives to comply with the Proclamations, and no public involvement in the decision. There is no ''proposal'' for action, as defined in section 1501.1(a)(5) of the Council on Environmental Quality regulations implementing the National Environmental Policy Act (NEPA). Therefore, NEPA does not apply to this action.

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

Regulatory Flexibility Act (RFA)

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This action incorporates the boundaries of the Monument area into the Magnuson-Stevens Act definitions at 50 CFR 600.10 and the commercial fishing prohibition into the Magnuson-Stevens Act prohibitions at § 600.725.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. The determination as to whether the entity is large or small is based on the average annual revenue for the three years, here from 2019 through 2021. The Small Business Administration (SBA) has established size standards for all other major industry sectors in the U.S., including for-hire fishing (NAICS code 487210). These entities are classified as small businesses if combined annual receipts are not in excess of $8.0 million for all its affiliated operations. As with commercial fishing businesses, the annual average of the three most recent years (2019–2021) is utilized in determining annual receipts for businesses primarily engaged in for-hire fishing.

The directly regulated entities are the firms that currently hold at least one Greater Atlantic Region commercial fishing permit that could be used to fish in the Monument. A few permit categories (Lobster: Areas 1, 2, 4, 5, 5 waiver program, 6, and Outer Cape Cod; General Category Scallop B) were not included when constructing the set of directly regulated entities because these permit categories do not enable a firm to fish in the Monument areas. There are a total of 1,338 small firms and 11 large firms subject to this action. Of those, a total of 1,024 small firms derive the majority of their revenue from commercial fishing operations, while 314 derive the majority of their revenue from for-hire recreational activities. Firms that are classified as ''for-hire'' may still fish commercially—these firms are included in the tabulation of directly regulated entities, although their main source of income (for-hire fishing) would not be directly impacted by the proposed action.

Table 3 describes numbers of directly regulated entities, their main activities,

and their revenues from various sources. The distribution of gross receipts for both classes is highly right-skewed: There are many firms with a small to moderate amount of gross receipts and a handful of firms with much more economic activity. This results in the average receipts being higher than the 75th percentile of gross receipts for these two groups.

TABLE 3—NUMBER AND CHARACTERIZATION OF THE DIRECTLY REGULATED ENTITIES

[2020 dollars]

Size	Type	Firms	Vessels	Average gross receipts	Average for-hire receipts	25th Percentile gross receipts	75th Percentile gross receipts
Large	Fishing	11	151	$19,944,000	$0	$15,463,000	$24,445,000
Small	Fishing	1,024	1,519	717,000	1,000	56,000	681,000
Small	For-Hire	314	380	144,000	142,000	7,000	85,000

As stated above, this action incorporates the boundaries of the Monument area into the Magnuson-Stevens Act definitions at 50 CFR 600.10 and the commercial fishing prohibition into the Magnuson-Stevens Act prohibitions at § 600.725. While 1,338 small firms and 11 large firms hold permits that overlap with the Monument area, the monument has been closed to commercial fishing since October 2021. Because fishing was previously prohibited, this action will have no additional effect on regulated entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing.

Dated: October 13, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.10, add the definition for ''Northeast Canyons and Seamounts Marine National Monument'' in alphabetical order to read as follows:

§ 600.10 Definitions.

* * * * *

Northeast Canyons and Seamounts Marine National Monument means the area designated by Presidential Proclamation 9496, consisting of:

(1) *Canyons Unit.* The Canyons Unit is defined by the area bounded by straight lines connecting the following points, in the order stated:

Point	N latitude	W longitude
1	40°31.62′	68°16.08′
2	40°36.00′	67°37.68′
3	40°12.42′	67°34.68′
4	40°7.32′	68°12.72′
1	40°31.62′	68°16.08′

(2) *Seamounts Unit.* The Seamounts Unit is defined by the area bounded by straight lines connecting the following points, except between points 1 and 2, where the boundary follows the outer limits of the U.S. EEZ:

Point	N latitude	W longitude
1	40°2.64′	67°43.32′
2	39°56.34′	[a]
3	38°51.90′	[b]
1	40°2.64′	67°43.32′

[a] U.S. EEZ longitude, approximately 65°56.58′.
[b] U.S. EEZ longitude, approximately 66°55.86′.

* * * * *

■ 3. In § 600.725, add paragraph (x) to read as follows:

§ 600.725 General prohibitions.

* * * * *

(x) Fish for commercial purposes within the Northeast Canyons and Seamounts Marine National Monument, as defined in § 600.10, consistent with Presidential Proclamations 9496 and 10287. Fishing for commercial purposes means fishing that is intended to, or results in, the barter, trade, transfer, or sale of fish, either in whole or in part.

(1) Vessels may transit the Northeast Canyons and Seamounts Marine National Monument, provided commercial fishing gear is stowed and not available for immediate use during passage without interruption through the Northeast Canyons and Seamounts Marine National Monument.

(2) [Reserved]

* * * * *

[FR Doc. 2023–23053 Filed 10–18–23; 8:45 am]

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Notices

Federal Register

Vol. 88, No. 201

Thursday, October 19, 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 COMMERCE

International Trade Administration

[A–570–095, C–570–096]

Aluminum Wire and Cable From the People's Republic of China: Initiation of Scope and Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders

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

SUMMARY: Based on available information, the U.S. Department of Commerce (Commerce) is self-initiating scope inquiries, pursuant to the Tariff Act of 1930, as amended (the Act), to determine whether imports of aluminum wire and cable (AWC), completed in Cambodia, the Republic of Korea (Korea), and the Socialist Republic of Vietnam (Vietnam) (collectively, the third countries) using AWC inputs manufactured in the People's Republic of China (China), are covered by the antidumping duty (AD) and countervailing duty (CVD) orders on AWC from China (collectively, the *Orders*). In addition, in accordance with our regulations, Commerce is also self-initiating country-wide circumvention inquiries to determine whether imports of AWC, if not covered by the scope of the *Orders,* are nonetheless circumventing the *Orders,* and is aligning the scope and circumvention inquiries in accordance with our regulations.

DATES: Applicable October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Mark Hoadley at (202) 482–3148, AD/CVD Operations, Office VII or Shawn Gregor at (202) 482–3226, Office of Policy, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On September 21, 2018, Encore Wire Corporation and Southwire Company LLC filed petitions seeking the imposition of AD and CVD duties on imports of AWC from China.[1] Following Commerce's affirmative determinations of dumping and countervailable subsidies,[2] and the U.S. International Trade Commission's (ITC) finding of material injury,[3] Commerce issued the *Orders*.[4]

Scope of the Orders

The merchandise subject to the *Orders* is AWC from China, which is defined as ''an assembly of one or more electrical conductors made from 8000 Series Aluminum Alloys (defined in accordance with ASTM B800), Aluminum Alloy 1350 (defined in accordance with ASTM B230/B230M or B609/B609M0), and/or Aluminum Alloy 6201 (defined in accordance with ASTM B398/B398M), provided that: (1) at least one of the electrical conductors is insulated; (2) each insulated electrical conductor has a voltage rating greater than 80 volts and not exceeding 1000 volts; and (3) at least one electrical conductor is stranded and has a size not less than 16.5 thousand circular mil (kcmil) and not greater than 1000 kcmil.'' For a full description of the scope of the *Orders, see* the Appendix to this notice.

Merchandise Subject to Scope and Circumvention Inquiries

The scope and circumvention inquiries cover AWC assembled and completed in the third countries, using Chinese-origin AWC inputs (*e.g.,* stranded wire and cables or unfinished AWC), that is subsequently exported from the third countries to the United States. Specifically, Commerce placed information on the administrative record, as attachments to its Initiation Memorandum, that AWC inputs produced in China undergo further processing in the third countries before being exported to the United States.[5]

Statutory and Regulatory Requirements To Initiate Scope and Circumvention Inquiries

Section 351.225(b) of Commerce's regulations states that if Commerce ''determines from available information that an inquiry is warranted to determine whether a product is covered by the scope of an order,'' then Commerce ''may initiate a scope inquiry and publish a notice of initiation in the **Federal Register**.''

Additionally, 19 CFR 351.226(b) states that if Commerce ''determines from available information that an inquiry is warranted into the question of whether the elements necessary for a circumvention determination under section 781 of the Act exist,'' Commerce ''may initiate a circumvention inquiry and publish a notice of initiation in the **Federal Register**.'' Section 781(b)(1) of the Act provides that Commerce may find circumvention of an AD or CVD order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting circumvention inquiries, under section 781(b)(1) of the Act, Commerce considers the following criteria: (A) the merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of an antidumping or countervailing duty order or finding; (B) before importation into the United States, such imported merchandise is completed or assembled

[1] *See Aluminum Wire and Cable from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation,* 83 FR 52811 (October 18, 2018); *see also Aluminum Wire and Cable from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 83 FR 52805 (October 18, 2018).

[2] *See Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value,* 84 FR 58134 (October 30, 2019); *see also Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 84 FR 58137 (October 30, 2019).

[3] *See Aluminum Wire and Cable from China; Determinations,* 84 FR 70210 (December 20, 2019); *see also Aluminum Wire and Cable from China,* Inv Nos. 701–TA–611 and 731–TA–1428 (Final), USITC Pub. 5001 (December 2019).

[4] *See Aluminum Wire and Cable from the People's Republic of China: Antidumping Duty and Countervailing Duty Orders,* 84 FR 70496 (December 23, 2019) (*Orders*).

[5] *See* Memorandum, ''Aluminum Wire and Cable from the People's Republic of China: Initiation of Circumvention and Scope Inquiries on the Antidumping Duty and Countervailing Duty Orders,'' dated concurrently with, and hereby adopted by, this notice (Initiation Memorandum). This memorandum is a public document and is on file electronically 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 another foreign country from merchandise which is subject to the order or merchandise which is produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in section (B) is minor or insignificant; (D) the value of the merchandise produced in the foreign country to which the AD or CVD order applies is a significant portion of the total value of the merchandise exported to the United States; and (E) the administering authority determines that action is appropriate to prevent evasion of such order or finding.

In determining whether or not the process of assembly or completion in a third country is minor or insignificant under section 781(b)(1)(C) of the Act, section 781(b)(2) of the Act directs Commerce to consider: (A) the level of investment in the foreign country; (B) the level of research and development in the foreign country; (C) the nature of the production process in the foreign country; (D) the extent of production facilities in the foreign country; and (E) whether or not the value of processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States. However, no single factor, by itself, controls Commerce's determination of whether the process of assembly or completion in a third country is minor or insignificant.[6] Accordingly, it is Commerce's practice to evaluate each of these five factors as they exist in the third country, based on the particular circumvention scenario presented by the facts collected during the inquiry.[7]

In addition, section 781(b)(3) of the Act sets forth additional factors to consider in determining whether to include merchandise assembled or completed in a third country within the scope of an antidumping and/or countervailing duty order. Specifically, Commerce shall take into account such factors as: (A) the pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise is affiliated with the person who, in the third country, uses the merchandise to complete or assemble the merchandise which is subsequently imported into the United States; and (C) whether imports of the merchandise into the third country have increased after the initiation of the investigation that resulted in the issuance of such order or finding.

Available Information Supports Initiation of Scope and Circumvention Inquiries

Commerce is self-initiating these scope inquiries to determine if AWC inputs produced in China and further processed in the third countries before being exported to the United States meet the scope description.[8] We are seeking to determine whether in-scope AWC inputs leave China and undergo minor processing in the third countries before being exported to the United States. If the Chinese-origin, in-scope merchandise that undergoes minor processing in the third countries results in merchandise that still corresponds to the description of in-scope merchandise outlined in the *Orders,* Commerce will find that the merchandise meeting the scope description is covered by the *Orders.* For those products for which Commerce finds that the merchandise is covered by the *Orders,* Commerce may rescind the circumvention inquiries, pursuant to 19 CFR 351.226(f)(6).

Based on available information, we also determine that initiation of these circumvention inquiries is warranted to determine whether certain imports of AWC, completed in the third countries using AWC inputs manufactured in China, are circumventing the *Orders.*[9]

Commerce has made this determination in accordance with its analysis of the factors set forth in section 781(b) of the Act and 19 CFR 351.226(i).[10]

Commerce has determined that it is appropriate to first determine whether the merchandise is subject to the scope of the *Orders* through scope inquiries, before considering whether the merchandise is circumventing the *Orders.* Accordingly, Commerce will initially conduct its scope inquiries of the merchandise at issue, and then once it has made a determination as to the scope coverage status of the merchandise, it will determine whether to continue with the circumvention inquiries. Commerce may apply its scope determinations, in accordance with 19 CFR 351.225(m)(1), on a producer-specific, exporter-specific, or importer-specific basis, or on a country-wide basis, regardless of the producer, exporter, or importer of the products being exported from the third countries to the United States.

If Commerce determines that AWC inputs produced in China and further processed in the third countries before being exported to the United States are not subject to the scope of the *Orders,* in whole or in part, Commerce intends to continue with the circumvention inquiries of that merchandise. If, as a result of the circumvention inquiries, Commerce determines that the products subject to the inquiries are circumventing the *Orders,* then in accordance with 19 CFR 351.226(m)(1), Commerce may apply its determination on a producer-specific, exporter-specific, or import-specific basis, or on a country-wide basis, regardless of the

[6] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, Vol. I (1994) at 893.

[7] *Id.; see also Uncovered Innerspring Units from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order,* 83 FR 65626 (December 21, 2018), and accompanying Issues and Decision Memorandum at 4.

[8] *See* Initiation Memorandum. As explained in the Initiation Memorandum, the available information supports initiating these scope inquiries on a country-wide basis. Commerce has taken this approach in prior scope inquiries, where the facts supported initiation on a country-wide basis. *See, e.g., Quartz Surface Products from the People's Republic of China: Initiation of Scope and Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders,* 87 FR 6844 (February 7, 2022); and *Stainless Steel Sheet and Strip from the People's Republic of China: Initiation of Anti-Circumvention and Scope Inquiries on the Antidumping and Countervailing Duty Orders,* 85 FR 29401, 29402 (May 15, 2020). Pursuant to 19 CFR 351.225(m), even if Commerce initiates a scope inquiry on a country-wide basis, if it subsequently finds that the merchandise is subject to the scope of the order, it is not required to apply its ultimate determination on a country-wide basis but has the discretion to apply the determination as it deems appropriate.

[9] *See* Initiation Memorandum. As explained in the Initiation Memorandum, the available information supports initiating these circumvention inquiries on a country-wide basis. Commerce has taken this approach in prior circumvention inquiries, where the facts supported initiation on a country-wide basis. *See, e.g., Quartz Surface Products from the People's Republic of China: Initiation of Scope and Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders,* 87 FR 6844 (February 7, 2022); *see also* Oil *Country Tubular Goods from the People's Republic of China: Initiation of Anti-Circumvention Inquiries on the Antidumping and Countervailing Duty Orders,* 85 FR 71877, 71878–79 (November 12, 2020); *Stainless Steel Sheet and Strip from the People's Republic of China: Initiation of Anti-Circumvention and Scope Inquiries on the Antidumping and Countervailing Duty Orders,* 85 FR 29401, 29402 (May 15, 2020); *Corrosion-Resistant Steel Products from the People's Republic of China: Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders,* 84 FR 43585 (August 21, 2019); *Steel Butt-Weld Pipe Fittings from the People's Republic of China: Initiation of Anti-Circumvention Inquiry on the Antidumping Duty Order,* 82 FR 40556, 40560 (August 25, 2017) (stating at initiation that Commerce would evaluate the extent to which a country-wide finding applicable to all exports might be warranted); and *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders,* 81 FR 79454, 79458 (November 14, 2016) (stating at initiation that Commerce would evaluate the extent to which a country-wide finding applicable to all exports might be warranted). Pursuant to 19 CFR 351.226(m), even if Commerce initiates a circumvention inquiry on a country-wide basis, if it subsequently finds circumvention to exist, it is not required to apply its ultimate determination on a country-wide basis but has the discretion to apply that circumvention determination as it deems appropriate.

[10] *See* Initiation Memorandum.

producer, exporter, or importer of the products being exported from the third countries to the United States.

Pursuant to 19 CFR 351.225(f)(7) and 226(f)(7), Commerce may ''alter or extend'' time limits under the scope and circumvention inquiries as necessary to make certain all parties to each or both segments of the proceedings are able to file comments and factual information as necessary.

Consistent with the approach taken in prior scope and circumvention inquiries that Commerce initiated on a country-wide basis, we intend to solicit information from certain companies in the third countries concerning their production of AWC and their shipments thereof to the United States. A company's failure to completely respond to Commerce's requests for information may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.

Respondent Selection

Commerce intends to base respondent selection on responses to quantity and value questionnaires. Commerce intends to identify the companies to which it will issue the quantity and value questionnaire, in part, based on U.S. Customs and Border Protection (CBP) data. Parties to which Commerce does not issue the quantity and value questionnaire may also respond to the quantity and value questionnaire, which will be available in ACCESS, by the applicable deadline. Commerce intends to place the CBP data on the record within five days of publication of the initiation notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after placement of the CBP data on the record of the relevant inquiry.

Suspension of Liquidation

(1) Scope Inquiries

Pursuant to 19 CFR 351.225(l)(1), when Commerce self-initiates a scope inquiry under 19 CFR 351.225(b), Commerce will notify CBP of the initiation and direct CBP to continue the suspension of liquidation of entries of products subject to the scope inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order. Accordingly, Commerce will notify CBP of the initiation of the scope inquiries and direct CBP to continue to suspend (unliquidated) entries of the products subject to the scope inquiries that were already covered by the suspension of liquidation. In addition, Commerce will direct CBP to apply the cash deposit rate that would be applicable if the products were determined to be covered by the scope of the *Orders.*

Should Commerce issue preliminary or final scope rulings, Commerce will follow the suspension of liquidation rules under 19 CFR 351.225(l)(2)–(4). In the event that Commerce issues preliminary or final scope rulings that the products are covered by the scope of the *Orders,* Commerce will instruct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. Commerce will also instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after the date of initiation of the scope inquiries pursuant to paragraphs (l)(2)(ii) and (l)(3)(ii). In addition, pursuant to paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A), Commerce normally will instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the date of initiation of the scope inquiry, but not for such entries prior to November 4, 2021, the effective date of these provisions in the Final Rule.[11] These rules will not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures for these entries, as stated in 19 CFR 351.225(l)(5).

(2) Circumvention Inquiries

Pursuant to 19 CFR 351.226(l)(1), when Commerce self-initiates a circumvention inquiry under 19 CFR 351.226(b), Commerce will notify CBP of the initiation and direct CBP to continue the suspension of liquidation of entries of products covered by the circumvention inquiry that were already covered by the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be circumventing the order. Accordingly, Commerce will notify CBP of the initiation of the circumvention inquiries and direct CBP to continue to suspend (unliquidated) entries of the products covered by the circumvention inquiries that were already covered by the suspension of liquidation. In addition, Commerce will direct CBP to apply the cash deposit rate that would be applicable if the products were determined to be circumventing the *Orders.*

Should Commerce issue preliminary or final circumvention determinations, Commerce will follow the suspension of liquidation rules under 19 CFR 351.226(l)(2)–(4). In the event that Commerce issues affirmative preliminary or final circumvention determinations that the products are circumventing the *Orders,* Commerce will instruct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. Commerce will also instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, on or after the date of publication of the notice of initiation of the circumvention inquiries pursuant to paragraphs (l)(2)(ii) and (l)(3)(ii). In addition, pursuant to paragraphs (l)(2)(iii)(A) and (l)(3)(iii)(A), Commerce may instruct CBP to begin the suspension of liquidation and application of cash deposits for any unliquidated entries not yet suspended, entered, or withdrawn from warehouse, for consumption, prior to the date of initiation of the circumvention inquiry, but not for such entries prior to November 4, 2021, the effective date of these provisions in the *Final Rule.*[12] These rules will not affect CBP's authority to take any additional action with respect to the suspension of liquidation or related measures for these entries, as stated in 19 CFR 351.226(l)(5).

Notification to Interested Parties

In accordance with 19 CFR 351.225(b) and 226(b), and section 781(b) of the Act, Commerce determines that available information supports initiating both scope and circumvention inquiries to determine whether certain imports of AWC, completed in and exported from the third countries using AWC inputs manufactured in China, are subject to or circumventing the *Orders.* Accordingly, Commerce is notifying all interested parties of the initiation of scope and circumvention inquiries. In addition, we have included a description of the products that are the subject of these inquiries, and an explanation of the reasons for Commerce's decision to

[11] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300, 52327 (September 20, 2021) (*Final Rule*).

[12] *Id.,* 86 FR at 52345.

initiate these inquiries as provided above and in the accompanying Initiation Memo. Pursuant to 19 CFR 351.225(e)(3) and 226(e)(3), due to the interrelated nature of the scope and circumvention inquiries, Commerce is aligning the deadlines for the scope inquiries with the circumvention inquiries and will conduct the scope inquiries first for the reasons explained above.

Pursuant to 19 CFR 351.225(f)(1), interested parties have until 30 days after publication of this notice in the **Federal Register** to submit one set of comments and factual information addressing the self-initiation of the scope inquiries.

Under 19 CFR 351.225(l)(2)(iii)(B) and (l)(3)(iii)(B), interested parties may timely request that Commerce adopt an alternative date to begin the suspension of liquidation and application of cash deposits under paragraphs (l)(2)(ii)(A) and (l)(3)(iii)(A). A request for Commerce to adopt an alternative date must be based on a specific argument supported by evidence establishing the appropriateness of that alternative date.[13] If parties wish to make such a request, that request must be included with the set of comments and factual information submitted to Commerce pursuant to 19 CFR 351.225(f)(1).

Within 14 days of the filing of such comments, any interested party is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct factual information submitted by the other interested parties (including rebuttal in response to any requests made under 19 CFR 351.225(l)(2)(iii)(B) and (l)(3)(iii)(B)). At this time, we are not soliciting or accepting comments on the self-initiation of the circumvention inquiries. Should Commerce determine to proceed with the circumvention inquiries after finalizing its scope determinations, Commerce will notify interested parties on the segment-specific service list of an opportunity to comment.

In accordance with section 19 CFR 351.225(e), unless the scope inquiries are rescinded, in whole or in part, Commerce intends to issue its final scope rulings within 120 days after the date on which the scope inquiries were initiated. Furthermore, in accordance with section 781(f) of the Act and 19 CFR 351.226(e)(2), unless the circumvention inquiries are rescinded, in whole or in part, Commerce intends to issue its final circumvention determinations within 300 days from the date of publication of the notice of initiation of a circumvention inquiries in the **Federal Register**.

Dated: October 11, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Orders

The scope of these *Orders* covers aluminum wire and cable, which is defined as an assembly of one or more electrical conductors made from 8000 Series Aluminum Alloys (defined in accordance with ASTM B800), Aluminum Alloy 1350 (defined in accordance with ASTM B230/B230M or B609/B609M), and/or Aluminum Alloy 6201 (defined in accordance with ASTM B398/B398M), provided that: (1) At least one of the electrical conductors is insulated; (2) each insulated electrical conductor has a voltage rating greater than 80 volts and not exceeding 1000 volts; and (3) at least one electrical conductor is stranded and has a size not less than 16.5 thousand circular mil (kcmil) and not greater than 1000 kcmil. The assembly may: (1) Include a grounding or neutral conductor; (2) be clad with aluminum, steel, or other base metal; or (3) include a steel support center wire, one or more connectors, a tape shield, a jacket or other covering, and/or filler materials.

Most aluminum wire and cable products conform to National Electrical Code (NEC) types THHN, THWN, THWN–2, XHHW–2, USE, USE–2, RHH, RHW, or RHW–2, and also conform to Underwriters Laboratories (UL) standards UL–44, UL–83, UL–758, UL–854, UL–1063, UL–1277, UL–1569, UL–1581, or UL–4703, but such conformity is not required for the merchandise to be included within the scope.

The scope of the *Orders* specifically excludes aluminum wire and cable products in lengths less than six feet, whether or not included in equipment already assembled at the time of importation.

The merchandise covered by the *Orders* is currently classifiable under subheading 8544.49.9000 of the Harmonized Tariff Schedule of the United States (HTSUS). Products subject to the scope may also enter under HTSUS subheading 8544.42.9090. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the *Orders* is dispositive.

[FR Doc. 2023–23027 Filed 10–18–23; 8:45 am]

BILLING CODE 3510–DS–P

[13] *Id.,* 86 FR at 52326–29, for further information.

DEPARTMENT OF COMMERCE

International Trade Administration

Environmental Technologies Trade Advisory Committee

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of an open meeting of a Federal advisory committee.

SUMMARY: The Environmental Technologies Trade Advisory Committee (ETTAC) will hold a hybrid meeting, accessible in-person and online, on Tuesday, November 14, 2023 at the U.S. Department of Commerce in Washington, DC. The meeting is open to the public with registration instructions provided below. This notice sets forth the schedule and proposed topics for the meeting.

DATES: The meeting is scheduled for Tuesday, November 14, 2023 from 9:30 a.m. to 3:00 p.m. Eastern Standard Time (EST). The deadline for members of the public to register to participate, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5:00 p.m. EST on Friday, November 3, 2023.

ADDRESSES: The meeting will be held virtually as well as in-person in the Commerce Research Library at the U.S. Department of Commerce Herbert Clark Hoover Building, 1401 Constitution Avenue NW, Washington, DC 20230. Requests to register to participate in-person or virtually (including to speak or for auxiliary aids) and any written comments should be submitted via email to Ms. Megan Hyndman, Office of Energy & Environmental Industries, International Trade Administration, at *Megan.Hyndman@trade.gov.* This meeting has a limited number of spaces for members of the public to attend in-person. Requests to participate in-person will be considered on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Ms. Megan Hyndman, Office of Energy & Environmental Industries, International Trade Administration (Phone: 202–823–1839; email: *Megan.Hyndman@trade.gov*).

SUPPLEMENTARY INFORMATION: The ETTAC is mandated by section 2313(c) of the Export Enhancement Act of 1988, as amended, 15 U.S.C. 4728(c), to advise the Environmental Trade Working Group of the Trade Promotion Coordinating Committee, through the Secretary of Commerce, on the development and administration of programs to expand U.S. exports of environmental technologies, goods, services, and products. The ETTAC was most recently re-chartered through August 16, 2024.

On Tuesday, November 14, 2023 from 9:30 a.m. to 3:00 p.m. EST, the ETTAC will hold the fourth meeting of its current charter term. During the meeting, committee members will participate in breakout discussions to discuss issues of interest to specific

environmental technology sectors and to deliberate on potential recommendation topics. The committee will also hear briefings on U.S. government resources and programs to support U.S. environmental technology exporters, including the U.S. National Export Strategy. An agenda will be made available one week prior to the meeting upon request to Megan Hyndman.

The meeting will be open to the public and time will be permitted for public comment before the close of the meeting. Members of the public seeking to attend the meeting are required to register by Friday, November 3, 2023, at 5:00 p.m. EST, via the contact information provided above. This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to OEEI at *Megan.Hyndman@trade.gov* or (202) 823–1839 no less than one week prior to the meeting. Requests received after this date will be accepted, but it may not be possible to accommodate them.

Written comments concerning ETTAC affairs are welcome any time before or after the meeting. To be considered during the meeting, written comments must be received by Friday, November 3, 2023, at 5:00 p.m. EST to ensure transmission to the members before the meeting. Draft minutes will be available within 30 days of this meeting.

Dated: October 13, 2023.

Man K. Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2023–23072 Filed 10–18–23; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–895, A–583–861]

Low Melt Polyester Staple Fiber From the Republic of Korea and Taiwan: Final Results of the Expedited First Sunset Reviews of Antidumping Duty Orders

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

SUMMARY: As a result of these expedited sunset reviews, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) orders on low melt polyester staple fiber (low melt PSF) from the Republic of Korea (Korea) and Taiwan would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Expedited Sunset Reviews'' section of this notice.

DATES: Applicable October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Hart, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1058.

SUPPLEMENTARY INFORMATION:

Background

On August 16, 2018, Commerce published in the **Federal Register** the AD orders on low melt PSF from Korea and Taiwan.[1] On July 3, 2023, Commerce published the *Initiation Notice* of the first sunset reviews of the *Orders* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] In accordance with 19 CFR 351.218(d)(1)(i) and (ii), Commerce received notices of intent to participate in these sunset reviews from Huvis Indorama Advanced Materials, LLC and Nan Ya Plastics Corporation, America (collectively, the domestic interested parties) within 15-days after the date of publication of the *Initiation Notice.*[3] The domestic interested parties claimed interested party status under section 771(9)(C) of the Act as producers of a domestic like product in the United States.

Commerce received timely, adequate substantive responses to the *Initiation Notice* from the domestic interested parties within the 30-day period specified in 19 CFR 351.218(d)(3)(i).[4] Commerce did not receive substantive responses from any other interested parties, and no party requested a hearing.

On August 22, 2023, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.[5] As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited, *i.e.,* 120-day, sunset reviews of the *Orders.*

Scope of the Orders

The merchandise subject to the *Orders* is synthetic staple fibers, not carded or combed, specifically bi-component polyester fibers having a polyester fiber component that melts at a lower temperature than the other polyester fiber component (low melt PSF). For a complete description of the scope of the *Orders, see* the Issues and Decision Memorandum.[6]

Analysis of Comments Received

All issues raised in these sunset reviews are addressed in the Issues and Decision Memorandum, including the likelihood of continuation or recurrence of dumping and the magnitude of the margins of dumping likely to prevail if the *Orders* were revoked.[7] A list of topics discussed in the Issues and Decision Memorandum is included as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *http://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Expedited Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Orders* would likely lead to the continuation or recurrence of dumping and that the magnitude of the dumping margins likely to prevail would be at a rate up to 16.27 percent for Korea and up to 49.93 percent for Taiwan.

Administrative Protective Orders

This notice serves as the only reminder to interested parties subject to an administrative protective order (APO) of their responsibility concerning

[1] *See Low Melt Polyester Staple Fiber from the Republic of Korea and Taiwan: Antidumping Duty Orders,* 83 FR 40752 (August 16, 2018) (collectively, *Orders*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 42688 (July 3, 2023) (*Initiation Notice*).

[3] *See* Domestic Interested Parties' Letter, ''Low Melt Polyester Staple Fiber from the Republic of Korea—Domestic Interested Parties' Notice of Intent to Participate,'' dated July 18, 2023; *see also* Domestic Interested Parties' Letter, ''Low Melt Polyester Staple Fiber from Taiwan—Domestic Interested Parties' Notice of Intent to Participate,'' dated July 18, 2023.

[4] *See* Domestic Interested Parties' Letter, ''Low Melt Polyester Staple Fiber from the Republic of Korea—Domestic Interested Parties' Notice of Intent to Participate,'' dated July 18, 2023; *see also,* Domestic Interested Parties' Letter, ''Low Melt Polyester Staple Fiber from Taiwan—Domestic Interested Parties' Notice of Intent to Participate,'' dated July 18, 2023.

[5] *See* Commerce's Letter, ''Sunset Reviews for July 2023,'' dated August 22, 2023.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Reviews of the Antidumping Duty Orders on Low Melt Polyester Staple Fiber from the Republic of Korea and Taiwan,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[7] *Id.*

the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely 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

We are issuing and publishing the results in accordance with sections 751(c), 752(c), and 771(i)(1) of the Act and 19 CFR 351.218.

Dated: October 10, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–22881 Filed 10–18–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD381]

Identifying Aquaculture Opportunity Areas in Alaska

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

ACTION: Notice; request for information.

SUMMARY: NOAA is beginning the process to identify Aquaculture Opportunity Areas (AOAs) in Alaska state waters to help sustainably advance invertebrate (*e.g.,* shellfish, sea cucumber) and seaweed (*e.g.,* macroalgae, kelp) aquaculture, in partnership with the State of Alaska. NOAA requests data, comments, views, information, analysis, or suggestions from the public to support the identification of AOAs in Alaska state waters, including siting parameters that can be used to select potential study areas for further analysis. Please respond to the questions listed in the **SUPPLEMENTARY INFORMATION** section, as appropriate.

DATES: Written comments must be received on or before December 18, 2023.

Two webinar-based listening sessions are scheduled for Alaska.

1. November 14, 2023, 9 a.m. to 11 a.m. (AKST) Alaska.

2. November 15, 2023, 2 p.m. to 4 p.m. (AKST) Alaska.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0113, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0113 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written information to Jon Kurland, Regional Administrator for Alaska Region NMFS, Attn: Records Office. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Webinar links:* Links and toll-free phone numbers for each webinar can be found at: *https://www.fisheries.noaa.gov/action/request-information-identifying-aquaculture-opportunity-areas-alaska.*

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. Responses to this request are voluntary. Respondents need not reply to all questions. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Please note that the U.S. Government will not pay for any costs that you may incur in responding to this Request for Information (RFI), or for the use of any information contained in the response. The documents and information submitted in response to this RFI become the property of the U.S. Government and will not be returned.

FOR FURTHER INFORMATION CONTACT: Alicia Bishop, 907–586–7724, *nmfs.akr.aoainfo@noaa.gov.*

SUPPLEMENTARY INFORMATION: An AOA is a defined geographic area that NOAA has evaluated through both spatial analysis and a programmatic National Environmental Policy Act (NEPA) process and determined to be environmentally, socially, and economically appropriate to support multiple commercial aquaculture operations. On June 1, 2023, NOAA announced the beginning of the process to identify AOAs in partnership with the State of Alaska in Alaska state waters. This is the beginning of a multi-year process in which NOAA and the State of Alaska will work to analyze locations and identify AOAs in Alaska state waters to help sustainably advance invertebrate (*e.g.,* shellfish, sea cucumber) and seaweed (*e.g.,* macroalgae, kelp) aquaculture. NOAA will not consider finfish aquaculture during identification of AOAs in Alaska because it is prohibited by state law.

NOAA has directives to preserve ocean sustainability and facilitate domestic aquaculture in the U.S., including through the National Aquaculture Act of 1980, the NOAA Marine Aquaculture Policy, and the Executive Order 1321, Promoting American Seafood Competitiveness and Economic Growth (May 7, 2020). NOAA has a variety of proven science-based tools and strategies that can support these directives and help communities thoughtfully consider how and where to sustainably develop aquaculture that will complement wild-capture fisheries, working waterfronts, and our nation's seafood processing and distribution infrastructure.

The areas identified as AOAs will have characteristics that are expected to be able to support multiple aquaculture farm sites of varying types; however, all portions of the AOA may not be appropriate for aquaculture or for all types of aquaculture. Identifying AOAs is an opportunity to use the best available science, which includes Indigenous Knowledge, and supports the ''triple bottom line'' of environmental, economic, and social sustainability. This approach has been refined and utilized widely within states and by other countries with robust, sustainable aquaculture sectors.

The Secretary of Commerce will identify AOAs in consultation with the Secretary of Defense, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Homeland Security, the Administrator of the Environmental Protection Agency, other appropriate Federal officials, and appropriate Regional Fishery Management Councils, and in coordination with appropriate State and Tribal governments.

NOAA held a 60-day public comment period in 2020 (85 FR 67519, October 23, 2020) to collect input on where in the country to focus the science-based, inclusive process to identify AOAs. During that comment period, NOAA received letters of support from individuals, industry, Alaska Native organizations, state agencies, and the state legislature to begin the process in Alaska state waters.

NOAA cannot conduct spatial modeling on the scale of the entire coast of Alaska, and will narrow down to study areas that will be the focus moving forward. This will be done using a combination of spatial mapping, scientific review, public input gathered through this RFI, and other relevant information. NOAA's National Centers for Coastal Ocean Science will use public input and the best available data, which includes Indigenous Knowledge, to account for key environmental, economic, social, and cultural considerations to identify areas that may support sustainable aquaculture development. NOAA will then combine those data with input from other State and Federal agencies, Fishery Management Councils, Marine Fisheries Commissions, Alaska Native Tribes and organizations, and the general public to identify areas that will be considered in more depth through the NEPA process. Through this notice, NOAA is requesting data, comments, views, information, analysis, or suggestions from the public to support the identification of AOAs in Alaska state waters, including siting parameters that can be used to select potential study areas for further analysis. The public input provided in response to this request for information will inform NOAA as it works with Federal, State, and Local agencies, appropriate Regional Fishery Management Councils, and in coordination with appropriate Alaska Native Tribes and organizations to identify AOAs. Additional opportunities for public input will be provided during the NEPA process.

NOAA may use the information received through this notice in the NEPA process. The information could inform the development of potential NEPA alternatives, such as different locations, different aquaculture types in each location (*e.g.,* seaweed in one location, shellfish in another location), and different configurations of farm locations or farming gear. NOAA expects to publish a notice of intent (NOI) to prepare a programmatic NEPA document. Public notices announcing the NOI and announcing the availability of a draft NEPA document will provide future opportunities for public comment on the identification of AOAs in Alaska state waters.

AOA identification is a planning process, and does not result in areas permitted for aquaculture. Future aquaculture operations proposed within an AOA would be subject to the same Federal and State permitting and authorization requirements as an aquaculture operation proposed anywhere else and would be required to comply with all applicable Federal and State laws and regulations. Site-specific environmental surveys may be required for the permitting process. Additional NEPA analysis beyond that completed for identification of AOA(s) may be necessary as a part of permitting and authorization processes for individual operations.

Additional information on identifying AOAs in Alaska, including frequently asked questions, is available on NOAA's website at: *https://www.fisheries.noaa.gov/alaska/aquaculture/identifying-aquaculture-opportunity-areas-alaska.*

Request for Information

NOAA requests data, comments, views, information, analysis, or suggestions from the public to support the identification of AOAs in Alaska state waters, including siting parameters that can be used to select potential study areas for further analysis.

NOAA proposes using the following parameters to select study areas in Alaska state waters:

a. State waters within a 25-mile (40-kilometer) radius of coastal community population centers (based on 2010 census data) as a proxy for needed infrastructure to support aquaculture development in Alaska.

b. State waters that do not regularly experience significant sea ice cover (based on the 10 year aggregate maximum sea ice cover reported by the U.S. National Ice Center).

Figures showing the potential AOA study areas that would result from use of these parameters can be found on the NOAA's National Centers for Coastal Ocean Science Alaska AOA study area website: *https://coastalscience.noaa.gov/news/alaska-aquaculture-opportunity-areas/.*

These parameters are proposed starting points, from which NOAA will select study areas using a combination of spatial mapping approaches, scientific review, public input, Indigenous Knowledge, and any other relevant information.

Specifically, NOAA is soliciting information and feedback on:

1. Are the preliminary parameters (noted above) useful? Are there other parameters NOAA should consider in identifying initial study areas for the aquaculture siting analysis? Are there other distances from population centers/local infrastructure that should be considered, and why?

2. Are there size limitations NOAA should consider for AOAs in Alaska? How many farms should fit within an AOA? Should the size of AOAs be aligned with state economic development goals for shellfish and seaweed aquaculture?

3. Are there specific locations within Alaska state waters that should be considered or avoided for AOAs? Please be as specific as possible and include latitude and longitude or defining landmarks. Please indicate why such areas should be considered or avoided, for example, favorable biological parameters, water quality (*e.g.,* nutrients or other constituents that might make an area favorable), proximity to infrastructure (*e.g.,* ports, testing or processing facilities, or hatcheries that could supply seed for grow-out), relationship to other planned initiatives, *etc.*

4. Are there subsistence harvest locations, fishing areas, and other traditionally and culturally important locations or sacred sites that should be avoided? Is there available spatial data or geographic information system (GIS) layers, or a point of contact for these data or information?

5. Are there specific locations within Alaska state waters where the presence of aquaculture gear may overlap with sensitive habitats or biologically important areas for protected species (*e.g.,* whales, sea otters, sea lions, *etc.*)?

6. Are there specific locations within Alaska state waters that should be avoided because of concerns about harmful algal blooms (HABs) or impaired water quality?

7. Is there ongoing environmental, economic, or social science research that would assist in the identification of AOAs in Alaska state waters? If so, please describe in as much detail as is available.

8. Is there information that may not be readily available or accessible online that would be useful for AOA planning processes in Alaska state waters? This includes spatial data or GIS layers representing subsistence, environmental, and socioeconomic considerations, or a point of contact for these data, for the following categories:

a. Biophysical/oceanographic (ice cover, temperature, ocean acidification indices, wave climate, currents, bathymetry),

b. Natural resources (minerals, energy resources, fishes and other aquatic

organisms, protected species and habitats, marine mammals, kelp beds, eelgrass beds, biodiversity),

c. Social, historical, and cultural resources (cultural and subsistence harvest, community subsistence hunting, subsistence fishing, culturally important sites to encourage or avoid, shipwrecks),

d. Government boundaries,

e. Industry (fishing, energy production, transportation, communication cables),

f. Military,

g. Navigation, and

h. Recreational resources (fishing, hunting, *etc.*).

9. Are there aquaculture species or gear considerations that may result in optimized growth in Alaska state waters? This might include (but is not limited to): species or aquaculture gear depth thresholds, water current thresholds, temperature thresholds, salinity thresholds, *etc.* Are there any species or gear not currently being used in Alaska state waters that you would like to see in the future? Do they extend any of these (or other) thresholds? Please be as specific as possible.

10. Is there any additional information NOAA should consider?

When providing input, please specify:

• The question number(s) you are responding to; and

• Whether your comments are related to specific type(s) of aquaculture (macroalgae, invertebrates, or a combination of species).

Responses to this request are voluntary. Respondents need not reply to all questions.

Authority: E.O. 13921.

Dated: October 12, 2023.

Danielle Blacklock,

Director, Office of Aquaculture, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–23084 Filed 10–18–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD374]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Ocean Wind 1 Project Offshore of New Jersey

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

ACTION: Notice of issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) as amended, and implementing regulations, notification is hereby given that a Letter of Authorization (LOA) has been issued to Ocean Wind, LLC (Ocean Wind), a subsidiary wholly owned by Orsted Wind Power North America, LLC (Orsted), for the taking of marine mammals incidental to the construction of the Ocean Wind 1 Project.

DATES: The LOA is effective from October 13, 2023 through October 12, 2028.

ADDRESSES: The LOA and supporting documentation are available online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

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

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are promulgated (when applicable), and public notice and an opportunity for public comment are provided.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). If such findings are made, NMFS must prescribe the permissible methods of taking; ''other means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as ''mitigation''); and requirements pertaining to the monitoring and reporting of such takings. The MMPA defines ''take'' to mean harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13); 50 CFR 216.103). Level A harassment is defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362(18); 50 CFR 216.3). Level B harassment is defined as any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (16 U.S.C. 1362(18); 50 CFR 216.3). Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I authorize NMFS to propose and, if appropriate, promulgate regulations and issue an associated LOA(s). NMFS promulgated regulations on September 13, 2023 (88 FR 62898) for the taking of marine mammals incidental to the construction of the Ocean Wind 1 Project offshore of New Jersey. The LOA authorizes Ocean Wind and those persons it authorizes or funds to conduct activities on its behalf to take marine mammals incidental to specified activities during the construction of the Project and requires them to implement mitigation, monitoring, and reporting requirements.

Summary of Request

On September 13, 2023, NMFS promulgated a final rule (88 FR 62898) responding to a request from Ocean Wind for authorization to take marine mammals (17 species comprising 18 stocks) by Level B harassment (all 18 stocks) and by Level A harassment (10 stocks) incidental to construction activities occurring in Federal and State waters off of New Jersey, specifically within and around the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Area OCS–A 0498 (Lease Area) and along 2 export cable routes to sea-to-shore transition points (collectively referred to as the ''Project Area''), over the course of 5 years (October 13, 2023 through October 12, 2028). The activities covered under the final rule include: the installation of 98 wind turbine generators (WTGs) and 3 offshore substations (OSSs) on monopile foundations by impact pile driving; the installation and subsequent removal of nearshore temporary cofferdams and goal posts by vibratory pile driving at the cable landfall sites in Ocean County, New Jersey and Cape May County, New Jersey; high-resolution geophysical (HRG) marine site characterization

surveys using active acoustic sources; the detonation of up to 10 unexploded ordnance or munitions and explosives of concern (UXOs/MECs) of different charge weights; fishery and ecological monitoring surveys; the placement of scour protection; the installation of the export cable route from OSSs to shore-based converter stations and inter-array cables between turbines by trenching, laying, and burial activities; vessel transits within the specified geographical region to transport crew, supplies, and materials to support construction and operation.

Marine mammals exposed to elevated noise levels during impact driving, or UXO/MEC detonations may be taken by Level A harassment, and marine mammals exposed to elevated noise levels during impact and vibratory pile driving, site characterization surveys, or UXO/MEC detonations may be taken by Level B harassment. No Level A harassment of North Atlantic right whales, blue whales, sperm whales, Atlantic spotted dolphins, Atlantic white-sided dolphins, common dolphins, long-finned or short-finned pilot whales, or Risso's dolphins is anticipated or authorized. No mortality or serious injury of any marine mammal is anticipated or authorized.

Authorization

In accordance with the final rule (88 FR 62898, September 13, 2023, *see* 50 CFR 217.266), we have issued a LOA to Ocean Wind authorizing the take, by harassment, of marine mammals incidental to specified construction activities within the specified geographical region. No mortality or serious injury of any marine mammal species is anticipated or authorized. The incidental takes authorized herein are the same as those analyzed and authorized in the final rule (88 FR 62898, September 13, 2023). Takes of marine mammals will be minimized through the following planned mitigation and monitoring measures, as applicable for each specified activity: (1) implementation of seasonal/time of day work restrictions; (2) use of multiple NMFS-approved Protected Species Observers (PSOs) to visually observe for marine mammals (with any detection within specifically designated zones triggering a delay or shutdown, as applicable); (3) use of NMFS-approved passive acoustic monitoring (PAM) operators to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering a delay or shutdown, as applicable); (4) implementation of clearance and shutdown zones; (6) use of soft-start prior to the start of impact pile driving; (7) use of noise attenuation technology during impact pile driving and UXO/MEC detonations; (8) use of situational awareness monitoring for marine mammal presence; (9) use of sound field verification monitoring; (10) use of soft-start impact pile driving and ramp-up acoustic sources during HRG surveys; (11) implementation of vessel separation zones between marine mammals and project vessels; (12) use of PAM within the vessel transit corridor for Project vessels to travel over 10 knots (11.5 miles per hour); and (13) implementation of additional Vessel Strike Avoidance measures to reduce the risk of a vessel collision with a marine mammal. Additionally, NMFS may modify the LOA's mitigation, monitoring, or reporting measures, based on new information, when appropriate (*see also* 50 CFR 217.267(c)). Ocean Wind is also required to submit reports, as specified in the final rule.

Based on the findings and information discussed in the preamble of the final rule, the take authorized in the LOA will have a negligible impact on marine mammal stocks, will not have an unmitigable adverse impact on the availability of the affected marine mammal stock for subsistence uses, and the mitigation measures provide a means of affecting the least practicable adverse impact on the affected stocks and their habitat.

Dated: October 16, 2023.

Kimberly Damon-Randall,

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

[FR Doc. 2023–23087 Filed 10–18–23; 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; Application for Appointment in the NOAA Commissioned Officer Corps

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite 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. Public comments were previously requested via the **Federal Register** on August 10, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration, Commerce.

Title: Application for Appointment in the NOAA Commissioned Officer Corps.

OMB Control Number: 0648–0047.

Form Number(s): NOAA Forms 56–42 and 56–42a.

Type of Request: Regular submission [revision and extension of a current information collection].

Number of Respondents: 300.

Average Hours per Response: Written applications: 2 hours; Interviews: 5 hours; References: 15 minutes.

Total Annual Burden Hours: 2,475.

Needs and Uses: This is a request for revision and extension of an existing information collection.

The NOAA Commissioned Officer Corps is the uniformed service of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce. Officers serve under Senate-confirmed appointments and Presidential commissions (33 U.S.C. chapter 17, subchapter 1, sections 853 and 854). The NOAA Corps provides a cadre of professionals trained in engineering, earth sciences, oceanography, meteorology, fisheries science, and other related disciplines who serve their country by supporting NOAA's mission of surveying the Earth's oceans, coasts, and atmosphere to ensure the economic and physical well-being of the Nation.

NOAA Corps officers operate vessels and aircraft engaged in scientific missions and serve in leadership positions throughout NOAA. Persons wishing to apply for an appointment in the NOAA Commissioned Officer Corps must complete an application package, including NOAA Form 56–42, at least three letters of recommendation, and official transcripts. A personal interview must also be conducted. Eligibility requirements include a bachelor's degree with at least 48 credit hours of science, engineering, or other disciplines related to NOAA's mission, excellent health, and normal color vision with uncorrected visual acuity no worse than 20/400 in each eye (correctable to 20/20).

The revision includes updates which reflect the current status of the NOAA Corps. This includes amending the essay questions and updating the

instructions to reflect a new direct-to-aviation recruitment model.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

Legal Authority: 33 U.S.C. chapter 17, subchapter 1, sections 853 and 854.

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

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 and entering either the title of the collection or the OMB Control Number 0648–0047.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–23015 Filed 10–18–23; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

Per 45 CFR chapter XXI 2102.3, the next meeting of the U.S. Commission of Fine Arts is scheduled for October 19, 2023, at 9:00 a.m. and will be held via online videoconference. Items of discussion may include buildings, infrastructure, parks, memorials, and public art.

Draft agendas, the link to register for the online public meeting, and additional information regarding the Commission are available on our website: *www.cfa.gov.* Inquiries regarding the agenda, as well as any public testimony, should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing *cfastaff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated: October 10, 2023 in Washington, DC.

Susan M. Raposa,

Technical Information Specialist.

[FR Doc. 2023–23009 Filed 10–18–23; 8:45 am]

BILLING CODE 6330–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement for Master Plan and Installation Development at Nellis Air Force Base, Nevada

AGENCY: Department of the Air Force.

ACTION: Notice of intent.

SUMMARY: The Department of the Air Force (Air Force) is issuing this Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) to assess the potential social, economic, and environmental impacts associated with the proposed master plan and installation development at Nellis Air Force Base (AFB), Nevada.

DATES: A public scoping period of 30 days will take place starting from the date of the publication of this NOI in the **Federal Register**. Comments will be accepted at any time during the environmental impact analysis process; however, to ensure the Air Force has sufficient time to consider public scoping comments during preparation of the Draft EIS, please submit comments within the 30-day scoping period. The Draft EIS is anticipated in late 2024. The Final EIS and a decision on which alternative to implement is expected in late 2025.

During the scoping period, the Air Force will hold two in-person public scoping meetings: November 14 and 15, 2023, from 5:00 p.m. to 7:00 p.m., at the Cora Coleman Senior Center located at 2100 Bonnie Lane, Las Vegas, NV 89156. Both meetings are at the same location but offered on two different days to provide options to interested individuals.

ADDRESSES: All public meeting materials may be viewed on the EIS website (*https://www.nellisafbeis.com*). For those without access to a computer or the internet, copies of the scoping materials may be obtained by submitting a request to Nellis AFB Public Affairs at (702) 652–2750. Scoping comments may be submitted by one of the following methods: (1) submit a written comment in person at one of the two public scoping meetings, (2) mail a written comment to Attn: Master Plan and Installation Development at Nellis AFB, 2222 S 4th Avenue, P.O. Box 6257, Yuma, AZ 85366, and/or (3) submit a comment via the project website at *https://www.nellisafbeis.com.* For questions regarding the Proposed Action or EIS development, or to request sign language assistance at the in-person scoping meetings, contact Daniel Fisher at *daniel.fisher.26@us.af.mil* or (210) 925–2738.

SUPPLEMENTARY INFORMATION: Nellis AFB is proposing to develop the east side of the Installation. The purpose of the Proposed Action is to optimize Nellis AFB's current operational capabilities and capacity for future warfighting training and testing. The Proposed Action is needed because the current Nellis and United States Air Force Warfare Center mission sets are outpacing the ability to expand resources and capacity. In addition, the Air Force anticipates that facility requirements are likely to increase over time through normal attrition and the arrival of new missions and that the number of active duty and civilian personnel would also increase. The existing infrastructure does not meet current and future mission needs; mission capability at Nellis AFB is nearing physical capacity, and additional flightline support facilities and infrastructure are needed to meet anticipated future growth. The Proposed Action is also needed to relieve stress on facility and infrastructure constraints on the west side of the Installation. Flying units are currently sharing hangar space, which is not conducive to future mission growth. Presently, the Installation's infrastructure and utilities are a limitation to operational expansion and growth; utilities and the west-side ramp are reaching full operational capacity and must be expanded to accommodate future operations. Without expansion, the existing facilities and infrastructure at Nellis AFB would be insufficient to meet Air Force and Department of Defense current and future mission requirements.

The Proposed Action is development of the east side of Nellis AFB to address current mission constraints and future mission growth because the majority of the land available to construct facilities and infrastructure is located in the undeveloped area on the east side of the Installation. Constructed facilities and infrastructure will be grouped by functional land use category, and facilities with similar uses and mission functions will be located in the same general area. For planning purposes, the Air Force grouped similar mission activities into eight categories based on facility and infrastructure function and conservatively estimated the anticipated amount of impervious surface coverage typical of each functional category. The eight functional categories are Airfield Operations/Industrial/Light Industrial; Administrative/Small-scale Administrative; Medical/Community

Services/Community Commercial/Small-scale Retail and Service; Lodging/Residential (Accompanied and Unaccompanied); Outdoor Recreation/Open Space/Training Space; Transportation; Utilities/Infrastructure; and Existing Pavements.

In order to address facility requirements needed to support current and future mission structure changes and the associated increase in mission personnel, the Air Force is proposing two alternatives to gain functional capacity and support future mission growth at Nellis AFB: Alternative 1, complete build-out covering approximately 2,000 acres, and Alternative 2, partial build-out covering approximately 1,486 acres. The Air Force will also evaluate a No Action Alternative in the EIS. The Air Force is early in the planning process and has not yet identified a Preferred Alternative.

The EIS will provide analysis to inform decision-makers, as well as the public and tribal partners, of the potential environmental consequences and any associated mitigation, and will provide interested persons or agencies opportunities to provide their input. The environmental impacts analysis is expected to focus on potential impacts related to air emissions from construction, potential threatened and endangered species impacts from construction and habitat reduction, soil and water quality impacts from soil compaction and erosion, stormwater impacts from the increase in impervious surfaces, and potential impacts to cultural resources. Impacts to transportation may include increased traffic on and off the Installation. Permitting actions for construction, air emissions, and stormwater pollution prevention may be required. The Air Force will also consult with appropriate resource agencies and Native American tribes to determine the potential for significant impacts. Consultation will be incorporated into the preparation of the EIS and will include, but not be limited to, consultation under Section 7 of the Endangered Species Act and consultation under Section 106 of the National Historic Preservation Act. Additional analysis will be provided in the Draft EIS.

Scoping and Agency Coordination: To effectively define the full range of issues to be evaluated in the EIS, the Air Force is soliciting comments from interested local, state, and federal officials and agencies; Native American tribes; and interested members of the public and other stakeholders. Comments are requested on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the natural and/or human environment. Concurrent with the publication of this Notice of Intent, public scoping notices will be announced locally.

Mia Day,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–23047 Filed 10–18–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Board of Regents, Uniformed Services University of the Health Sciences; Notice of Location Change for Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Department of Defense (DoD).

ACTION: Notice of change in location for Federal advisory committee meeting.

SUMMARY: On September 29, 2023, the DoD published a notice announcing the next meeting of the Board of Regents, Uniformed Services University of the Health Sciences (BoR USUHS) on October 20, 2023, from 12:30 p.m. to 5 p.m. (EST). The DoD is publishing this notice to announce that this Federal advisory committee meeting location has changed to the Cocoa Terrace Conference Room, Hershey Lodge, 325 University Drive, Hershey, PA 17033 due to challenges with the previously published meeting location.

DATES: Friday, October 20, 2023, open to the public from 12:30 p.m. to 5 p.m. (EST).

ADDRESSES: Cocoa Terrace Conference Room, Hershey Lodge, 325 University Drive, Hershey, PA 17033. The meeting will be held both in-person and virtually. Members of the public wishing to attend the meeting in-person or virtually should contact Ms. Angela Bee via email at *bor@usuhs.edu.*

FOR FURTHER INFORMATION CONTACT: Ms. Annette Askins-Roberts, Designated Federal Officer (DFO), at (301) 295–3066, or *bor@usuhs.edu.* Mailing address is 4301 Jones Bridge Road, Bethesda, MD 20814. Website: *https://www.usuhs.edu/ao/board-of-regents.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer, the BoR USUHS was unable to provide sufficient public notification required by 41 CFR 102–3.150(a) regarding the change in location of its October 20, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 12, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–23012 Filed 10–18–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0099]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense (DoD).

ACTION: Notice of availability of proposed amendments to the Manual for Courts-Martial (MCM), United States (2024 ed.), supplementary materials, and notice of public meeting.

SUMMARY: The DoD requests comments on proposed changes to the MCM, United States (2024 ed.) and its supplementary materials and announces a public meeting to receive comments on said changes. The approval authority for the changes to the MCM is the President, while the approval authority for the changes to the supplementary materials is the General Counsel of the DoD.

DATES: Comments on the proposed changes must be received no later than December 18, 2023. A public meeting to receive comments concerning the proposed changes will be held on November 14, 2023, at 10:00 a.m. in the Court of Appeals of the Armed Forces building, 450 E St. NW, Washington, DC 20442–0001 with an option for remote attendance. Details on remote attendance will be posted at least 7 days in advance of the meeting at *https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/.*

ADDRESSES: The proposed changes to the MCM (2024 ed.) can be reviewed at *https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/.* You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Assistant to the Secretary of

Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

• *JSC Portal: http://jsc.defense.gov/Contact*. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Commander Anthony M. DeStefano, U.S. Coast Guard, Executive Secretary, JSC, (202) 372–3807, *anthony.m.destefano@uscg.mil*. The JSC website is located at *http://jsc.defense.gov*.

SUPPLEMENTARY INFORMATION: The proposed changes to the MCM are being made available on the internet at *http://www.regulations.gov,* Docket ID: DoD–2023–OS–0099 rather than being printed in the **Federal Register**.

These proposed changes have not been coordinated within the DoD under DoD Directive 5500.01, ''Preparing, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony,'' June 15, 2007, and do not constitute the official position of the DoD, the Military Departments, or any other Government agency.

This notice is provided in accordance with DoD Instruction 5500.17, ''Role and Responsibilities of the Joint Service Committee on Military Justice (JSC),'' February 21, 2018.

The JSC invites members of the public to comment on the proposed changes; such comments should address specific recommended changes and provide supporting rationale.

This notice also sets forth the date, time, and location for a public meeting of the JSC to discuss the proposed changes.

This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

Dated: October 16, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–23115 Filed 10–18–23; 8:45 am]

BILLING CODE 6001– FR–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–535–000]

WBI Energy Transmission, Inc.; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed South Spearfish Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document, that will discuss the environmental impacts of the South Spearfish Project involving construction, operation, and abandonment of facilities by WBI Energy Transmission, Inc. (WBI Energy) in Lawrence County, South Dakota. The Commission will use this environmental document in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity and authorization for abandonment of facilities. This gathering of public input is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission's NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on November 13, 2023. Comments may be submitted in written form. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission before the opening of this docket on August 28, 2023, you will need to file those comments in Docket No. CP23–535–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law. The Commission does not subsequently grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

WBI Energy provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (*www.ferc.gov*) under the Natural Gas, Landowner Topics link.

Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.*

(1) You can file your comments electronically using the *eComment* feature, which is on the Commission's website (*www.ferc.gov*) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature, which is also on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You will be asked to select the type of filing you are making; a comment on a particular project is considered a ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–535–000) on your letter. 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.

Additionally, the Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

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.*

Summary of the Proposed Project

The proposed project would allow for incremental firm transportation capacity from WBI Energy's existing Line Section 15 in western South Dakota to the community of Spearfish, South Dakota for Montana-Dakota Utilities, Company. Specifically, WBI Energy proposes the following in Lawrence County, South Dakota:

- modify the Deadwood-Central City Lateral Takeoff Valve Setting adjacent to the Deadwood Mainline Transfer Station on WBI Energy's Line Section 15;
- increase the maximum allowable operating pressure of the 8-inch-diameter Deadwood-Central City Lateral from the Deadwood Mainline Transfer Station to the proposed South Spearfish Station;
- install two pig launcher/receivers,[1] one at each end of the uprated Deadwood-Central City Lateral;
- construct the new South Spearfish Station adjacent to the existing South Spearfish Lateral Takeoff Valve Setting. The new station would contain the relocated South Spearfish Town Border Station and the new Deadwood Lateral Transfer Station;
- relocate approximately 500 feet of the South Spearfish Lateral adjacent to the South Spearfish Town Border Station and the existing South Spearfish Lateral Takeoff Valve Setting; and
- abandon by sale the existing 5.5-mile-long 4-inch-diameter South Spearfish Lateral and certain town border station equipment, at the existing South Spearfish Town Border Station to Montana-Dakota upon the commissioning of the new South Spearfish Town Border Station.

The general location of the project facilities is shown in appendix 1.[2]

[1] A ''pig'' is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes. A pig launcher/receiver are facilities where pigs are inserted/retrieved from the pipeline.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary''. For instructions on connecting to eLibrary, refer to the last page of this notice. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

Land Requirements for Construction

Construction of the Project will affect approximately 8.1 acres of land, including temporary workspace needed for construction of pipeline and aboveground facilities, staging area, and access roads. Following construction, approximately 4.7 acres would revert to pre-construction conditions and uses. The remaining approximately 3.4 acres, including the permanent pipeline easement and aboveground facility sites, would be retained for permanent operation of the Project.

NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed project under the relevant general resource areas:

- geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- environmental justice;
- air quality and noise; and
- reliability and safety.

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/Notice of Schedule* will be issued, which will open up an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft

EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary [3] and the Commission's natural gas environmental documents web page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] The environmental document for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes: federal, state, and local government representatives and agencies; elected officials; public interest groups; Native American Tribes; other interested parties; and local libraries. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please complete one of the following steps:

(1) Send an email to *GasProjectAddressChange@ferc.gov* stating your request. You must include the docket number CP23–535–000 in your request. If you are requesting a change to your address, please be sure to include your name and the correct address. If you are requesting to delete your address from the mailing list, please include your name and address as it appeared on this notice. This email address is unable to accept comments. *OR*

(2) Return the attached ''Mailing List Update Form'' (appendix 2).

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at *https://www.ferc.gov/news-events/events* along with other related information.

Dated: October 13, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23107 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

[3] For instructions on connecting to eLibrary, refer to the last page of this notice.

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at title 40, Code of Federal Regulations, section 1501.8.

[5] The Advisory Council on Historic Preservation's regulations are at title 36, Code of Federal Regulations, part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

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: RP24–39–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: § 4(d) Rate Filing: Housekeeping Filing on 10–12–23 to be effective 11/12/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5033.
Comment Date: 5 p.m. ET 10/24/23.

Docket Numbers: RP24–40–000.
Applicants: Southwest Gas Storage Company.
Description: § 4(d) Rate Filing: Housekeeping Filing on 10–12–23 to be effective 11/12/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5064.
Comment Date: 5 p.m. ET 10/24/23.

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.

Filings in Existing Proceedings

Docket Numbers: PR23–69–001.
Applicants: Dow Intrastate Gas Company.
Description: Amendment Filing: Amended Statement of Operating Conditions to be effective 9/1/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5002.
Comment Date: 5 p.m. ET 11/2/23.
Protest Date: 5 p.m. ET 11/2/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*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.

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: October 12, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–23091 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15324–000]

Scott D. Sanicki; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Exemption from Licensing.

b. *Project No.:* 15324–000.

c. *Date Filed:* October 2, 2023.

d. *Applicant:* Scott D. Sanicki.

e. *Name of Project:* Quiet Woods Water Wheel Project.

f. *Location:* On the Pocotopaug Creek, near the town of East Hampton, Middlesex County, Connecticut.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708, *amended by* the Hydropower Regulatory Efficiency Act of 2013, Public Law 113–23, 127 Stat. 493 (2013).

h. *Applicant Contact:* Scott D. Sanicki, 102 Quiet Woods Road, East Hampton, CT; *ssanicki@comcast.net.*

i. *FERC Contact:* John Baummer at (202) 502–6837; or email at *john.baummer@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* December 1, 2023.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, 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. All filings must clearly identify the project name and docket number on the first page: Quiet Woods Water Wheel Project (P–15324–000).

m. This application is not ready for environmental analysis at this time.

n. The proposed project would consist of: (1) a new 6-foot-diameter undershot poncelet water wheel and 3-kilowatt generator cantilevered to a 6-foot-wide, 6-foot-long, 3-foot-deep concrete support pad on the creek bank; (2) a new 350-foot-long underground transmission line connecting to a dwelling structure; and (3) appurtenant facilities. The project is estimated to generate an average of 8,800 kilowatt-hours annually.

The proposed project does not include a dam or impoundment. The applicant proposes to manually operate the project in a run-of-river mode.

o. Copies of the application may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document (P–15324). For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call tollfree, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.*

p. With this notice, we are initiating consultation with the Connecticut State Historic Preservation Officer (SHPO), as required by section 106 of the National Historic Preservation Act and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

q. Procedural schedule and final amendments: The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate (*e.g.,* if there are no deficiencies or a need for additional information, the schedule would be shortened).

Issue Deficiency Letter (if necessary)	January 2024.
Request Additional Information	January 2024.
Issue Acceptance Letter	April 2024.
Issue Scoping Document 1 for comments	May 2024.
Request Additional Information (if necessary)	July 2024.

Issue Scoping Document 2	August 2024.
Issue Notice of Ready for Environmental Analysis	August 2024.

Dated: October 13, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23105 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2514–029]

Appalachian Power Company; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2514–029.

c. *Date filed:* February 28, 2022. Supplemented on February 28, 2023.

d. *Applicant:* Appalachian Power Company (Appalachian).

e. *Name of Project:* Byllesby-Buck Hydroelectric Project (Byllesby-Buck Project or project).

f. *Location:* On the New River in Carroll County, Virginia.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Elizabeth Parcell, Process Supervisor, American Electric Power Service Corporation, 40 Franklin Road SW, Roanoke, Virginia 24011, (540) 985–2441, *ebparcell@aep.com.*

i. *FERC Contact:* Jody Callihan at (202) 502–8278 or email at *jody.callihan@ferc.gov.*

j. *Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, 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, 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. All filings must clearly identify the project name and docket number on the first page: Byllesby-Buck Hydroelectric Project (P–2514–029).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on April 20, 2022, revising the regulations under 40 CFR parts 1502, 1507, and 1508 that federal agencies use to implement the National Environmental Policy Act (NEPA) (see National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453–70). The final rule became effective on May 20, 2022. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. The Byllesby-Buck Project consists of two developments (Byllesby and Buck) that have a combined total installed capacity of 26.1 megawatts (MW). The Byllesby Development is located 3 river miles upstream of the Buck Development. The project had an average annual generation of 92,820 megawatt-hours (MWh) between 2016 and 2020.

The Byllesby Development consists of: (1) a 64-foot-high, 528-foot-long concrete dam, sluice gate, and main spillway section topped with four sections of 9-foot-high flashboards, five sections of 9-foot-high inflatable Obermeyer crest gates, and six bays of 10-foot-high Tainter gates; (2) an auxiliary spillway including six sections of 9-foot-high flashboards; (3) a 239-acre impoundment with a gross storage capacity of 2,000 acre-feet; (4) a powerhouse containing four turbine-generator units with a total installed capacity of 18.0 megawatts (MW); (5) a control house and switchyard; and (6) appurtenant facilities.

The Buck Development consists of: (1) a 42-foot-high, 353-foot-long concrete dam and sluice gate; (2) a 1,005-foot-long, 19-foot-high spillway section topped with twenty sections of 9-foot-high flashboards, four sections of 9-foot-high inflatable crest gates, and six bays of 10-foot-high Tainter gates; (3) a 66-acre impoundment with a gross storage capacity of 661 acre-feet; (4) a powerhouse containing three turbine-generator units with a total installed capacity of 8.1 MW; (5) two 2-mile-long overhead 13.2-kilovolt transmission lines extending from the Buck powerhouse to the Byllesby control house; and (6) appurtenant facilities.

The Byllesby-Buck Project is currently operated in a run-of-river (ROR) mode, with the Byllesby impoundment maintained between elevations of 2,078.2 feet and 2,079.2 feet National Geodetic Vertical Datum of 1929 (NGVD 29) and the Buck impoundment maintained between elevations of 2,002.4 feet and 2,003.4 feet NGVD 29. A minimum flow of 360 cubic feet per second (cfs), or project inflow if less, is provided downstream of each powerhouse. There is a bypassed reach at each development (590 feet long at Byllesby and 4,100 feet long at Buck), but there is currently no dedicated minimum flow for either of the bypassed reaches, which receive leakage flow of approximately 11 cfs (Byllesby) and 17 cfs (Buck). Article 406 of the current license specifies the down-ramping rates and procedures currently required at the Buck Development to minimize stranding of adult walleye (in the bypassed reach) following large spill events that occur during the spawning season (late winter through spring).

Appalachian proposes to continue operating the project in a ROR mode and providing a 360-cfs minimum flow

downstream of each powerhouse (Byllesby and Buck). In addition, Appalachian proposes to release a continuous, year-round minimum flow of 35 cfs into the Byllesby bypassed reach. At the Buck Development, Applachian proposes to modify the existing down-ramping procedures and provide a seasonal minimum flow of 100 cfs in the bypassed reach (from February 15 through May 15 of each year) to increase habitat connectivity and water depths in the reach to provide adult walleye with additional escape routes during the spawning season. In addition to these measures, Appalachian proposes environmental measures for the protection and enhancement of other aquatic resources as well as terrestrial, recreation, and cultural resources.

Appalachian also proposes to upgrade three (of the four) turbine-generator units at the Byllesby Development and two (of the three) turbine-generator units at the Buck Development. The proposed upgrades are expected to increase the total installed capacity from 26.1 MW to 29.8 MW and the project's average annual generation by 25,927 MWh. In addition, Appalachian proposes to replace three flashboard sections at the Byllesby Development and six flashboard sections at the Buck Development with inflatable (Obermeyer) crest gates. Lastly, Appalachian proposes to add to the current project boundary: (1) the Byllesby control house and switchyard and (2) two 2-mile-long, overhead 13.2-kilovolt transmission lines that extend from the Buck powerhouse to the Byllesby control house.

m. This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''PRELIMINARY TERMS AND CONDITIONS,'' or ''PRELIMINARY FISHWAY PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural Schedule:*

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Filing of Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions ...	December 12, 2023.
Filing of Reply Comments ...	January 26, 2024.

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. 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: October 13, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23100 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–519–000]

Rio Bravo Pipeline Company, LLC; Notice of Schedule for the Preparation of an Environmental Assessment for the Rio Bravo Pipeline Route Amendment

On July 20, 2023, Rio Bravo Pipeline Company, LLC (Rio Bravo) filed an application in Docket No. CP23–519–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the Rio Bravo Pipeline Route Amendment (Amendment), and would involve four minor route adjustments to the previously authorized route for the Rio Bravo Pipeline, as well as incorporate several minor design changes.

On August 1, 2023, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Amendment. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Amendment.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Amendment and the planned schedule for the completion of the environmental review.[1]

Schedule for Environmental Review

Issuance of EA—November 14, 2023
90-day Federal Authorization Decision Deadline[2]—February 12, 2024

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Amendment's progress.

Project Description

The Amendment would adjust the Rio Bravo Pipeline's certificated route from approximate milepost (MP) 69.8 to MP 79.4 and from approximate MP 92.4 to MP 93.0 in Willacy County, Texas and from approximate MP 99.7 to MP 100.5 in Willacy and Cameron Counties, Texas. The Amendment would also relocate a meter station and extend the approved Rio Bravo Pipeline route approximately 0.6 mile in Cameron County, Texas and modify the pipe wall thickness of the majority of the Rio Bravo Pipeline consistent with U.S. Department of Transportation's Pipeline Hazardous Materials Safety Administration regulations. The route adjustments are intended to minimize impacts on certain sensitive environmental resources, address landowner requests, meet technical requirements from the International Boundary and Water Commission, and align the terminus of the pipelines with the currently approved design of the Rio Grande LNG Terminal.

Background

On August 23, 2023, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Rio Bravo Pipeline Route Amendment* (Notice of Scoping). The Notice of Scoping was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the Notice of Scoping, the Commission received comments from the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, several individuals, Rio Grande LNG, LLC, and from Rio Bravo. The primary issues raised by the commenters specific to the scope of the Amendment are requests to extend the scoping comment period; impacts on endangered species (*e.g.,* ocelot habitat), wildlife, and cultural resources; and reliability and safety. All substantive comments received during the scoping period and up until issuance of the EA will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

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.*

Additional information about the Amendment is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP23–519), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: October 13, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23106 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

[1] 40 CFR 1501.10 (2020).

[2] The Commission's deadline applies to the decisions of other federal agencies, and state agencies acting under federally delegated authority, that are responsible for federal authorizations, permits, and other approvals necessary for proposed projects under the Natural Gas Act. Per 18 CFR 157.22(a), the Commission's deadline for other agency's decisions applies unless a schedule is otherwise established by federal law.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2171–000]

Tri-State Generation and Transmission Association, Inc.; Notice of Conference Call

On Friday, October 20, 2023, Commission staff will hold a conference call with Tri-State Generation and Transmission Association, Inc. (Tri-State) beginning at 10:00 a.m. (Eastern Time). The purpose of the conference call is to clarify the following statements made by Tri-State in the June 16, 2023 transmittal letter to its formula rate filing in Docket No. ER23–2171–000: ''Given that an order on the Initial Decision has not yet issued, Tri-State is filing this rate to be consistent with its prior rates and cooperative principles. This filing will be adjusted accordingly in the event of a future Commission order that includes a conflicting directive.'' [1] The discussion during the conference call will be limited solely to whether Tri-State intends to submit an amended filing as referenced in these statements.

All interested parties are invited to listen by phone. The conference call will not be webcasted or transcribed. However, an audio listen-only line will be provided. Those wishing to access the listen-only line must email Sean Pauley at *sean.pauley@ferc.gov* by 5:00 p.m. (Eastern Time) on Thursday October 19, 2023, with your name, email, and phone number, in order to receive the call-in information before the conference call. Please use the following text for the subject line, ''ER23–2171–000 listen-only line registration.''

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1 (866) 208–3372 (voice) or (202) 208–1659 (TTY), or send a FAX to (202) 208–2106 with the required accommodations.

For additional information, please contact Sean Pauley at (202) 502–6766 or *sean.pauley@ferc.gov.*

Dated: October 13, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23104 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

[1] Tri-State Transmittal at 6.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–5–000.
Applicants: Ben Milam Solar 1 LLC.
Description: Ben Milam Solar 1 LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 10/13/23.
Accession Number: 20231013–5073.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: EG24–6–000.
Applicants: Ben Milam Solar 3 LLC.
Description: Ben Milam Solar 3 LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 10/13/23.
Accession Number: 20231013–5078.
Comment Date: 5 p.m. ET 11/3/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–2130–001; ER23–2133–001.
Applicants: PGR 2022 Lessee 9, LLC, Glover Creek Solar, LLC.
Description: Notice of Non-Material Change in Status of Glover Creek Solar, LLC, et. al.
Filed Date: 10/11/23.
Accession Number: 20231011–5194.
Comment Date: 5 p.m. ET 11/1/23.

Docket Numbers: ER24–84–000.
Applicants: Arizona Public Service Company.
Description: Notice of Cancellation of Firm Point-to-Point Transmission Service Agreement of Arizona Public Service Company.
Filed Date: 10/10/23.
Accession Number: 20231010–5401.
Comment Date: 5 p.m. ET 10/31/23.

Docket Numbers: ER24–85–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX–231RC 8ME (Norton Solar) 1st Amended Generation Interconnection Agreement to be effective 9/19/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5126.
Comment Date: 5 p.m. ET 11/2/23.

Docket Numbers: ER24–86–000.
Applicants: EFS Parlin Holdings, LLC.
Description: Tariff Amendment: Cancellation partial tariff MBR to be effective 10/31/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5131.
Comment Date: 5 p.m. ET 11/2/23.

Docket Numbers: ER24–87–000.
Applicants: EFS Parlin Holdings, LLC.
Description: Tariff Amendment: Cancellation partial tariff Reactive rates to be effective 10/31/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5133.
Comment Date: 5 p.m. ET 11/2/23.

Docket Numbers: ER24–88–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Starr Solar Ranch 1 2nd Amended Generation Interconnection Agreement to be effective 9/19/2023.
Filed Date: 10/12/23.
Accession Number: 20231012–5134.
Comment Date: 5 p.m. ET 11/2/23.

Docket Numbers: ER24–89–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7097; Queue No. AE1–113/AE2–255 to be effective 9/13/2023.
Filed Date: 10/13/23.
Accession Number: 20231013–5031.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–90–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: ISO New England Inc.; 2024 Capital Budget for Recovery of 2024 Admin. Costs to be effective 1/1/2024.
Filed Date: 10/13/23.
Accession Number: 20231013–5041.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–91–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: ISO–NE; Filing of Rev. Tariff Sheet for Recovery for 2024 Operation of NESCOE to be effective 1/1/2024.
Filed Date: 10/13/23.
Accession Number: 20231013–5050.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–92–000.
Applicants: Metropolitan Edison Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Metropolitan Edison Company submits tariff filing per 35.13(a)(2)(iii): Met-Ed Amends 10 ECSAs (5650 5659 5702 5711 5720 5774 5777 5779 5780 5781) to be effective 12/31/9998.
Filed Date: 10/13/23.
Accession Number: 20231013–5055.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–93–000.
Applicants: Ameren Transmission Company of Illinois.
Description: § 205(d) Rate Filing: Fiber Agreement of ATXI and WVPA to be effective 12/15/2023.
Filed Date: 10/13/23.
Accession Number: 20231013–5080.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–94–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits Capital Budget Quarterly Filing for Third Quarter of 2023.
Filed Date: 10/13/23.
Accession Number: 20231013–5084.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–95–000.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: Compliance Filing of Tariff Revisions re: Order No. 895 to be effective 12/31/9998.
Filed Date: 10/13/23.
Accession Number: 20231013–5094.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–96–000.
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) Rate Filing: Transmission Owner Rate Case TO21 Formula Rate to be effective 1/1/2024.
Filed Date: 10/13/23.
Accession Number: 20231013–5108.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–97–000.
Applicants: Kaiser Aluminum Washington, LLC.
Description: Baseline eTariff Filing: Initial MBR Tariff FIling to be effective 11/27/2023.
Filed Date: 10/13/23.
Accession Number: 20231013–5112.
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–98–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Enhancements to Market Seller Offer Cap, Capacity Performance and EAS Revenues to be effective 12/12/2023.
Filed Date: 10/13/23.
Accession Number: 20231013–5141
Comment Date: 5 p.m. ET 11/3/23.

Docket Numbers: ER24–99–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Capacity Market Reforms to Accommodate the Energy Transition to be effective 12/12/2023.
Filed Date: 10/13/23.
Accession Number: 20231013–5157.
Comment Date: 5 p.m. ET 11/3/23.

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: October 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–23093 Filed 10–18–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2021–0669; FRL–9116–04–OAR]

Phasedown of Hydrofluorocarbons: Notice of 2024 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020, and Notice of Final Administrative Consequences

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has issued calendar year 2024 allowances for the production and consumption of hydrofluorocarbons in accordance with the Agency's regulations. This issuance of allowances is undertaken pursuant to the American Innovation and Manufacturing Act, which directs the Environmental Protection Agency by October 1 of each calendar year to determine the quantity of production and consumption allowances for the following calendar year. In this notice, the Agency is also providing notice of separate Agency actions finalizing administrative consequences for certain entities. These administrative consequences were applied to withhold, retire, and revoke entities' remaining calendar year 2023 and newly issued calendar year 2024 allowances in accordance with the administrative consequence regulatory provisions.

FOR FURTHER INFORMATION CONTACT: Andy Chang, U.S. Environmental Protection Agency, Stratospheric Protection Division, telephone number: 202–564–6658; email address: *chang.andy@epa.gov.* You may also visit EPA's website at *https://www.epa.gov/climate-hfcs-reduction* for further information.

SUPPLEMENTARY INFORMATION: Subsection (e)(2)(D)(i) of the American Innovation and Manufacturing Act of 2020 (AIM Act) directs the Environmental Protection Agency (EPA) to determine, by October 1 of each calendar year, the quantity of allowances for the production and consumption of regulated substances that may be used for the following calendar year. EPA has codified the production and consumption baselines and phasedown schedules for regulated substances in 40 CFR 84.7. Under the phasedown schedule, for 2024, total production allowances may not exceed 229,521,263 metric tons of exchange value equivalent (MTEVe) and total consumption allowances may not exceed 181,522,990 MTEVe.

EPA regulations at 40 CFR part 84, subpart A, outline the process by which the Agency determines the number of allowances each entity is allocated. EPA allocated allowances consistent with this process for calendar year 2024, and has posted entity-specific allowance allocations on its website at *https://www.epa.gov/climate-hfcs-reduction.* An allowance allocated under the AIM Act does not constitute a property right and is a limited authorization for the production or consumption of a regulated substance.

Note that while allowances may be transferred or conferred once they are allocated, they can only be expended to cover imports and production in the calendar year for which they are allocated. In other words, calendar year 2024 allowances may only be expended for production and import of bulk HFCs between January 1, 2024, and December 31, 2024.

Application-Specific Allowances

EPA established the methodology for issuing application-specific allowances in the 2021 final rule titled *Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act* (86 FR 55116) and codified the methodology for issuing allowance allocations in 40 CFR 84.13. Because application-specific allowances can be expended to either produce or import HFCs, and application-specific allowances must be provided from within the overall annual production and consumption caps, EPA subtracts the amount of application-specific allowances allocated from both the production and consumption general allowance pools. EPA issues application-specific allowances to end users in five applications established by the AIM Act: propellants in metered dose inhalers (MDIs), defense sprays, structural composite preformed polyurethane foam for marine use and trailer use, etching of semiconductor material or wafers and the cleaning of chemical vapor deposition chambers within the semiconductor manufacturing sector, and onboard aerospace fire suppression. Additionally, EPA issues application-specific allowances to the U.S. Department of Defense for mission-critical military end uses.

EPA's 2023 final rule titled *Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years* (88 FR 46836), updated the methodology for how the Agency would issue production and consumption allowances for 2024 through 2028. These updates are codified in 40 CFR 84.9 (production) and 40 CFR 84.11 (consumption), and EPA is issuing allowances to entities who meet the criteria in the regulations, including those who were previously issued consumption allowances as new market entrants pursuant to 40 CFR 84.15.

EPA's final calculations for allocation of allowances for each entity on September 29, 2023, follows below. EPA followed the methodology from the applicable regulations in determining allocations, *i.e.,* 40 CFR 84.13 for application-specific allowances, 40 CFR 84.9 for production allowances, and 40 CFR 84.11 for consumption allowances.

Applying the methodology codified in 40 CFR 84.13, EPA allocated the number of application-specific allowances shown in Table 1.

TABLE 1—NUMBER OF CALENDAR YEAR 2024 APPLICATION-SPECIFIC ALLOWANCES ALLOCATED PER ENTITY

Entity	Application	Application-specific allowances (MTEVe) allocated
Analog devices	Semiconductors	18,130.0
Applied Materials	Semiconductors	10,666.7
Armstrong Pharmaceuticals	Propellants in MDIs	230,001.2
ASML US	Semiconductors	1,033.8
AstraZeneca Pharmaceuticals	Propellants in MDIs	3,848.9
Aurobindo Pharma USA	Propellants in MDIs	28,316.9
Broadcom	Semiconductors	213.1
Compsys	Structural Composite Preformed Polyurethane Foam	19,928.6
Defense Technology	Defense Sprays	1,537.4
Diodes Incorporated	Semiconductors	2,584.5
General Electric	Semiconductors	73.9
GlaxoSmithKline	Propellants in MDIs	523,906.9
GlobalFoundries	Semiconductors	152,916.2
Guardian Protective Devices	Defense Sprays	7,467.0
Hitachi High-Tech America	Semiconductors	537.9
IBM Corporation	Semiconductors	369.4
Intel Corporation	Semiconductors	597,502.0
Invagen Pharmaceuticals	Propellants in MDIs	156,427.2
Jireh Semiconductor	Semiconductors	1,600.2
Keysight Technologies	Semiconductors	537.7
Kindeva Drug Delivery	Propellants in MDIs	335,693.4
LA Semiconductor	Semiconductors	2,584.5
Lam Research Corp	Semiconductors	182,210.4
Lupin	Propellants in MDIs	21,415.7
Medtronic Tempe Campus	Semiconductors	457.1
Microchip Technology	Semiconductors	43,757.2
Micron Technology	Semiconductors	40,557.8
Newport Fab DBA TowerJazz	Semiconductors	6,414.4
Northrop Grumman Corporation	Semiconductors	2,116.0
NXP Semiconductor	Semiconductors	72,169.2
Odin Pharmaceuticals	Propellants in MDIs	1,075.7
Polar Semiconductor	Semiconductors	11,718.5
Proteng Distribution	Onboard Aerospace Fire Suppression	6,723.4
Qorvo Texas	Semiconductors	1,065.3
Raytheon Technologies	Onboard Aerospace Fire Suppression	1,535.4
Renesas Electronics America	Semiconductors	1,065.3
Samsung Austin Semiconductor	Semiconductors	334,439.8
Security Equipment Corporation	Defense Sprays	53,652.3
Semiconductor Components Industries DBA ON Semiconductor.	Semiconductors	19,001.0
SkyWater Technology	Semiconductors	18,718.8
Skyworks Solutions	Semiconductors	536.8
Taiwan Semiconductor Manufacturing Company Arizona Corporation (TSMC Arizona Corporation).	Semiconductors	34,250.1
Texas Instruments	Semiconductors	193,836.7
The Research Foundation for The State University of New York OBO SUNY Polytechnic Institute.	Semiconductors	1,034.4
Tokyo Electron America	Semiconductors	558.8
Tower Semiconductor San Antonio	Semiconductors	8,502.2
UDAP Industries	Defense Sprays	37,629.1
Wabash National Corporation	Structural Composite Preformed Polyurethane Foam	66,340.0
WaferTech	Semiconductors	18,103.3
Wolfspeed	Semiconductors	48,648.1
X–FAB Texas	Semiconductors	2,432.6
Department of Defense	Mission-critical Military End Uses	2,511,081.5
Total Issued	All	5,836,924.3

EPA has denied requests for application-specific allowances from Apple Inc. and Zarc International, Inc. because they are ineligible under 40 CFR 84.13. The requests were ineligible for at least one of the following reasons:

(1) Did not report purchases of regulated substances in the past three years; or

(2) Failed to submit a request by the deadline.

General Pool Allowances for Production

Applying the methodology codified in 40 CFR 84.9, EPA allocated the number of production allowances shown in Table 2.

TABLE 2—NUMBER OF CALENDAR YEAR 2024 PRODUCTION ALLOWANCES ALLOCATED PER ENTITY

Entity	Production allowances allocated (MTEVe)
Application-specific allowances	[a] 5,836,924.3
Arkema	26,990,669.0
Chemours	50,038,369.2
Honeywell International	113,275,864.9
Iofina Chemical	1,160.9
Mexichem Fluor DBA Koura	33,378,274.7
Total Issued	229,521,263.0

[a] See Table 1; this value corresponds to the total number of application-specific allowances allocated.

General Pool Allowances for Consumption

Applying the methodology codified in 40 CFR 84.11, EPA allocated the number of consumption allowances shown in Table 3.

TABLE 3—NUMBER OF CALENDAR YEAR 2024 CONSUMPTION ALLOWANCES ALLOCATED PER ENTITY

Entity	Consumption allowances allocated (MTEVe)
Application-specific allowances	[a] 5,836,924.3
A.C.S. Reclamation & Recovery (Absolute Chiller Services)	128,987.8
Ability Refrigerants	128,987.8
ACT Commodities	50.4
Advance Auto Parts	461,215.3
Advanced Specialty Gases	184,102.8
AFK & Co	124,689.8
AFS Cooling	128,987.8
A-Gas	2,199,784.7
Air Liquide USA	321,682.9
AllCool Refrigerant Reclaim	128,987.8
American Air Components	128,987.8
Arkema	20,051,844.9
Artsen	663,053.3
Automart Distributors DBA Refrigerant Plus	128,987.8
AutoZone Parts	1,304,000.7
AW Product Sales & Marketing	77,991.8
Bluon	21,590.6
CC Packaging	125,118.2
Chemours	22,115,332.4
Chemp Technology	128,987.8
ChemPenn	14,336.2
ComStar International	232,510.8
Creative Solution	128,987.8
Cross World Group	128,987.8
Daikin America	2,013,820.3
EDX Industry	370,884.7
Electronic Fluorocarbons	67,293.9
Fireside Holdings DBA American Refrigerants	128,973.9
First Continental International	496,747.8
FluoroFusion Specialty Chemicals	1,647,053.3
Freskoa USA	128,987.8
GlaxoSmithKline	347,339.2
Golden Refrigerant	128,987.8
Harp USA	493,996.4
Honeywell International	53,136,510.9
Hudson Technologies	1,928,081.5
Hungry Bear	128,987.8
ICool USA	2,198,406.6
IGas Holdings	16,846,810.7
Iofina Chemical	817.1
Kidde-Fenwal	128,987.8
Lenz Sales & Distribution	716,447.4
Lina Trade	128,987.8
Linde	343,607.9
Matheson Tri-Gas	22,015.7

TABLE 3—NUMBER OF CALENDAR YEAR 2024 CONSUMPTION ALLOWANCES ALLOCATED PER ENTITY—Continued

Entity	Consumption allowances allocated (MTEVe)
MEK Chemical Corporation	53,572.5
Meraki Group	128,987.8
Metalcraft	103,835.2
Mexichem Fluor DBA Koura	16,441,211.7
Mondy Global	205,649.7
National Refrigerants	12,780,590.6
Nature Gas Import and Export	528,873.0
North American Refrigerants	128,987.8
O23 Energy Plus	128,987.8
Perfect Score Too DBA Perfect Cycle	24,427.9
Reclamation Technologies	256,685.4
Resonac America (formerly Showa Chemicals of America)	42,851.2
RGAS (formerly listed as Combs Gas)	2,951,990.2
RMS of Georgia	1,063,455.0
Sciarra Laboratories	5,604.6
SDS Refrigerant Services	128,987.8
Solvay Fluorides	711,375.5
Summit Refrigerants	128,987.8
SynAgile Corporation	725.8
Technical Chemical	2,203,622.1
TradeQuim	128,987.8
Transocean Offshore Deepwater Drilling	11.0
Tulstar Products	473,694.4
Tyco Fire Products	128,987.8
USA United Suppliers of America DBA USA Refrigerants	273,401.8
USSC Acquisition Corp	84,777.8
Walmart	1,471,574.6
Waysmos USA	361,839.8
Wego Chemical Group	36,492.6
Weitron	4,089,895.7
Wesco HMB	128,987.8
Wilhelmsen Ships Service	26,063.9
Total Issued	181,522,990.0

[a] See Table 1; this value corresponds to the total number of application-specific allowances allocated.

Administrative Consequences

Separate from the allocation of calendar year 2024 allowances, EPA also took administrative consequences against certain entities. Each administrative consequence is an independent stand-alone action, but for administrative efficiency EPA is providing notice of these independent actions through this notice as well. The requirements surrounding administrative consequences are codified in 40 CFR 84.35. Using this authority, EPA can retire, revoke, or withhold the allocation of allowances, or ban an entity from receiving, transferring, or conferring allowances. A retired allowance is one that must go unused and expire at the end of the year; a revoked allowance is one that EPA takes back from an allowance holder and redistributes to all the other allowance holders; and a withheld allowance is one that is retained by the Agency until an allowance holder that has failed to meet a regulatory requirement comes back into compliance, at which point EPA allocates it to the allowance holder. A withheld allowance could become a revoked allowance if the allowance holder fails to meet the regulatory requirement at issue within the timeframe specified by EPA.[1] More information on EPA's approach to administrative consequences can be found at 86 FR 55168.

EPA finalized administrative consequences for certain entities that were allocated consumption allowances, listed in Table 3 for calendar year 2024, effective concurrently with the issuance of calendar year 2024 allowances. Specifically, the following entities failed to submit complete HFC reports as required in 40 CFR 84.31 and therefore EPA has withheld a portion of their consumption allowances until the missing reports are filed and verified by EPA: Air Liquide USA; Creative Solution; and Matheson Tri-gas, Inc.

The following entities imported regulated HFCs without expending the requisite number of consumption allowances at the time of import and therefore EPA has retired and/or revoked consumption allowances commensurate with the quantities of regulated substances imported without allowances: American Air Components; AFK & Co.; Artsen; Bluon, Inc.; Electronic Fluorocarbons; Fluorofusion Specialty Chemicals; and Resonac America, Inc. Lastly, Honeywell International produced and imported regulated substances without expending the requisite number of consumption allowances at the time of production or import.

In some of these cases, EPA finalized administrative consequences that totaled more than was allocated to an entity. For example, American Air Components, Bluon, Inc., and Resonac America, Inc. imported regulated HFCs without the necessary allowances at the time of import in such quantities that exceed their initial allocation of calendar year 2024 allowances. With

[1] Administrative consequences that the Agency has finalized can be found here: *https://www.epa.gov/climate-hfcs-reduction/administrative-consequences-under-hfc-allocation-rule.*

respect to one entity, the Agency decided to apply the administrative consequence across multiple years. EPA made this determination given the size of the administrative consequence and as a result of considerations related to the step reduction in 2024 and implications for the market as a whole regarding access to chemicals that are anticipated to be impacted by EPA HFC regulations. A summary of these administrative consequences is included in Table 4.

TABLE 4—SUMMARY OF ADMINISTRATIVE CONSEQUENCES EFFECTIVE ON SEPTEMBER 29, 2023, PURSUANT TO 40 CFR 84.35

Entity	Number of affected allowances (MTEVe)	Applicable year(s)	Administrative consequence action	Reasoning
American Air Components	208,516.5	2024 and future years as needed	Retire	Imported regulated HFCs without expending requisite number of allowances; Will retire and revoke allowances until the full administrative consequence is covered.
	[a] 104,258.3	2025 and future years as needed	Revoke.	
AFK & Co	5,701.9	2024	Retire	Imported regulated HFCs without expending requisite number of allowances.
	[a] 2,851.0	2024	Revoke.	
Artsen	346.7	2024	Retire	Imported regulated HFCs without expending requisite number of allowances.
	[a] 173.4	2024	Revoke.	
Bluon	575,800.7	2024 and future years as needed	Retire	Imported regulated HFCs without expending requisite number of allowances; Will retire and revoke allowances until the full administrative consequence is covered.
	[a] 288,855.8	As early as 2025 and future years as needed.	Revoke.	
Electronic Fluorocarbons	64,931.9	2023	Retire	Imported regulated HFCs without expending requisite number of allowances.
	[a] 32,466.0	2024	Revoke.	
Fluorofusion Specialty Chemicals	[a] 5,505.2	2024	Revoke	Imported regulated HFCs without expending requisite number of allowances.
Resonac America	200,070.5	2024 and future years as needed	Retire	Imported regulated HFCs without expending requisite number of allowances; Will retire and revoke allowances until the full administrative consequence is covered.
	[a] 100,035.3	As early as 2025 and future years as needed.	Revoke.	
Honeywell International	[a] 231,334.0	2024	Revoke	Produced and imported HFCs without expending requisite number of allowances; [b] Will spread the administrative consequence over five years.
	[a] 462,668.1	2025	Revoke.	
	[a] 925,336.2	2026	Revoke.	
	[a] 1,388,004.3	2027	Revoke.	
	[a] 1,619,338.4	2028	Revoke.	
Air Liquide USA	64,336.6	2024	Withhold	Failure to submit complete HFC reports as required in 40 CFR 84.31.
Creative Solution	25,797.6	2024	Withhold	Failure to submit complete HFC reports as required in 40 CFR 84.31.
Matheson Tri-Gas	4,403.1	2024	Withhold	Failure to submit complete HFC reports as required in 40 CFR 84.31.

[a] As stated in the HFC Allocation Framework Rule (86 FR 55116), EPA explained it would take a 50% premium in first instances of administrative consequences. These values correspond to 50% of the full amount of consumption without requisite allowances at the time of production and/or import.

[b] EPA only finalized administrative consequences for Honeywell International that affect the company's consumption allowances, since the company did not produce regulated substances in a quantity that exceeded the quantity of available production allowances that it had in its possession.

The allowance adjustments by way of withholding, retiring, and/or revoking a portion of entities' calendar year 2024 allowances effective September 29, 2023, are reflected below in Table 5.

TABLE 5—CALENDAR YEAR 2024 ALLOWANCES ADJUSTED THROUGH ADMINISTRATIVE CONSEQUENCES EFFECTIVE SEPTEMBER 29, 2023

Entity	Number of withheld consumption allowances (MTEVe)	Number of retired consumption allowances (MTEVe)	Number of revoked consumption allowances (MTEVe)
Air Liquide USA	64,336.6	.....	.....
Creative Solution	25,797.6	.....	.....
Matheson Tri-Gas	4,403.1	.....	.....
Electronic Fluorocarbons	.....	.....	32,466.0
Honeywell International	.....	.....	231,334.0
AFK & Co	.....	5,701.9	2,851.0
American Air Components	.....	128,987.8	.....
Artsen	.....	346.7	173.4
Bluon	.....	21,590.6	.....
Fluorofusion Specialty Chemicals	.....	.....	5,505.2
Resonac America	.....	42,851.2	.....

Adjustments to Consumption Allowances

EPA notes that entities in Table 4 who either imported or produced (or both) without expending the requisite number of consumption allowances at the time of production or import were not eligible to receive allowances that were redistributed as a result of allowances revoked for calendar year 2024. Further, an entity is not eligible to receive redistributed allowances if they were subject to administrative consequences that resulted in the revocation of allowances that contributed to the overall total of allowances being redistributed at the time. For example, if EPA revoked 50 MTEVe allowances from company A and 50 MTEVe allowances from company B, effective on the same day, EPA's redistribution of that single pool of 100 MTEVe allowances would go to all general pool allowances holders except company A and company B. This applies regardless of whether the revocation happens in one year or over multiple years. However, entities who only had allowances withheld by the Agency as a result of failure to comply with certain HFC reporting requirements as contained in 40 CFR 84.31 were eligible to receive allowances that were redistributed as a result of allowances revoked for calendar year 2024. For 2024, the total number of revoked and redistributed allowances is 272,329.6 MTEVe, which are being apportioned to eligible consumption allowance holders based on their relative market share, and the total number of retired allowances in 2024 is 199,478.2 MTEVe.

Table 6 reflects consumption allowance totals available to each entity as of September 29, 2023, after taking into account the administrative consequences shown in Table 5.

TABLE 6—TOTAL NUMBER OF CALENDAR YEAR 2024 CONSUMPTION ALLOWANCES AVAILABLE TO EACH ENTITY AS OF SEPTEMBER 29, 2023, ADJUSTED FOR ADMINISTRATIVE CONSEQUENCES

Entity	Available consumption allowances, adjusted for administrative consequences (MTEVe)
Application-specific allowances	[a] 5,836,924.3
A.C.S. Reclamation & Recovery (Absolute Chiller Services)	129,280.9
Ability Refrigerants	129,280.9
ACT Commodities	50.5
Advance Auto Parts	462,263.3
Advanced Specialty Gases	184,521.1
AFK & Co.	116,136.9
AFS Cooling	129,280.9
A-Gas	2,204,783.0
Air Liquide USA	258,077.2
AllCool Refrigerant Reclaim	129,280.9
American Air Components	0.0
Arkema	20,097,406.2
Artsen	662,533.2
Automart Distributors DBA Refrigerant Plus	129,280.9
AutoZone Parts	1,306,963.6
AW Product Sales & Marketing	78,169.0
Bluon	0.0
CC Packaging	125,402.5
Chemours	22,165,582.4
Chemp Technology	129,280.9
ChemPenn	14,368.8
ComStar International	233,039.1
Creative Solution	103,483.3
Cross World Group	129,280.9
Daikin America	2,018,396.1
EDX Industry	371,727.4
Electronic Fluorocarbons	34,827.9
Fireside Holdings DBA American Refrigerants	129,266.9
First Continental International	497,876.5
FluoroFusion Specialty Chemicals	1,641,548.1
Freskoa USA	129,280.9
GlaxoSmithKline	348,128.4
Golden Refrigerant	129,280.9
Harp USA	495,118.8
Honeywell International	52,905,176.9
Hudson Technologies	1,932,462.4
Hungry Bear	129,280.9
ICool USA	2,203,401.8
IGas Holdings	16,885,089.6
Iofina Chemical	819.0
Kidde-Fenwal	129,280.9
Lenz Sales & Distribution	718,075.3
Lina Trade	129,280.9
Linde	344,388.6
Matheson Tri-Gas	17,662.6
MEK Chemical Corporation	53,694.2
Meraki Group	129,280.9

TABLE 6—TOTAL NUMBER OF CALENDAR YEAR 2024 CONSUMPTION ALLOWANCES AVAILABLE TO EACH ENTITY AS OF SEPTEMBER 29, 2023, ADJUSTED FOR ADMINISTRATIVE CONSEQUENCES—Continued

Entity	Available consumption allowances, adjusted for administrative consequences (MTEVe)
Metalcraft	104,071.1
Mexichem Fluor DBA Koura	16,478,569.0
Mondy Global	206,117.0
National Refrigerants	12,809,630.4
Nature Gas Import and Export	530,074.7
North American Refrigerants	129,280.9
O23 Energy Plus	129,280.9
Perfect Score Too DBA Perfect Cycle	24,483.4
Reclamation Technologies	257,268.6
Resonac America (formerly Showa Chemicals of America)	0.0
RGAS (formerly listed as Combs Gas)	2,958,697.6
RMS of Georgia	1,065,871.4
Sciarra Laboratories	5,617.3
SDS Refrigerant Services	129,280.9
Solvay Fluorides	712,991.9
Summit Refrigerants	129,280.9
SynAgile Corporation	727.4
Technical Chemical	2,208,629.1
TradeQuim	129,280.9
Transocean Offshore Deepwater Drilling	11.0
Tulstar Products	474,770.7
Tyco Fire Products	129,280.9
USA United Suppliers of America DBA USA Refrigerants	274,023.0
USSC Acquisition Corp	84,970.4
Walmart	1,474,918.3
Waysmos USA	362,662.0
Wego Chemical Group	36,575.5
Weitron	4,099,188.7
Wesco HMB	129,280.9
Wilhelmsen Ships Service	26,123.1
Total Available	181,228,974.5

Judicial Review

The AIM Act provides that certain sections of the Clean Air Act (CAA) ''shall apply to'' the AIM Act and actions ''promulgated by the Administrator of [EPA] pursuant to [the AIM Act] as though [the AIM Act] were expressly included in title VI of [the CAA].'' 42 U.S.C. 7675(k)(1)(C). Among the applicable sections of the CAA is section 307, which includes provisions on judicial review. Section 307(b)(1) provides, in part, that petitions for review must only be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, but ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.'' For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

The issuance of calendar year 2024 allowances for the production and consumption of hydrofluorocarbons herein noticed is ''nationally applicable'' within the meaning of CAA section 307(b)(1). The AIM Act imposes a national cap on the total number of allowances available for each year for all entities nationwide. 42 U.S.C. 7675(e)(2)(B)–(D). For 2024, there was a national pool of 229,521,263 production allowances and 181,522,990 consumption allowances available to distribute. The allocation action noticed herein distributed that finite set of allowances consistent with the methodology EPA established in the nationally applicable framework rule. As such, the allowance allocation is the division and assignment of a single, nationwide pool of HFC allowances to entities across the country according to the uniform, national methodology established in EPA's regulations. Each entity's allowance allocation is a relative share of that pool; thus, any additional allowances awarded to one entity directly affects the allocations to others.

In the alternative, to the extent a court finds the final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that the allocation action is based on a determination of ''nationwide scope or effect'' within the meaning of CAA section 307(b)(1).[2] In deciding to invoke this exception, the Administrator has taken into account a number of policy considerations, including his judgment regarding the benefit of obtaining the D.C. Circuit's authoritative centralized review, rather than allowing development of the issue in other contexts, in order to ensure consistency in the Agency's approach to

[2] In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the ''nationwide scope or effect'' exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03.

allocation of allowances in accordance with EPA's national regulations in 40 CFR part 84. The final action treats all affected entities consistently in how the 40 CFR part 84 regulations are applied. The allowance allocation is the division and assignment of a single, nationwide pool of HFC allowances to entities across the country according to the uniform, national methodology established in EPA's regulations, and each entity's allowance allocation is a relative share of that pool; thus, any additional allowances awarded to one entity directly affect the allocations to others. The Administrator finds that this is a matter on which national uniformity is desirable to take advantage of the D.C. Circuit's administrative law expertise and facilitate the orderly development of the basic law under the AIM Act and EPA's implementing regulations. The Administrator also finds that consolidated review of the action in the D.C. Circuit will avoid piecemeal litigation in the regional circuits, further judicial economy, and eliminate the risk of inconsistent results for different regulated entities. The Administrator also finds that a nationally consistent approach to the allocation of allowances constitutes the best use of agency resources. The Administrator is publishing his finding that the allocation action is based on a determination of nationwide scope or effect in the **Federal Register** as part of this notice in addition to inclusion on the website announcing allocations.

For these reasons, the final action of the Agency allocating hydrofluorocarbon allowances to entities located throughout the country is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and finds that the final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the **Federal Register**.

Under section 307(b)(1) of the CAA, petitions for judicial review of this allocation action must be filed in the United States Court of Appeals for the District of Columbia Circuit by December 18, 2023. Under section 307(b)(1) of the CAA, petitions for judicial review of the administrative consequence actions noticed herein must be filed in the United States Court of Appeals for the appropriate circuit by December 18, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

Paul Gunning,

Director, Office of Atmospheric Protection.

[FR Doc. 2023–22163 Filed 10–18–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2023–0500; FRL–11447–01–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with the Clean Air Act, as amended (CAA or the Act), notice is given of a proposed consent decree in *Center for Biological Diversity* v. *United States Environmental Protection Agency, et al.,* No. 2:23–cv–01843 (E.D. Pa.). On May 16, 2023, Plaintiff Center for Biological Diversity filed a complaint in the Unites States District Court for the Eastern District of Pennsylvania. Plaintiff alleged that the Environmental Protection Agency (EPA or the Agency) has unreasonably delayed taking action following the United States Court of Appeals for the Third Circuit's September 3, 2021, order in Case No. 21–1279. That order granted EPA's request to remand to EPA for reconsideration a final rule titled ''Air Plan Approval; Pennsylvania; Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) Under the 2008 Ozone National Ambient Air Quality Standards (NAAQS),'' published in the **Federal Register** on December 14, 2020). The proposed consent decree would establish a deadline for EPA to complete its reconsideration of that final rule.

DATES: Written comments on the proposed consent decree must be received by November 20, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0500, online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Additional Information about Commenting on the Proposed Consent Decree'' heading under the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Derek Mills, Air and Radiation Law Office, Office of General Counsel, U.S. Environmental Protection Agency; telephone (202) 564–3341; email address *mills.derek@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Consent Decree

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2023–0500) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

The electronic version of the public docket for this action contains a copy of the proposed consent decree and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

II. Additional Information About the Proposed Consent Decree

On December 14, 2020, EPA issued a final rule approving two revisions to Pennsylvania's state implementation plan (SIP) to address certain reasonably available control technology requirements, specifically those related to control techniques guidelines for volatile organic compounds and the addition of regulations controlling volatile organic compounds emissions from industrial cleaning solvents. That final rule was titled ''Air Plan Approval; Pennsylvania; Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) Under the

2008 Ozone National Ambient Air Quality Standards (NAAQS),'' and published at 85 FR 80616 (December 14, 2020) (''Final Rule'').

On February 12, 2021, Plaintiff petitioned the United States Court of Appeals for the Third Circuit to review the Final Rule.[1] On August 2, 2021, EPA filed a motion for voluntary remand without vacatur in Third Circuit Case No. 21–1279 so that the Agency could reconsider the Final Rule. On September 3, 2021, the Third Circuit granted EPA's motion for voluntary remand without vacatur. To date, EPA has not completed its reconsideration of the Final Rule. The proposed consent decree would establish a deadline for EPA to complete its reconsideration of the Final Rule. Further, if that reconsideration process results in rulemaking, EPA shall, within 15 business days of signature of a notice of a final rule, send the rulemaking package to the Office of the Federal Register for review and publication in the **Federal Register**.

In accordance with section 113(g) of the CAA, for a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed consent decree. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

III. Additional Information About Commenting on the Proposed Consent Decree

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0500, via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

Gautam Srinivasan,

Associate General Counsel.

[FR Doc. 2023–23083 Filed 10–18–23; 8:45 am]

BILLING CODE 6560–50–P

[1] *Center for Biological Diversity* v. *EPA, et al.,* Case No. 21–1279 (3d. Cir.).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Performance Review Board—Appointment of Members

AGENCY: U.S. Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of performance review board appointments.

SUMMARY: This notice announces the appointment of those individuals who have been selected to serve as members of the Performance Review Board (PRB). The PRB is comprised of a Chairperson and career senior executives that meet annually to review and evaluate performance appraisal documents. The PRB provides a written recommendation to the appointing authority for final approval of each SES and SL performance rating, performance-based pay adjustment, and performance award. The PRB is advised by the Office of the Chief Human Capital Officer, Office of Legal Counsel, and Office for Civil Rights, Diversity and Inclusion to ensure compliance with laws and regulations. Designated members will serve a 12-month term.

DATES: The board membership is applicable beginning on November 1, 2023.

FOR FURTHER INFORMATION CONTACT: Cynthia G. Pierre, Chief Operating Officer, EEOC, 131 M Street NE, Washington, DC 20507, (202) 291–3260.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the names and position of the EEOC PRB members are set forth below:

Mr. Carlton Hadden, Chair, Director, Office of Federal Operations, EEOC
Mr. Bradley Anderson, Director, Birmingham District, EEOC
Ms. Kimberly Essary, Deputy Chief Data Officer, EEOC
Ms. Gwendolyn Reams, Acting General Counsel, EEOC
Mr. Kevin Richardson, Chief Human Capital Officer, EEOC
Mr. Richard Toscano, Director, Equal Employment Opportunity Staff, U.S. Department of Justice
Ms. Jamie Williamson, Director, Philadelphia District, EEOC
Mr. Raymond Peeler, Associate Legal Counsel, EEOC (Alternate)
Ms. Pierrette McIntire, Chief Information Officer, EEOC (Alternate)

By the direction of the Commission.

Cynthia G. Pierre,

Chief Operating Officer.

[FR Doc. 2023–23088 Filed 10–18–23; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 179690]

Privacy Act of 1974; System of Records

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC, Commission, or Agency) proposes to modify an existing system of records, FCC/WTB–1, Wireless Services Licensing Records, subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The Commission uses records in this system to administer the Commission's regulatory responsibilities including licensing, enforcement, rulemaking, and other actions necessary to perform spectrum management duties. This modification makes various necessary changes and updates, including formatting changes required by the Office of Management and Budget (OMB) Circular A–108 since its previous publication, the addition of four new routine uses, as well as the revision of six existing routine uses and the deletion of one existing routine use.

DATES: This modified system of records will become effective on October 19, 2023. Written comments on the routine uses are due by November 20, 2023. The routine uses in this action will become effective on November 20, 2023 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Katherine C. Clark, Attorney-Advisor, Office of General Counsel, Federal Communications Commission, 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine C. Clark, (202) 418–1773, or *privacy@fcc.gov* (and to obtain a copy of the Narrative Statement and the Supplementary Document, which includes details of the modifications to this system of records).

SUPPLEMENTARY INFORMATION: This notice serves to update and modify FCC/WTB–1, as a result of various necessary changes and updates. The substantive changes and modifications to the previously published version of the FCC/WTB–1 system of records include:

1. Updating the language in the Security Classification to follow OMB guidance;

2. Updating the language in the Purposes section for clarity and for consistency with the language and phrasing currently used in the FCC's SORNs and to include collecting and maintaining information to allow staff access to documents necessary for key activities discussed in this SORN, including analyzing effectiveness and efficiency of FCC programs, informing future rule-making and policy-making activity, and improving staff efficiency;

3. Modifying the language in the Categories of Individuals and Categories of Records for clarity and for consistency with the language and phrasing currently used in the FCC's SORNs;

4. Updating and/or revising language in six routine uses (listed by current routine use number): (1) Public Access; (2) Litigation and (3) Adjudication (now two separate routine uses); (5) Law Enforcement and Investigation; (6) Congressional Inquiries; and (7) Government-wide Program Management and Oversight;

5. Adding four new routine uses (listed by current routine use number): (4) FCC Enforcement Actions; (8) Breach Notification, the addition of which is as required by OMB Memorandum No. M–17–12; (9) Assistance to Federal Agencies and Entities Related to Breaches, the addition of which is required by OMB Memorandum No. M–17–12; and (10) Non-Federal Personnel;

6. Deleting one prior routine use (listed by former routine use number) (2) Financial Obligations Under the Debt Collection Acts, which does not reflect how the FCC has used or disclosed records from this system;

7. Updating the SORN to include the records schedule ''Universal Licensing System'' Records Schedule, Number N1–173–08–001.

The system of records is also updated to reflect various administrative changes related to the system managers and system addresses; policy and practices for storage and retrieval of the information; administrative, technical, and physical safeguards; and updated notification, records access, and contesting records procedures.

SYSTEM NAME AND NUMBER:

FCC/WTB–1, Wireless Services Licensing Records.

SECURITY CLASSIFICATION:

No information in the system is classified.

SYSTEM LOCATION:

Wireless Telecommunications Bureau (WTB), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

SYSTEM MANAGER:

Chief, Wireless Telecommunications Bureau (WTB), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 7701; and 47 U.S.C. 301, 303, 309, 312, 362, 364, 386, 507, and 510.

PURPOSES OF THE SYSTEM:

The FCC uses the information in this system for purposes that include, but are not limited to:

1. To provide public access to pending requests for authorizations and information regarding current licenses and leases;

2. To provide public access to license data, which promotes the economically efficient allocation of spectrum and the resolution of radio interference problems;

3. To determine the availability of spectrum for licensing;

4. To determine when compliance filings, renewal applications, and fees are due from licensees;

5. To resolve disputes between radio operators regarding who has certain rights to use particular frequency bands in particular geographic areas;

6. To resolve cross border disputes, on occasion—*e.g.,* dispute(s) with entities operating in Canada and Mexico;

7. To allow licensees to transfer, assign, or lease their interests in particular licenses or portions of licenses as the rules permit (after agency approval);

8. To evaluate the completeness and sufficiency of requests for new or modified authorizations;

9. To provide reports to a variety of Federal officials on the current uses and utilization of the spectrum the FCC is charged with regulating;

10. To collect and maintain information to allow staff access to documents necessary for key activities discussed in this SORN, including analyzing effectiveness and efficiency of related FCC programs and informing future rule-making and policy-making activity; and improving staff efficiency.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals whose records are maintained in this system include, but are not limited to: licensees, lessees, applicants (including persons or entities with attributable interests therein), and entities or individuals who participate in relevant FCC proceedings; tower owners; and contact persons relating to radio systems licensed or processed by the WTB under parts 13, 22, 24, 27, 74, 80, 87, 90, 95, 97, and 101 of the Commission's Rules (Wireless Services).

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in this system include, but are not limited to:

1. Applications, requests for authorization, and related pleadings, all of which may include contact information and other personally identifiable information (PII);

2. Forms 175, 601, 602, 603, 605, and 608 and related pleadings, all of which may include contact information and other (PII);

3. Authorizations, licenses, leases, and related pleadings, all of which may include contact information and other (PII);

4. Correspondence relating to applications, requests for authorization, FCC forms, authorizations, licenses, leases, and all related pleadings.

RECORD SOURCE CATEGORIES:

Sources of records include individuals conducting business with or participating in relevant proceedings of the FCC.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows.

1. Public Access—Records related to applications, requests for authorizations, authorizations, licenses, leases, and related pleadings and correspondence will be routinely made publicly available, with the exception of material which is afforded confidential treatment pursuant to a request made under 47 CFR 0.459.

2. Litigation—To disclose records to the Department of Justice (DOJ) when: (a) the FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the FCC collected the records.

3. Adjudication—To disclose records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

4. FCC Enforcement Actions—When a record in this system involves an informal complaint filed alleging a violation of the Communications Act or FCC regulations or orders (FCC Rules and Regulations) by an applicant, licensee, certified or regulated entity, or an unlicensed person or entity, the complaint may be provided to the alleged violator for a response. Where a complainant in filing his or her complaint explicitly requests confidentiality of his or her name from public disclosure, the Commission will endeavor to protect such information from public disclosure. Complaints that contain requests for confidentiality may be dismissed if the Commission determines that the request impedes the Commission's ability to investigate and/or resolve the complaint.

5. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation, to disclose pertinent information as it deems necessary with the target of an investigation, as well as with appropriate Federal, State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order.

6. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

7. Government-wide Program Management and Oversight—To provide information to the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under FOIA; or to OMB to obtain that office's advice regarding obligations under the Privacy Act.

8. Breach Notification—To appropriate agencies, entities, and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize or remedy such harm.

9. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or Federal entity, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

10. Non-Federal Personnel—To disclose information to non-Federal personnel, including contractors, other vendors (*e.g.,* identity verification services), grantees, and volunteers who have been engaged to assist the FCC in the performance of a contract, service, grant, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform their activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

This an electronic system of records that resides on the FCC's network. Paper records that are not filed electronically are keyed into the system by FCC staff; such paper records are retained for one year and then destroyed.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information in the electronic database can be retrieved by searching electronically using a variety of parameters including name, a licensee's unique identifier, call sign, file number, etc.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The information in this electronic system is maintained and disposed of in accordance with the ''Universal Licensing System'' Records Schedule, Number N1–173–08–001.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records, files, and data are stored within FCC or a vendor's

accreditation boundaries and maintained in a database housed in the FCC's or vendor's computer network databases. Access to the electronic and paper files is restricted to authorized employees and contractors; and in the case of electronic files to IT staff, contractors, and vendors who maintain the IT networks and services. Other employees and contractors may be granted access on a need-to-know basis. The electronic files and records are protected by the FCC and third-party privacy safeguards, a comprehensive and dynamic set of IT safety and security protocols and features that are designed to meet all Federal privacy standards, including those required by the Federal Information Security Modernization Act of 2014 (FISMA), OMB, and the National Institute of Standards and Technology (NIST).

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedure below.

CONTESTING RECORD PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedure below.

NOTIFICATION PROCEDURES:

Individuals wishing to determine whether this system of records contains information about themselves may do so by writing to *privacy@fcc.gov.* Individuals requesting record access or amendment must also comply with the FCC's Privacy Act regulations regarding verification of identity as required under 47 CFR part 0, subpart E.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None

HISTORY:

71 FR 17269 (April 5, 2006)

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–23102 Filed 10–18–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 178826]

Privacy Act of 1974; System of Records.

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC, Commission, or Agency) has modified an existing system of records, FCC/EB–5, Enforcement Bureau Activity Tracking System (EBATS), subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The FCC's Enforcement Bureau (EB) uses EBATS to track its investigations into possible violations of Federal communications laws and regulations. This modification updates one routine use.

DATES: This action will become effective on October 19, 2023. The routine uses in this action will become effective on November 20, 2023 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Katherine C. Clark, Attorney-Advisor, Office of General Counsel, Room 10.306, Federal Communications Commission, 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine C. Clark, (202) 418–1773 or *privacy@fcc.gov* (and to obtain a copy of the Narrative Statement and the Supplementary Document, which includes details of the proposed alterations to this system of records).

SUPPLEMENTARY INFORMATION: This notice serves to update and modify FCC/EB–5. The sole modification to the previously published version of the FCC/EB–5 system of records notice is revising the language in routine use (6) Law Enforcement and Investigation to include disclosures to international and multinational regulatory and/or law enforcement agencies.

SYSTEM NAME AND NUMBER:

FCC/EB–5, Enforcement Bureau Activity Tracking System (EBATS).

SECURITY CLASSIFICATION:

No information in the system is classified.

SYSTEM LOCATION:

Enforcement Bureau (EB), FCC, 45 L Street NE, Washington, DC 20554; and FCC Field Offices that may maintain paper documents on an *ad hoc,* temporary basis when needed to resolve enforcement cases in their jurisdictions.

SYSTEM MANAGER:

Enforcement Bureau (EB), FCC, 45 L Street NE, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

47 U.S.C. 101, 102, 104, 301, 303, 309(e), 312, 315, 318, 362, 364, 386, 501, 502, 503, 507, and 510.

PURPOSES OF THE SYSTEM:

The Enforcement Bureau uses the information in this system for purposes that include, but are not limited to:

1. Maintaining documents and tracking the status of enforcement investigations of entities (including individuals) that have been identified as possible violators of the Communications Act of 1934, as amended, FCC regulations, other FCC requirements or orders, other statutes and regulations subject to the FCC's jurisdiction, and/or international treaties (collectively referred to hereafter as FCC Rules and Regulations);

2. Maintaining documents and tracking the status of formal complaints, including, but not limited to those that involve market disputes;

3. Determining the levels of compliance among FCC licensees and other regulatees;

4. Documenting the Commission's monitoring, overseeing, auditing, inspecting, and investigating for compliance and enforcement purposes;

5. Providing a basis for the various administrative and civil or criminal actions against violators by EB, other appropriate Commission bureaus or offices, and/or other government agencies;

6. Gathering background information for reference materials from various external sources that include, but are not limited to, databases, documents, files, and other related resources, to ensure that the information that is being compiled is accurate and up-to-date (cross-checking) in the course of investigating consumer complaints and/or enforcement investigations;

7. Maintaining archival information (paper documents and files) for reference in enforcement investigations and other actions; and

8. Preventing duplication of FCC's enforcement actions, *e.g.,* for cross-reference purposes, etc.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records in this system include, but are not limited to:

1. Individuals, including FCC employees, who have filed complaints alleging violations of FCC Rules and Regulations; or individuals who have filed such complaints on behalf of other entities and who may have included their personally identifiable information (PII) in the complaint;

2. Individuals who are or have been the subjects of FCC enforcement actions,

including field monitoring, inspection, and investigation, for possible violations of FCC Rules and Regulations;

3. Licensees, applicants, regulatees, and unlicensed individuals about whom there are questions of compliance with FCC Rules and Regulations; and

4. FCC employees, contractors, and interns who perform work on behalf of EB.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in this system include, but are not limited to:

1. Information that is associated with those individuals who file complaints or who are being investigated for possible enforcement actions. The information may include:

(a) An individual's name, Social Security Number (SSN) or Taxpayer Identification Number (TIN), gender, race/ethnicity, birth date/age, place of birth, biometric data (photograph(s)), marital status, spousal data, miscellaneous family data, home address, home address history, home telephone number(s), personal cell phone number(s), personal fax number(s), personal email address(es), personal criminal background report(s), credit card number(s), driver license number(s), bank account data, financial data, law enforcement data, background investigatory data, national security data, employment and/or employer data, and other miscellaneous materials, documents, files, and records used for background information, data verification, and other purposes.

(b) Inspection reports, audit reports, complaints, referrals, monitoring reports, inspection cases, referral memos, correspondence, audio and sound recordings, photographs, discrepancy notifications, warning notices, forfeiture actions, and other related materials.

(c) Miscellaneous materials, documents, files, and records that are used for background information and data verification concerning individuals who may have been alleged to or have violated the Commission's Rules and Regulations.

2. Information that is associated with the same or similar current enforcement investigations and historic records and other archival, background, and research data and materials that are stored for reference in enforcement actions, including inspection reports, complaints, monitoring reports, investigative cases, referral memos, correspondence, discrepancy notifications, warning notices, and forfeiture actions; and

3. Other, miscellaneous information that complainants may have included on informal consumer complaint forms, interference reports, as well as any additional FCC forms and complaint data intake systems that may be used from time to time to report possible violations of FCC Rules and Regulations to the FCC or associated with case files.

RECORD SOURCE CATEGORIES:

Sources of records include individuals submitting complaints, relevant law enforcement databases, publicly available electronic information and data, and individuals who have been contacted during investigations to be sources of information.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows.

1. Public Access—Names and other information about individuals subject to investigations or similar actions may be disclosed to the public in Commission releases, including Notices of Apparent Liability, Forfeiture Orders, Consent Agreements, Notice Letters, or all other actions released by EB or the Commission as part of their duties to enforce FCC Rules and Regulations.

2. Due Diligence Inquiries—Where there is an indication of a violation or potential violation of FCC Rules and Regulations, records from this system may be shared with a requesting individual, or representative thereof, for purposes of obtaining such information so long as the information is relevant to a pending transaction of an FCC-issued license.

3. FCC Enforcement Actions—When a record in this system involves an informal complaint filed alleging a violation of FCC Rules and Regulations by an applicant, licensee, certified or regulated entity, or an unlicensed person or entity, the complaint may be provided to the alleged violator for a response. Where a complainant in filing his or her complaint explicitly requests confidentiality of his or her name from public disclosure, the Commission will endeavor to protect such information from public disclosure. Complaints that contain requests for confidentiality may be dismissed if the Commission determines that the request impedes the Commission's ability to investigate and/or resolve the complaint.

4. Litigation—To disclose records to the Department of Justice (DOJ) when: (a) the FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the FCC collected the records.

5. Adjudication—To disclose records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

6. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation, to disclose pertinent information as it deems necessary to the target of an investigation, as well as with the appropriate Federal, State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order.

7. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

8. Government-wide Program Management and Oversight—To the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or the Office of Management and Budget (OMB) to obtain that office's advice regarding obligations under the Privacy Act.

9. Breach Notification—To appropriate agencies, entities, and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

10. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or Federal entity, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

11. Non-Federal Personnel—To disclose information to non-Federal personnel, including contractors, other vendors (*e.g.,* identity verification services), grantees, and volunteers who have been engaged to assist the FCC in the performance of a service, grant, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform their activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Information in this information system consists of:

1. Electronic records, files, and data are stored in the FCC's computer network databases, at headquarters; and

2. Paper records, documents, and files are stored in filing cabinets in the EB office suites at headquarters and in field offices (on an *ad hoc,* temporary basis when needed to resolve enforcement cases in their jurisdictions as needed for limited periods).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

1. Information in the electronic database information can be retrieved by the name(s) of the individual(s) who filed the complaint(s), the individual who is subject of the complaint, and by a unique file number assigned to each type of activity conducted by the Bureau, *e.g.,* internal initiative investigations, complaint investigations, cases, market dispute mediations, formal adjudications, hearings, due diligence requests, etc.

2. Information in the central files, which includes, but is not limited to, paper documents, records, and files, includes all the other information pertaining to these internal initiative investigations, complainant investigations, and/or cases. This information may include, but is not limited to, name, address, and telephone number, and is maintained for reference and archival purposes. This information is retrieved by a unique identification file number assigned to each internal initiative investigation, complainant investigation, and/or case.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The information in this electronic system is maintained and disposed of in accordance with the National Archives and Records Administration (NARA) General Records Schedule No. DAA–0173–2014–0002–0002.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records, data, and files are maintained in the FCC computer network databases at headquarters, which are protected by the FCC's IT privacy safeguards, a comprehensive and dynamic set of IT safety and security protocols and features that are designed to meet all Federal IT privacy standards, including those required by the National Institute of Standard and Technology (NIST) and the Federal Information Security Modernization Act of 2014 (FISMA). The paper documents and files are maintained in file cabinets in ''non-public'' rooms in the EB office suite at headquarters and in field offices. The file cabinets are locked at the end of the business day. Access to the EB offices at both headquarters and field offices is via a key and card-coded door.

Authorized EB supervisors and staff have access to the information in both the electronic files databases and paper document files, and IT contractors, who maintain these electronic files databases, also have access to them. Other FCC employees, interns, and contractors may be granted access to the information in the electronic and paper formats only on a ''need-to-know'' basis.

RECORD ACCESS PROCEDURES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a(k), the FCC has determined that this system of records is exempt from providing record access procedures for this system of records, 47 CFR 0.561.

CONTESTING RECORD PROCEDURES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a (k), the FCC has determined that this system of records is exempt from providing contesting record procedures for this system of records, 47 CFR 0.561.

NOTIFICATION PROCEDURES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a(k), the FCC has determined that this system of records is exempt from providing notification procedures for this system of records. 47 CFR 0.561.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system of records is exempt from sections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act of 1974, and from 47 CFR 0.554–0.557 of the Commission's rules. These provisions concern the notification, record access, and contesting procedures described above, and also the publication of record sources. The system is exempt from these provisions because it contains investigative material compiled for law enforcement purposes as defined in Section (k) of the Privacy Act.

HISTORY:

(88 FR 42364) (June 30, 2023).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–23101 Filed 10–18–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 179693]

Privacy Act of 1974; System of Records.

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC, Commission, or Agency) proposes to modify an existing system of records, FCC/WTB–6, Archival Radio Operator Records, subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The

Commission uses this system to administer the Commission's radio operator program including applications and determinations of license applicant qualifications, and to refer possible violations of law to the appropriate office within the Commission and to the appropriate agency outside the Commission. This modification makes various necessary changes and updates, including formatting changes required by the Office of Management and Budget (OMB) Circular A–108 since its previous publication, the addition of new routine uses, as well as the revision and deletion of existing routine uses.

DATES: This modified system of records will become effective on October 19, 2023. Written comments on the routine uses are due by November 20, 2023. The routine uses in this action will become effective on November 20, 2023 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Katherine C. Clark, Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine C. Clark, (202) 418–1773, or *privacy@fcc.gov* (and to obtain a copy of the Narrative Statement and the Supplementary Document, which includes details of the modifications to this system of records).

SUPPLEMENTARY INFORMATION: This notice serves to update and modify FCC/WTB–6, as a result of various necessary changes and updates. The substantive changes and modifications to the previously published version of the FCC/WTB–6 system of records include:

1. Updating the language in the Security Classification to follow OMB guidance.

2. Updating the language in the Purposes section to be consistent with the language and phrasing currently used in the FCC's SORNs.

3. Modifying the language in the Categories of Individuals and Categories of Records to be consistent with the language and phrasing currently used in the FCC's SORNs.

4. Deleting two routine uses (listed by former routine use number) (2) Employment, Clearances, Licensing, Contract, Grant, or other Benefits Decisions by the agency; and (3) Employment, Clearances, Licensing, Contract, Grant, or other Benefits Decisions by other than the agency—neither of which reflects how the FCC has used or disclosed records from this system.

5. Updating and/or revising language in the following routine uses (listed by current routine use number): (1) Public Access; (2) Litigation and Adjudication which is now two separate routine uses—(2) Litigation and (3) Adjudication; (5) Law Enforcement and Investigation; (6) Congressional Inquiries; and (7) Government-wide Program Management and Oversight.

6. Adding the following new routine uses (listed by current routine use number): (4) FCC Enforcement Actions; (8) Breach Notification, the addition of which is as required by OMB Memorandum No. M–17–12; (11) Assistance to Federal Agencies and Entities Related to Breaches, the addition of which is required by OMB Memorandum No. M–17–12; and (10) Non-Federal Personnel to allow contractors, vendors, grantees, or volunteers performing or working on a contract, grant, or cooperative agreement for the Federal Government to have access to needed information.

7. Updating the SORN to include the records schedule N1–173–94–002, ''Wireless Telecommunications Bureau—Licensing Division Records.''

The system of records is also updated to reflect various administrative changes related to the system managers and system addresses; policy and practices for storage and retrieval of the information; administrative, technical, and physical safeguards; and updated notification, records access, and contesting records procedures.

SYSTEM NAME AND NUMBER:

FCC/WTB–6, Archival Radio Operator Records.

SECURITY CLASSIFICATION:

No information in the system is classified.

SYSTEM LOCATION:

Wireless Telecommunications Bureau, FCC, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325.

SYSTEM MANAGER(S):

Chief, Technologies Systems and Innovation Division, Wireless Telecommunications Bureau, FCC, 1270 Fairfield Road, Gettysburg, PA 17325.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

47 U.S.C. 303(l), 303(m), and 318.

PURPOSE(S) OF THE SYSTEM:

WTB uses the information in this information system for purposes that include, but are not limited to:

1. To administer the Commission's radio operator program including applications and determinations of license applicant qualifications.

2. To enforce the Communications Act, as amended, FCC regulations, other FCC requirements or orders, other statutes and regulations subject to the FCC's jurisdiction, and/or international treaties (Rules and Regulations), and refer possible violations to the FCC's Enforcement Bureau, OGC, and/or to the appropriate agency charged with the responsibility of investigating or prosecuting such violation(s).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals whose records are maintained in this system include, but are not limited to. individuals who applied for and/or received a radiotelephone (wireless) operator license or permit prior to the implementation of the Federal Communications Commission's Universal Licensing System (ULS) in 2001.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records in this system include, but are not limited to:

1. Applications for radiotelephone (wireless) operator's license or permit prior to the implementation of the FCC's Universal Licensing System in 2001; and

2. Documents associated with these applications.

RECORD SOURCE CATEGORIES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a(k), the FCC has determined (47 CFR 0.561) that this system of records is exempt from disclosing its record sources for this system of records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information about individuals in this system of records may routinely be disclosed under the following conditions:

1. Public Access—the licensee records will routinely be made publicly available; ITIN Numbers and material which is afforded confidential treatment pursuant to a request made under 47 CFR 0.459 will not be available for public inspection. Names and other information about individuals subject to investigations or similar actions may be disclosed to the public in Commission releases, including Notices of Apparent Liability, Forfeiture Orders, Consent Agreements, Notice Letters, or all other actions released by a Bureau or the Commission as part of their duties to enforce FCC Rules and Regulations.

2. Litigation—To disclose records to the Department of Justice (DOJ) when: (a) the FCC or any component thereof;

(b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the FCC collected the records.

3. Adjudication—To disclose records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

4. FCC Enforcement Actions—When a record in this system involves an informal complaint filed alleging a violation of FCC Rules and Regulations by an applicant, licensee, certified or regulated entity, or an unlicensed person or entity, the complaint may be provided to the alleged violator for a response. Where a complainant in filing his or her complaint explicitly requests confidentiality of his or her name from public disclosure, the Commission will endeavor to protect such information from public disclosure. Complaints that contain requests for confidentiality may be dismissed if the Commission determines that the request impedes the Commission's ability to investigate and/or resolve the complaint.

5. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation, to disclose pertinent information as it deems necessary with the target of an investigation, as well as with appropriate Federal, State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order.

6. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

7. Government-wide Program Management and Oversight—To DOJ to obtain that Department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or to OMB to obtain that office's advice regarding obligations under the Privacy Act.

8. Breach Notification—To appropriate agencies, entities, and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

9. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or Federal entity, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

10. Non-Federal Personnel—To disclose information to non-Federal personnel, including contractors, other vendors (*e.g.,* identity verification services), grantees, and volunteers who have been engaged to assist the FCC in the performance of a contract, service, grant, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform their activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

These are microfiche files that are maintained in the FCC's Gettysburg Office, 1270 Fairfield Road, Gettysburg, PA 17325.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

All records are retrievable by applicant name and the issue date of the FCC License.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The information in this system is maintained and disposed of in accordance with the National Archives and Records Administration (NARA) Records Schedule No. N1–173–94–002, ''Wireless Telecommunications Bureau—Licensing Division Records.''

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The microfiche files are securely maintained in the FCC's Gettysburg office. Access to the microfiche files is restricted to authorized employees and contractors maintaining these files; other employees and contractors may be granted access on a need-to-know basis. The microfiche are stored in locked file cabinets that are secured at the close of the business day. The security protocols and features are designed to meet all Federal privacy standards, including those required by the Federal Information Security Modernization Act of 2014 (FISMA), OMB, and the National Institute of Standards and Technology (NIST).

RECORD ACCESS PROCEDURES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a(k), the FCC has determined (47 CFR 0.561) that this system of records is exempt from disclosing its record access procedures for this system of records.

CONTESTING RECORD PROCEDURES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a(k), the FCC has determined (47 CFR 0.561) that this system of records is exempt from disclosing its contesting record procedures for this system of records.

NOTIFICATION PROCEDURES:

Under the authority granted to heads of agencies by 5 U.S.C. 552a(k), the FCC has determined (47 CFR 0.561) that this system of records is exempt from disclosing its notification procedure for this system of records.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system of records is exempt from sections (c)(3), (d), (e)(4)(G), (H), and (I), and (f) of the Privacy Act of 1974, 5 U.S.C. 552a, and from 47 CFR 0.554 through 0.557 of the Commission's rules. These provisions concern the notification, record access, and contesting procedures described above, and also the publication of record sources. The system is exempt from these provisions because it contains investigative material compiled for law enforcement purposes as defined in Section (k)(2) of the Privacy Act.

HISTORY:

71 FR 17272 (April 5, 2006).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–23103 Filed 10–18–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0083; –0182; –0198]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collections described below (OMB Control No. 3064–0083; –0182 and –0198).

DATES: Comments must be submitted on or before December 18, 2023.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Regulatory Counsel, MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street NW), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manny Cabeza, Regulatory Counsel, 202–898–3767, *mcabeza@fdic.gov,* MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collection of information:

1. *Title:* Recordkeeping and Disclosure Requirements in Connection with Regulation M (Consumer Leasing).

OMB Number: 3064–0083.

Affected Public: State nonmember banks and state savings associations engaging in consumer leasing.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0083]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
Recordkeeping Requirements in Connection with Regulation M (Consumer Leasing), 12 CFR 1013.8.	Recordkeeping (On occasion)	17	100	00:22.5	638
Third-Party Disclosure Requirements in Connection with Regulation M (Consumer Leasing), 12 CFR 1013.3.	Third-Party Disclosure (On occasion).	17	100	00:22.5	638
Total Annual Burden (Hours)					1,276

Source: FDIC.

General Description of Collection: Regulation M (12 CFR 1013), issued by the Bureau of Consumer Financial Protection, implements the consumer leasing provisions of the Truth in Lending Act. Regulation M requires lessors of personal property to provide consumers with meaningful disclosures about the costs and terms of the leases for personal property. Lessors are required to retain evidence of compliance with Regulation M for twenty-four months. There is no change in the methodology or substance of this information collection. The change in burden is due solely to the decrease in the estimated number of respondents from 19 in 2021 to 17.

2. *Title:* Retail Foreign Exchange Transactions.

OMB Number: 3064–0182.

Forms: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0182]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Recordkeeping Requirements, 12 CFR 349.19, 12 CFR 349.21(b)(2), 12 CFR 349.25(a) (Mandatory).	Recordkeeping (Annual)	1	1	1,332:00	1,332
2. Reporting Requirements, 12 CFR 349.16 (Mandatory).	Reporting (Annual)	1	1	16:00	16

SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued

[OMB No. 3064–0182]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
3. Disclosure Requirements, 12 CFR 349.22(a), 12 CFR 349.17(a)(4)(ii), 12 CFR 349.18, 12 CFR 349.25(c) and (d), 12 CFR 349.27, 12 CFR 349.28(a) and (b) (Mandatory).	Third-Party Disclosure (Annual)	1	1	276:00	276
Total Annual Burden (Hours)	.....	.....	.....	.....	1,624

Source: FDIC.

General Description of Collection: This information collection implements section 742(c)(2) of the Dodd-Frank Act (7 U.S.C. 2(c)(2)(E)) and FDIC regulations governing retail foreign exchange transactions as set forth at 12 CFR part 349, subpart B. The regulation allows banking organizations under FDIC supervision to engage in off-exchange transactions in foreign currency with retail customers provided they comply with various reporting, recordkeeping and third-party disclosure requirements specified in the rule. If an institution elects to conduct such transactions, compliance with the information collection is mandatory. Reporting Requirements—part 349, subpart B requires that, prior to initiating a retail foreign exchange business; a banking institution must provide the FDIC with a notice certifying that the institution has written policies and procedures, and risk measurement and management systems and controls in place to ensure that retail foreign exchange transactions are conducted in a safe and sound manner. The institution must also provide information about how it intends to manage customer due diligence, new product approvals and haircuts applied to noncash margin. Recordkeeping Requirements—part 349 subpart B requires that institutions engaging in retail foreign exchange transactions keep full, complete and systematic records of account, financial ledger, transaction, memorandum orders and post execution allocations of bunched orders. In addition, institutions are required to maintain records regarding their ratio of profitable accounts, possible violations of law, records of noncash margin and monthly statements and confirmations issued. Disclosure Requirements—The regulation requires that, before opening an account that will engage in retail foreign exchange transactions, a banking institution must obtain from each retail foreign exchange customer an acknowledgement of receipt and understanding of a written disclosure specified in the rule and of disclosures about the banking institution's fees and other charges and of its profitable accounts ratio. The institution must also provide monthly statements to each retail foreign exchange customer and must send confirmation statements following every transaction. The customer dispute resolution provisions of the regulation require certain endorsements, acknowledgements and signature language as well as the timely provision of a list of persons qualified to handle a customer's request for arbitration.

After reviewing the requirements in Subpart B and the similar ICRs currently approved by OMB for the OCC and the Federal Reserve, the FDIC has determined that subpart B imposes more recordkeeping requirements than those listed in the 2021 ICR. While the 2021 ICR listed 12 CFR 349.19 as the only recordkeeping requirement in Subpart B,[1] the FDIC notes that the requirement in 12 CFR 349.21(b)(2)[2] also meets the definition of a recordkeeping requirement, as does the requirement in 12 CFR 349.25(a).[3] The OCC and the Federal Reserve each listed requirements that are analogous to those in 12 CFR 349.21(b)(2) and 12 CFR 349.25(a) as recordkeeping requirements in their similar ICRs,[4] in addition to recordkeeping requirements that are analogous to those in 12 CFR 349.19.[5] The FDIC is revising its information collection to include this burden.

3. *Title:* Generic Information Collection for Qualitative Research.

OMB Number: 3064–0198.

Affected Public: General public including FDIC insured depository institutions.

Burden Estimate:

[1] See footnote 7.

[2] 12 CFR 349.21(b)(2) requires FDIC-supervised institutions that are engaged in, or that offer to engage in, retail foreign exchange transactions to establish written policies and procedures that include: Haircuts for noncash margin collected pursuant to 12 CFR 349.21 (12 CFR 349.21(b)(2)(i)), and annual evaluation and, if appropriate, modification of the haircuts (12 CFR 349.21(b)(2)(ii)).

[3] 12 CFR 349.25(a)(1) requires FDIC-supervised institutions that are engaged in retail foreign exchange transactions to establish and implement internal policies, procedures, and controls designed to ensure that orders placed for retail foreign exchange transactions by retail foreign exchange customers are given priority over orders placed for retail foreign exchange transactions for a proprietary account of the FDIC-supervised institution (12 CFR 349.25(a)(1)(i)), or an account in which a related person has an interest (12 CFR 349.25(a)(1)(ii), (iii), and (iv)). 12 CFR 349.14 defines ''related person'' as (1). Any general partner, officer, director, or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution; (2). An associated person or employee of the retail foreign exchange counterparty, if the retail foreign exchange counterparty is not an FDIC-supervised insured depository institution; (3). An institution-affiliated party, as that term is defined in 12 U.S.C. 1813(u)(1), (2), or (3), or employee of the retail foreign exchange counterparty, if the retail foreign exchange counterparty is not an FDIC-supervised insured depository institution, or; (4). And relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons. 12 CFR 349.25(a)(2) requires FDIC-supervised institutions that are engaged in retail foreign exchange transactions to establish and implement internal policies, procedures, and controls designed to prevent FDIC-supervised insured depository institution related persons from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of 12 CFR 349.25(a)(1). 12 CFR 349.25(a)(3) requires FDIC-supervised institutions that are engaged in retail foreign exchange transactions to establish and implement internal policies, procedures, and controls designed to fairly and objectively establish settlement prices for retail foreign exchange transactions.

[4] For the Federal Reserve, these requirements include those in 12 CFR 240.9(b)(2) and 12 CFR 240.13(a). For the OCC, these requirements include those in 12 CFR 48.13 and 12 CFR 48.9.

[5] These requirements include the Federal Reserve's regulations at 12 CFR 240.7 and the OCC's regulations at 12 CFR 48.7.

SUMMARY OF ESTIMATED ANNUAL BURDEN
[OMB No. 3064–0198]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Generic Information Collection for Qualitative Research, (Voluntary).	Reporting (Once)	10,000	1	01:00	10,000
Total Annual Burden (Hours)					10,000

Source: FDIC.

General Description of Collection: The FDIC is requesting renewal of this approved collection to use occasional qualitative surveys to gather information from the public to inform qualitative research. While the subject and nature of the surveys to be deployed under this information collection are yet to be determined, based on prior experience it is expected that the number or respondents will range from a few to, at times, several thousands, but, in general, these surveys are expected to involve an average of 500 respondents. Likewise, the time to respond to the surveys can range from a few minutes to several hours, but, it is expected that the average time to respond to a survey is approximately one hour. These surveys are completely voluntary in nature. FDIC estimates that approximately 20 such surveys will be conducted in any given year. Currently, the FDIC has a variety of methods to collect quantitative information from consumers and institutions (*e.g.,* Call Reports, FDIC National Survey of Unbanked and Underbanked Households, etc.). Qualitative data would provide complementary information on insights, opinions, and perceptions that will inform how the FDIC approaches its mission to safeguard financial stability of the banking system and promote consumer protection and economic inclusion. This clearance would allow the FDIC to engage with consumers and other relevant stakeholders through qualitative research methods such as focus groups, in-depth interviews, cognitive testing, and/or qualitative virtual methods. The purpose of the surveys is, in general terms, to obtain anecdotal information about regulatory burden, problems or successes in the bank supervisory process (including both safety-and-soundness and consumer related exams), the perceived need for regulatory or statutory change, and similar concerns. The information in these surveys is anecdotal in nature, that is, samples are not necessarily random, the results are not necessarily representative of a larger class of potential respondents, and the goal is not to produce a statistically valid and reliable database. Rather, the surveys are expected to yield anecdotal information about the particular experiences and opinions of members of the public, primarily staff at respondent banks or bank customers. The collection is noncontroversial and does not raise issues of concern to other Federal agencies; with the exception of information needed to provide remuneration for participants of focus groups and cognitive laboratory studies, personally identifiable information (PII) is collected only to the extent necessary and is not retained. Participation in this information collection will be voluntary and conducted in-person, by phone, or using other methods, such as virtual technology. The types of collections that this generic clearance covers include, but are not limited to: Small discussion groups; focus groups of consumers, financial industry professionals, or other stakeholders; cognitive laboratory studies, such as those used to refine questions or assess usability of a website; qualitative customer satisfaction surveys (*e.g.,* post-transaction surveys; opt-out web surveys); and in-person observation testing (*e.g.,* website or software usability tests).

There is no change in the substance or methodology of this information collection.

Request for Comment

Comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on October 13, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–23054 Filed 10–18–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2023–N–12]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: Federal Home Loan Bank Capital Stock—30-day notice of submission of information collection for approval from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Housing Finance Agency (FHFA) is seeking public comments concerning an information collection known as ''Federal Home Loan Bank Capital Stock,'' which has been assigned control number 2590–0002 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on November 30, 2023.

DATES: Interested persons may submit comments on or before November 20, 2023.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, Fax: (202) 395–3047, Email: *OIRA_submission@omb.eop.gov.* Please also submit comments to FHFA, identified by ''Proposed Collection; Comment

Request: 'Federal Home Loan Bank Capital Stock, (No. 2023–N–12)' '' by any of the following methods:

- *Agency Website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by *email* to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Office of General Counsel, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: ''Federal Home Loan Bank Capital Stock, (No. 2023–N–12).''

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.*

Copies of all comments received will be available for examination by the public through the electronic comment docket for this PRA Notice also located on the FHFA website.

FOR FURTHER INFORMATION CONTACT: Lindsay Spadoni, Assistant General Counsel, *Lindsay.Spadoni@fhfa.gov,* (202) 649–3634 or Angela Supervielle, Senior Counsel, *Angela.Supervielle@fhfa.gov,* (202) 649–3973 (these are not toll-free numbers). For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

A. Paperwork Reduction Act

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from 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) to include agency requests or requirements that ten or more persons submit information to a third party. FHFA's collection of information set forth in this document is titled ''Federal Home Loan Bank Capital Stock'' (assigned control number 2590–0002 by OMB). To comply with the PRA requirement, FHFA is publishing notice of a proposed three-year extension of this collection of information, which is due to expire on November 30, 2023.

B. Background

The Federal Home Loan Bank System consists of eleven regional Federal Home Loan Banks (Banks) and the Office of Finance (a joint office that issues and services the Banks' debt securities). The Banks are wholesale financial institutions, organized under authority of the Federal Home Loan Bank Act (Bank Act) to serve the public interest by enhancing the availability of residential housing finance and community lending credit through their member institutions and, to a limited extent, through certain eligible nonmembers. Each Bank is structured as a regional cooperative that is owned and controlled by member institutions located within its district, which are also its primary customers. An institution that is eligible for membership in a particular Bank must purchase and hold a prescribed minimum amount of the Bank's capital stock in order to become and remain a member of that Bank. With limited exceptions, only an institution that is a member of a Bank may obtain access to low cost secured loans, known as advances, or other products provided by that Bank.

Section 6 of the Bank Act establishes capital requirements for the Banks and requires FHFA to issue regulations prescribing uniform capital standards applicable to all of the Banks.[1] Section 6 also establishes parameters relating to the Banks' capital structures and requires that each Bank adopt a ''capital structure plan'' (capital plan) to establish, within those statutory parameters, its own capital structure and to establish requirements for, and govern transactions in, the Bank's capital stock.[2] FHFA's regulations on Bank Capital Requirements, Capital Stock, and Capital Plans are located at 12 CFR part 1277.

C. Need for and Use of the Information Collection

Both the Bank Act and FHFA's regulations state that a Bank's capital plan must require its members to maintain a minimum investment in the Bank's capital stock, but both permit each Bank to determine for itself what that minimum investment is and how each member's required minimum investment is to be calculated.[3] Although each Bank's capital plan establishes a slightly different method for calculating the required minimum stock investment for its members, each Bank's method is tied to some degree to both the level of assets held by the member institution (typically referred to as a ''membership stock purchase requirement'') and the amount of advances or other business engaged in between the member and the Bank (typically referred to as an ''activity-based stock purchase requirement'').

A Bank must collect information from its members to determine the minimum capital stock investment each member is required to maintain at any point in time. Although the information needed to calculate a member's required minimum investment and the precise method through which it is collected differ somewhat from Bank to Bank, the Banks typically collect two types of information. First, in order to calculate and monitor compliance with its membership stock purchase requirement, a Bank typically requires each member to provide and/or confirm an annual report on the amount and types of assets held by that institution. Second, each time a Bank engages in a business transaction with a member, the Bank typically confirms with the member the amount of additional Bank capital stock, if any, the member must acquire in order to satisfy the Bank's activity-based stock purchase requirement and the method through which the member will acquire that stock.

The OMB number for the information collection is 2590–0002, which is due to expire on November 30, 2023. The likely respondents include current and former Bank members and institutions applying for Bank membership.

D. Burden Estimate

FHFA has analyzed the time burden imposed on respondents by the two collections under this control number and estimates that the average total annual hour burden imposed on all respondents over the next three years will be 20,245 hours. The estimate for each collection was calculated as follows:

1. Membership Stock Purchase Requirement Submissions

FHFA estimates that the average annual number of current and former members and applicants for membership required to report information needed to calculate a membership stock purchase requirement will be 6,550, and that each institution will submit one report per year, resulting in an estimated total of 6,550 submissions annually. The estimate for the average time required to prepare, review, and submit each report is 0.7 hours. Accordingly, the estimate for the annual hour burden associated with membership stock purchase requirement submissions is (6,550 reports × 0.7 hours per report) = 4,585 hours.

[1] *See* 12 U.S.C. 1426(a).

[2] *See* 12 U.S.C. 1426(b), (c).

[3] *See* 12 U.S.C. 1426(c)(1); 12 CFR 1277.22, 1277.28(a).

2. Activity-Based Stock Purchase Requirement Submissions

FHFA estimates that the average number of daily transactions between Banks and members that will require the exchange of information to confirm the member's activity-based stock purchase requirement will be 300, and that there will be an average of 261 working days per year, resulting in an estimated 78,300 submissions annually. The estimate for the average preparation time per submission is 0.2 hours. Accordingly, the estimate for the annual hour burden associated with activity-based stock purchase requirement submissions is (78,300 submissions × 0.2 hours per submission) = 15,660 hours.

E. Comment Request

In accordance with the requirements of 5 CFR 1320.8(d), FHFA published an initial notice and request for public comments regarding this information collection in the **Federal Register** on August 8, 2023.[4] The 60-day comment period closed on October 10, 2023. FHFA received no substantive comments.

FHFA requests written comments on the following: (1) whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (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.

Shawn Bucholtz,

Chief Data Officer, Federal Housing Finance Agency.

[FR Doc. 2023–23067 Filed 10–18–23; 8:45 am]

BILLING CODE 8070–01–P

FEDERAL RESERVE SYSTEM

Sunshine Meeting Notice

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 1:00 p.m. on Wednesday, October 25, 2023.

PLACE: Martin Federal Reserve Board Building, C Street entrance between 20th and 21st Streets NW, Washington, DC 20551.

STATUS: Open.

On the day of the meeting, you will be able to view the meeting via webcast from a link available on the Board's website. You do not need to register to view the webcast of the meeting. A link to the meeting documentation will also be available approximately 20 minutes before the start of the meeting. Both links may be accessed from the Board's website at *www.federalreserve.gov*.

If you plan to attend the open meeting in person, we ask that you notify us in advance and provide your name, date of birth, and social security number (SSN) or passport number. You may provide this information by calling 202–452–2474 or you may register online *www.federalreserve.gov*. You may pre-register until close of business on October 24, 2023. You also will be asked to provide identifying information, including a photo ID, before being admitted to the Board meeting. The Public Affairs Office must approve the use of cameras; please email *media@frb.gov* for further information. If you need an accommodation for a disability, please contact Penelope Beattie on 202–452–3982. For users of telephone systems via text telephone (TTY) or any TTY-based Telecommunications Relay Services (TRS), please call 202–263–4869 or dial 7–1–1 from any telephone, anywhere in the United States.

Privacy Act Notice: The information you provide will be used to assist us in prescreening you to ensure the security of the Board's premises and personnel. In order to do this, we may disclose your information consistent with the routine uses listed in the Privacy Act Notice for BGFRS–32, including to appropriate federal, state, local, or foreign agencies where disclosure is reasonably necessary to determine whether you pose a security risk or where the security or confidentiality of your information has been compromised. We are authorized to collect your information by 12 U.S.C. 243 and 248, and Executive Order 9397. In accordance with Executive Order 9397, we collect your SSN so that we can keep accurate records, because other people may have the same name and birth date. In addition, we use your SSN when we make requests for information about you from law enforcement and other regulatory agency databases. Furnishing the information requested is voluntary; however, your failure to provide any of the information requested may result in disapproval of your request for access to the Board's premises. You may be subject to a fine or imprisonment under 18 U.S.C. 1001 for any false statements you make in your request to enter the Board's premises.

MATTERS TO BE CONSIDERED:

Discussion Agenda

1. Proposed revisions to the Board's debit interchange fee cap.

Notes: 1. For those attending in person, the staff memo will be available to attendees on the day of the meeting in paper. Meeting documentation will be available on the Board's website about 20 minutes before the start of the meeting.

2. This meeting will be recorded for the benefit of those unable to attend. The webcast recording and a transcript of the meeting will be available after the meeting on the Board's website *http://www.federalreserve.gov/aboutthefed/boardmeetings/*.

For questions please contact: Public Affairs Office at *media@frb.gov*.

SUPPLEMENTARY INFORMATION: You may access the Board's website at *www.federalreserve.gov* for an electronic announcement. (The website also includes procedural and other information about the open meeting.)

Dated: October 16, 2023.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–23116 Filed 10–18–23; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–4356]

Enforcement Policy for Non-Invasive Remote Monitoring Devices Used To Support Patient Monitoring; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring.'' The enforcement policy described in this guidance applies to modified devices where the original device was a legally marketed, non-invasive remote monitoring device listed in the guidance that measures or detects common physiological parameters and that is used to support patient monitoring. The guidance is intended to describe the enforcement policy for limited modifications to the indications, functionality, or hardware

[4] *See* 88 FR 53484 (Aug. 8, 2023).

or software of device types in the scope of the guidance without prior submission of a 510(k) where such submission would be required.

DATES: The announcement of the guidance is published in the **Federal Register** on October 19, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2023–D–4356 for ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring'' to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Jessica Paulsen, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2108, Silver Spring, MD 20993–0002, 301–796–6883.

SUPPLEMENTARY INFORMATION:

I. Background

The enforcement policy described in this guidance applies to modified devices where the original device was a legally marketed, noninvasive remote monitoring device listed in the guidance that measures or detects common physiological parameters and that is used to support patient monitoring. The guidance is intended to describe the enforcement policy for limited modifications to the indications, functionality, or hardware or software of device types in the scope of the guidance without prior submission of a premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) (see 21 CFR 807.81) where such submission would be required. This guidance supersedes ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency'' issued in March 2020 and updated in June 2020, October 2020, and March 2023.

In the **Federal Register** of March 13, 2023 (88 FR 15417), FDA announced that that guidance was being revised to continue in effect for 180 days after the expiration of the COVID–19 public health emergency (PHE) declaration issued under section 319 of the Public Health Service Act, during which time, FDA intended to further revise the guidance. Consistent with what we said in the **Federal Register** of March 13, 2023, FDA is therefore issuing this revised final guidance.

Leveraging the perspective gained during the COVID–19 pandemic, FDA is updating the policy reflected in the ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring During the Coronavirus Disease 2019 (COVID–19) Public Health Emergency'' guidance to exercise certain enforcement policies for certain devices beyond the expiration of the COVID–19 PHE (which expired on May 11, 2023) and the 180-day period announced in the March 13, 2023 **Federal Register** notice, including by removing clinical thermometers and pulse oximeters from the scope of the guidance, revising the policy with

respect to certain device types subject to special controls, and removing use of the term ''claims.''

This guidance is being implemented without prior public comment because FDA has determined that prior public participation for this guidance is not feasible or appropriate (see section 701(h)(1)(C) of the FD&C Act (21 U.S.C. 371(h)(1)(C)) and § 10.115(g)(2) (21 CFR 10.115(g)(2)). FDA has determined that this guidance document presents a less burdensome policy that is consistent with public health. Although this policy is being implemented immediately without prior comment, it remains subject to comment in accordance with FDA's good guidance practices regulation (§ 10.115(g)(3)(i)(D)). FDA will consider all comments received and revise the guidance document as appropriate.

This guidance is being issued consistent with FDA's good guidance practices regulation (§ 10.115). The guidance represents the current thinking of FDA on ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov, https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of ''Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number GUI00007017 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA regulations, guidance, and forms have been approved by OMB as listed in the following table:

21 CFR Part	Topic	OMB control No.
807, subpart E	Premarket Notification	0910–0120
800, 801, and 809	Medical Device Labeling Regulations	0910–0485

Dated: October 16, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–23110 Filed 10–18–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–4414]

American Regent, Inc., et al.; Withdrawal of Approval of Eight Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is withdrawing approval of eight abbreviated new drug applications (ANDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of November 20, 2023.

FOR FURTHER INFORMATION CONTACT: Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1676, Silver Spring, MD 20993–0002, 240–402–6980, *Martha.Nguyen@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process described in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived the opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
ANDA 040515	Promethazine Hydrochloride Injectable, 25 milligrams (mg)/milliliter (mL).	American Regent, Inc., 5 Ramsey Rd., Shirley, NY 11967.
ANDA 080028	Sulfacetamide Sodium Solution/Drops, 10% and 30%.	Allergan Sales, LLC, 2525 Dupont Dr., Irvine, CA 92612.
ANDA 091300	Riluzole Tablet, 50 mg	Apotex Corp., U.S. Agent for Apotex Inc., 2400 North Commerce Parkway, Suite 400, Weston, FL 33326.
ANDA 200271	Hydroxyprogesterone Caproate Solution, 1,250 mg/5 mL (250 mg/mL).	Lachman Consultant Services, Inc., U.S. Agent for Aspen Global Inc., 1600 Stewart Ave., Suite 604, Westbury, NY 11590.
ANDA 201570	Abacavir Sulfate Tablet, Equivalent to (EQ) 300 mg base.	Apotex Corp., U.S. Agent for Apotex Inc.

Application No.	Drug	Applicant
ANDA 202784	Esomeprazole Magnesium Capsule, Delayed Release Pellets, EQ 20 mg base and EQ 40 mg base.	Hetero USA, Inc., U.S. Agent for Hetero Labs Ltd., Unit-III, 1035 Centennial Ave., Piscataway, NJ 08854.
ANDA 208413	Choline C–11 Injectable, 4–33.1 millicurie/mL	Washington University School of Medicine, 510 South Kingshighway Blvd., St. Louis, MO 63110.
ANDA 208939	Esomeprazole Magnesium Capsule, Delayed Release, EQ 20 mg base.	Hetero USA, Inc., U.S. Agent for Hetero Labs Ltd.

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of November 20, 2023. Approval of each entire application is withdrawn, including any strengths and dosage forms inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products listed in the table without an approved new drug application or abbreviated new drug application violates sections 505(a) and 301(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(a) and 331(d)). Drug products that are listed in the table that are in inventory on November 20, 2023 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: October 13, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–23064 Filed 10–18–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–1005]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Focus Groups and Interviews as Used by the Food and Drug Administration

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (PRA).

DATES: Submit written comments (including recommendations) on the collection of information by November 20, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://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. The OMB control number for this information collection is 0910–0497. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: JonnaLynn Capezzuto, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–3794, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Focus Groups and Interviews as Used by the Food and Drug Administration

OMB Control No. 0910–0497—Extension

FDA conducts focus groups and in-depth individual interviews on a variety of topics involving FDA-regulated products, including drugs, biologics, devices, food, tobacco products, and veterinary medicine.

Focus groups are an important role in gathering information because they allow for a better understanding of consumers' attitudes, beliefs, motivations, and feelings than do quantitative studies and encourages interaction between participants.

Individual interviews allow for a more comprehensive, in-depth information exchange where more insights are likely to be collected.

Both focus groups and in-depth individual interviews serve the narrowly defined need for direct and informal opinion on a specific topic and, as a qualitative research tool, have three major purposes:

- To obtain consumer information that is useful for developing variables and measures for quantitative studies,
- To better understand consumers' attitudes and emotions in response to topics and concepts, and
- To further explore findings obtained from quantitative studies.

FDA will use findings to test and refine ideas but will generally conduct further research before making important decisions, such as adopting new policies and allocating or redirecting significant resources to support these policies.

Respondents to this collection of information will include members of the general public, healthcare professionals, the industry, and other stakeholders who are related to a product under FDA's jurisdiction. Inclusion and exclusion criteria will vary depending on the research topic.

In the **Federal Register** of April 11, 2023 (88 FR 21680), FDA published a 60-day notice requesting public comment on the proposed collection of information. Three comments were received, two in support of the information collection, and one that did not address the elements of the PRA.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Focus groups and individual in-depth interviews	12,000	1	12,000	1.75	21,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimated burden for the information collection reflects an overall increase of 5,600 hours and a corresponding increase of 3,200 responses. We have added individual in-depth interviews as a method of information gathering. In addition, we are consolidating ICR 0910–0677, ''Focus Groups About Drug Products as Used by the Food and Drug Administration'' into this request for extension.

Dated: October 13, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–23011 Filed 10–18–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2020–D–1057 and FDA–2020–D–1136]

Food and Drug Administration; Center of Drug Evaluation and Research Guidance Documents Related to Coronavirus Disease 2019, Expiration

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the withdrawal of guidances for industry entitled ''Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act,'' which posted March 2020 to communicate recommendations for notifying the Agency about the permanent discontinuance or interruption in manufacturing of certain drug products; and ''COVID–19: Potency Assay Consideration for Monoclonal Antibodies and Other Therapeutic Proteins Targeting SARS–CoV–2 Infectivity'' which posted January 2021 to communicate information on the development of monoclonal antibodies (mAbs) and other therapeutic proteins for use as COVID–19 therapeutics. FDA is withdrawing these two guidance documents because new draft guidances are available that reflect comments received on the COVID–19 guidances, and many of the recommendations set forth in the COVID–19 guidances are applicable outside the context of the public health emergency (PHE) and included in the draft guidances.

DATES: The expiration date is November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Kimberly Thomas, Office of Regulatory Policy, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–2357.

SUPPLEMENTARY INFORMATION:

I. Background

As part of FDA's commitment to providing timely guidance to support response efforts to the Coronavirus Disease 2019 (COVID–19) [1] pandemic, the Agency published on the FDA website the guidance for industry entitled ''Notifying FDA of Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act'' in March 2020, and announced its availability in the **Federal Register** on April 6, 2020 (85 FR 18247), (Notifying FDA Guidance); and in January 2021, the Agency published on the FDA website the guidance for industry entitled ''COVID–19: Potency Assay Considerations for Monoclonal Antibodies and Other Therapeutic Proteins Targeting SARS–CoV–2 Infectivity'' and announced its availability in the **Federal Register** February 19, 2021 (86 FR 10285), (Potency Assay Guidance). The Notifying FDA Guidance explained that during the COVID–19 pandemic FDA had been closely monitoring the medical supply chain with the expectation that it may be impacted by the COVID–19 outbreak, potentially leading to supply disruptions or shortages of drug and biological products in the United States. The Notifying FDA Guidance, therefore, communicated the Agency's recommendations for providing timely, informative notifications about changes in the production of certain drugs and biological products to help the Agency in its efforts to prevent or mitigate shortages of such products. The Potency Assay Guidance communicated information to assist sponsors in the development of mAbs and other therapeutic proteins for use as COVID–19 therapeutics and described how potency assay methods required for release and stability testing can be shown to assess known or potential mechanism(s) of action of the product. The guidance also described methods that applicants should use to ensure the potency of mAbs and other therapeutic proteins proposed for use in as anti-infective agents for COVID–19. FDA issued both guidances to communicate its recommendations for the duration of the COVID–19 PHE declared by the Secretary of Health and Human Services (HHS) on January 31, 2020, including any renewals made by the HHS Secretary in accordance with section 319(a)(2) of the Public Health Service Act (42 U.S.C. 247d(a)(2)). We also said in both guidances that we expected their recommendations would continue to apply in circumstances outside the context of the PHE and that following the end of the COVID–19 PHE, FDA intended to revise and replace the guidances with updated guidances that incorporated any appropriate changes based on comments received and the Agency's experience with implementation. Furthermore, in the **Federal Register** of March 13, 2023 (88 FR 15417), FDA listed the COVID–19-related guidance documents that will no longer be in effect with the expiration of the COVID–19 PHE declaration on May 11, 2023, guidances that FDA revised to continue in effect for 180 days after the expiration of the COVID–19 PHE declaration to provide a period for stakeholder transition and then would no longer be in effect, and guidances that FDA revised to continue in effect for 180 days after the expiration of the PHE declaration during which time FDA planned to further revise the guidances. The Notifying FDA Guidance and the Potency Assay Guidance were included in the latter category and were revised to remain in effect for 180 days post expiration of the PHE declaration.

FDA also stated in the **Federal Register** of March 13, 2023, that the

[1] The virus has been named ''SARS–CoV–2'' and the disease it causes has been named ''Coronavirus Disease 2019'' (COVID–19).

Agency ''continues to assess the needs and circumstances related to the policies in our COVID–19-related guidances, and we may alter our approach for individual guidances listed in this notice.'' (88 FR 15417 at 15418). Following the expiration of the COVID–19 PHE declaration on May 11, 2023, FDA has reviewed the Notifying FDA Guidance and the Potency Assay Guidance and determined that these two guidances are no longer needed because new draft guidances are available.

In March 2023 (88 FR 13126), the Agency issued the draft guidance document entitled ''Potency Assay Considerations for Monoclonal Antibodies and Other Therapeutic Proteins Targeting Viral Pathogens,'' which provides information to assist in the development of mAbs and other therapeutic proteins directly targeting viral proteins or host cell proteins mediating pathogenic mechanisms of infection. The draft guidance also provides detailed recommendations for drug developers with the goal of helping to ensure that drug developers provide adequate information to assess potency at each stage of a product's life cycle. FDA believes that many of the recommendations set forth in the 2021 Potency Assay Guidance are applicable outside the context of the COVID–19 PHE and are applicable to mAbs and other therapeutic protein directly targeting any viral surfaces (glycol) proteins mediating pathogenic mechanisms of infection, not just those that directly target SARS–CoV–2. In preparing the draft guidance, FDA considered comments received regarding the 2021 Potency Assay Guidance as well as the Agency's experience with SARS–CoV–2 and other viruses.

In April 2023 (88 FR 20526), the Agency issued the draft guidance for industry entitled ''Notification of a Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act'' to assist applicants and manufacturers in providing FDA timely, informative notifications about changes in the production of certain finished drugs and biological products as well as certain active pharmaceutical ingredients (API) that may, in turn, help the Agency in its effort to prevent and mitigate shortages. The draft guidance discusses the notification requirements under section 506C of the Federal Food, Drug and Cosmetic Act (FD&C Act) (21 U.S.C. 356c), including requirements added by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[2] related to notifying FDA about finished product and API manufacturing discontinuances and interruptions. The draft guidance provides recommendations for applicants and manufacturers to provide additional details and follow additional procedures to ensure FDA has the specific information it needs to help prevent or mitigate shortages. In addition, the draft guidance explains how FDA communicates information about products in shortage to the public. In preparing the draft guidance, FDA considered comments received on the 2020 Notifying FDA Guidance.

For the reasons discussed above, FDA is announcing the guidance entitled ''Notifying FDA of Permanent Discontinuance or Interruption in Manufacturing Under Section 506C of the FD&C Act'' (March 2020) and the guidance entitled ''COVID–19: Potency Assay Consideration for Monoclonal Antibodies and Other Therapeutic Proteins Targeting SARS–CoV–2 Infectivity'' (January 2021) will expire on November 7, 2023.

II. Expiration Date

The expiration date for the guidance documents in this document is November 7, 2023.

Dated: October 16, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–23071 Filed 10–18–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Rapid Uptake of Disseminated Interventions Evaluation, OMB No. 0906-xxxx

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than November 20, 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 Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Joella Roland, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–3983.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Rapid Uptake of Disseminated Interventions (RUDI) Evaluation, OMB No. 0906-xxxx—New.

Abstract: HRSA dedicated significant resources and effort to developing novel intervention strategies aimed at eliminating disparities and improving HIV-related health outcomes for people with HIV. HRSA encourages and supports Ryan White HIV/AIDS Program (RWHAP) providers to implement interventions developed through its RWHAP Part F Special Projects of National Significance program and technical assistance initiatives that have been found to be effective, with adaptations for priority populations served as applicable. HRSA disseminates its RWHAP Part F Special Projects of National Significance and technical assistance initiative resources and products across a variety of dissemination channels, hoping to reach a maximum number of RWHAP recipients and subrecipients for whom these resources may meet an important need. This mixed-methods RUDI evaluation will use a web-based survey and virtual site visits to collect information from RWHAP recipients and subrecipients on the uptake, utility, and efficacy of the resources and products HRSA disseminates; the effectiveness of its dissemination processes; and the reach of its dissemination channels. HRSA will use

[2] The CARES Act (Pub. L. 116–136) was enacted on March 27, 2020. The CARES Act amendments to section 506C of the FD&C Act took effect on September 23, 2020. See section 3112(g) of the CARES Act.

the information to identify opportunities for strengthening its dissemination channels and resources to improve care and health outcomes for program participants. A 60-day notice was published in the **Federal Register** on July 12, 2023, Vol. 88, No. 132, pp. 44371–44373 (88 FR 44371). HRSA received no comments.

Need and Proposed Use of the Information: Currently, HRSA does not systematically gather information about the resources accessed by RWHAP providers, RWHAP recipients, or AIDS Education and Training Center (AETC) staff and the extent to which they use those resources to inform implementation of interventions.

The mixed-methods RUDI evaluation will help HRSA systematically assess and understand (1) how, where, and why recipients of RWHAP funding access and use its disseminated resources and products; and (2) the utility and effectiveness of the disseminated resources and products in caring for and treating people with HIV. HRSA will use the findings from the RUDI evaluation to develop strategies to maximize the uptake and impact of its disseminated resources and products, contributing to ending the HIV epidemic in the United States.

Likely Respondents: The mixed-methods RUDI evaluation includes a web-based survey of all RWHAP recipients and subrecipients nationally, individual and small group interviews with a sample of RWHAP recipients, virtual site visits with a sample of RWHAP providers, and individual interviews with all AETCs. The RUDI web-based survey design includes two versions of the survey that will be administered to non-overlapping respondents—the RUDI Recipients Survey for RWHAP Part A and B recipient administrative entities—and the RUDI Providers Survey for Part A and B subrecipients and Part C, D, and F recipients who provide direct care. Both versions ask about respondents' use of HRSA-disseminated resources, how they were helpful, what could be improved, and reasons for non-use where applicable. In addition, the RUDI Recipients Survey asks about the recipients' role in guiding their subrecipients to needed resources, and the RUDI Providers Survey asks about the providers' experience implementing interventions for which they used the resources. Both surveys are designed to be followed up with additional sets of interviews with a sample of the survey respondents to provide deeper understanding of their experience to support development of actionable recommendations pertaining to dissemination. Virtual site visits to RWHAP providers include interviews with an average of three staff within each provider organization that were part of an intervention implementation with assistance from HRSA resources. Individual interviews for Part A and B recipient administrative entities and AETCs will generate a complete picture of how those organizations use HRSA resources and how the resources or their dissemination could be improved for the future, especially when considered together with the survey responses and virtual site visit data from the RWHAP providers.

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

Respondent	Data collection	Number of respondents (RWHAP sites)	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
RWHAP recipients	RUDI—Recipient Survey	56	1	56	0.33	18.48
RWHAP provider	RUDI—Provider Survey	1,066	1	1,066	0.33	351.78
RWHAP recipients	Interviews	20	3	60	0.75	45.00
RWHAP provider	Virtual site visit interviews	40	3	120	1.00	120.00
AETC providers	Interviews	8	1	8	1.00	8.00
		1,190		1,310		543.26

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–23108 Filed 10–18–23; 8:45 am]

BILLING CODE 4165–15–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: Bureau of Health Workforce Performance Data Collection, OMB No. 0915–0061—Revision

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 December 18, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA

Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Joella Roland, the HRSA Information Collection Clearance Officer at (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Bureau of Health Workforce Performance Data Collection, OMB No. 0915–0061—Revision.

Abstract: Over 50 Bureau of Health Workforce (BHW) programs award grants to health professions schools and training programs across the United States to develop, expand, and enhance training, and to strengthen the distribution of the health workforce. These programs are governed by titles III, VII, and VIII of the Public Health Service Act. Performance information is collected in the HRSA Performance Report for Grants and Cooperative Agreements. Data collection activities consisting of an annual progress report and an annual performance report satisfy statutory and programmatic requirements for performance measurement and evaluation (including specific title III, VII and VIII requirements), as well as Government Performance and Results Act of 1993 (GPRA), the GPRA Modernization Act of 2010, and the Foundations for Evidence-Based Policymaking Act of 2018 requirements. The performance measures were last revised in 2022 to ensure they addressed programmatic changes, met evolving program management needs, and responded to emerging workforce concerns. As these changes were successful, BHW will continue with its current performance management strategy and make additional changes that reduce burden, simplify reporting, reflect new Department of Health and Human Services and HRSA priorities, and enable longitudinal analysis of program performance. Specifically, an Excel upload feature was implemented for all programs to reduce burden. Questions on partnerships were revised and standardized across forms to understand the type and purposes of partnerships associated with grant funding. Employment-related questions were standardized across programs and forms to provide consistent outcomes on employment location, type of employment, and hiring organization. New questions were added for programs using apprenticeships. Specifically, questions were added to measure additional employment outcomes including role at the employment site and vulnerable populations served and to measure program satisfaction and types of competencies graduates were ready to perform.

Need and Proposed Use of the Information: The purpose of the proposed data collection is to continue analysis and reporting of grantee training activities and education, identify details about the practice locations where trainees work (or plan to work) after program completion, and report outcomes of funded initiatives. Data collected from these grant programs will also provide a description of the program activities of approximately 1,828 reporting grantees to inform policymakers on the barriers, opportunities, and outcomes involved in health care workforce development. The proposed measures focus on four key outcomes:

(1) increasing the workforce supply of well-educated practitioners in needed professions,

(2) increasing the number of practitioners that practice in underserved and rural areas,

(3) enhancing the quality of education, and

(4) supporting educational infrastructure to increase the capacity to train more health professionals in high demand areas.

Likely Respondents: Respondents are awardees of BHW health professions grant programs.

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 burden hours
Direct Financial Support Program	619	1	619	2.7	1,671.3
Infrastructure Program	219	1	219	4.8	1,051.2
Multipurpose or Hybrid Program	1,044	1	1,044	3.1	3,236.4
Total	1,882		1,882		5,958.9

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. 2023–23031 Filed 10–18–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–4040–0010]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before November 20, 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: Sagal Musa, *sagal.musa@hhs.gov* or (202) 205–2634. When submitting comments or requesting information, please include the document identifier 4040–0010–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collections: Project/Performance Site Location(s), Project Abstract, and Key Contacts forms.

Type of Collection: Revision.

OMB No. 4040–0010.

Abstract: The Project/Performance Site Location(s), Project Abstract, and Key Contacts forms provide the Federal grant-making agencies an alternative to the Standard Form 424 data set and form. Agencies may use Project/Performance Site Location(s), Project Abstract, and Key Contacts forms for grant programs not required to collect all the data that is required on the SF–424 core data set and form.

Type of respondent: Project/Performance Site Location(s), Project Abstract, and Key Contacts forms are used by organizations to apply for Federal financial assistance in the form of grants. This form is submitted to the Federal grant-making agencies for evaluation and review. Previously, 26 Federal grant-making entities were using this information collection. This information collection will now be utilized by 51 Federal grant-making agencies and additional grant-making entities. To improve the transparency of reading and enhance user-friendliness of the supporting statement A, language modifications were implemented within sections 3 through 16. For section 14, Cost to the Federal Government was adjusted to the 2023 base general schedule.*Grants.gov* is requesting a revision of this collection to allow for data reporting and publication by agencies requesting to use the common form. The information collection (IC) expires on November 30, 2025. *Grants.gov* seeks a three-year clearance of these collections.

ANNUALIZED BURDEN HOUR TABLE

Forms (if necessary)	Respondents (if necessary)	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
Project/performance site location(s).	Grant Applicants	127,281	1	1	127,281
Project Abstract	Grant Applicants	230	1	1	230
Key Contacts	Grant Applicants	4,566	1	1	4,566
Total		132,077	1	1	132,077

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–23074 Filed 10–18–23; 8:45 am]

BILLING CODE 4151–AE–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive Patent Commercialization License: Human Monoclonal Antibodies That Broadly Target Coronaviruses

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Institute of Allergy and Infectious Diseases, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to Leyden Laboratories B.V., located at Emmy Noetherweg 2, 2333 BK Leiden, the Netherlands to practice the inventions embodied in the patent applications listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Only written comments and/or applications for a license which are received by the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases on or before November 3, 2023 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated exclusive patent license should be directed to: Dawn Taylor-Mulneix, Technology Transfer and Patent Specialist, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Suite 2G, MSC 9804, Rockville, MD 20852–9804, phone number 301–767–5189, or *dawn.taylor-mulneix@nih.gov.*

SUPPLEMENTARY INFORMATION: The following represents the intellectual property to be licensed under the prospective agreement: U.S. provisional application (63/308,898), filed on February 19, 2022, and the PCT application (PCT/US2023/062324), filed on February 9, 2023, entitled ''Human Monoclonal Antibodies that Broadly Target Coronaviruses'' (HHS Reference No. E–047–2022). All rights in these inventions have been assigned to the Government of the United States of America.

The prospective exclusive patent commercialization license territory may be worldwide, and the field of use may be limited to: Prevention and treatment of coronavirus infection, illness, and transmission through mucosal delivery

to the respiratory tract of products, comprised of COV44–62 (fusion peptide), COV44–79 (fusion peptide), COV89–22 (stem helix), and/or COV72–37 (stem helix), including products that may be obtained from the genetic sequence of the same and derivatives thereof. The prospective exclusive patent commercialization license may include two products (preventative and therapeutic) in the field of use.

An abstract for this invention was published in the **Federal Register** on June 10, 2022. The family of coronaviruses cause upper respiratory tract disease in humans and have caused three major disease outbreaks in recent history: the 2003 SARS outbreak, the 2012 MERS outbreak, and the current SARS–CoV–2 pandemic. There is an urgent need for strategies that broadly target coronaviruses, both to deal with new SARS–CoV–2 variants and future coronavirus outbreaks.

Scientists at NIAID have developed several novel human monoclonal antibodies that bind to conserved parts of the SARS–CoV–2 spike protein. These antibodies can neutralize SARS–CoV–2 variants of concern including Omicron BA.1 and BA.2, as well as neutralize at least one other betacoronavirus. Further, these antibodies limit disease in animal models. Broadly reactive antibodies against coronaviruses are useful tools to identify conserved sites on the coronavirus spike protein, which could be investigated for the development of broad coronavirus vaccines that aim to prevent future pandemics. Potent neutralizers that target these sites could also be useful for prevention of disease caused by diverse coronaviruses, including those that may emerge in the future.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive patent commercialization license will be royalty bearing, and may be granted unless within fifteen (15) days from the date of this published notice, the National Institute of Allergy and Infectious Diseases receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

Complete applications for a license in the prospective field of use that are timely filed in response to this notice will be treated as objections to the grant of the contemplated exclusive patent commercialization license. Comments and objections submitted in response to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the *Freedom of Information Act,* 5 U.S.C. 522.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2023–23030 Filed 10–18–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0823]

National Maritime Security Advisory Committee; December 2023 Virtual Meeting

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal advisory committee virtual meeting.

SUMMARY: The National Maritime Security Advisory Committee (Committee) will conduct a virtual meeting to discuss the Committee's final recommendations concerning ways to enhance cyber security information sharing between the U. S. Coast Guard and Marine Transportation System (MTS) stakeholders. The virtual meeting will be open to the public.

DATES: *Meeting:* The Committee will meet virtually on Tuesday, December 5, 2023, from 1 p.m. until 3 p.m. Eastern Standard Time (EST). Please note this virtual meeting may close early if the Committee has completed its business.

Comments and supporting documentation: To ensure your comments are received by Committee members before the virtual meeting, submit your written comments no later than December 1, 2023.

ADDRESSES: To join the virtual meeting or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. EST on December 4, 2023, to obtain the needed information. The number of virtual lines are limited and will be available on a first-come, first-served basis.

Pre-registration information: Pre-registration is required for attending the virtual meeting. You must request attendance by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below. You will receive a response with attendance instructions.

The National Maritime Security Advisory Committee is committed to ensuring all participants have equal access regardless of disability status. If you require reasonable accommodations due to a disability to fully participate, please email Mr. Ryan Owens at *ryan.f.owens.uscg.mil* or call (202) 302–6565 as soon as possible.

Instructions: You are free to submit comments at any time, including orally at the meeting as time permits, But, if you want Committee members to review your comment before the meeting, please submit your comments no later than December 1, 2023. We are particularly interested in comments regarding the topics in the ''Agenda'' section below. 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–2023–0823 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 individual in the **FOR FURTHER INFORMATION CONTACT** section for alternate instructions. You must include the docket number USCG–2023–0823. Comments received will be posted without alteration at *https://www.regulations.gov* including any personal information provided. You may wish to review the Privacy and Security Notice found via a link on the homepage *https://www.regulations.gov.* For more about the privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov,* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Owens, Alternate Designated Federal Officer of the National Maritime Security Advisory Committee, 2703 Martin Luther King Jr. Avenue SE, Washington, DC 20593, Stop 7581, Washington, DC 20593–7581; telephone 202–302–6565 or via email at *ryan.f.owens@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is in compliance with the *Federal Advisory Committee Act,* (Pub. L. 117–286, 5 U.S.C., ch. 10). The

Committee is authorized, by section 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018,* Public Law 115–282, 132 Stat. 4192, and is codified in 46 U.S.C. 70112. The Committee operates under the provisions of the *Federal Advisory Committee Act* and 46 U.S.C. 15109. The National Maritime Security Advisory Committee provides advice, consults with, and makes recommendations to the Secretary of Homeland Security, via the Commandant of the U.S. Coast Guard, on matters relating to national maritime security.

Agenda

Tuesday, December 5, 2023

(1) Call to Order.

(2) Introduction.

(3) Designated Federal Officer Remarks.

(4) Roll call of Committee members and determination of quorum.

(5) Remarks from Committee Leadership.

(6) Presentation and discussion of final recommendations to Task T–2022–5: Working

Group on Cybersecurity Information Sharing.

(7) Public Comment Period.

(8) Adjournment of Meeting.

A copy of all meeting documentation will be available at *https://homeport.uscg.mil/NMSAC* no later than December 4, 2023. Alternatively, you may contact Mr. Ryan Owens as noted in the **FOR FURTHER INFORMATION** section above.

There will be a public comment period at the end of meeting. Speakers are requested to limit their comments to 3 minutes. Please note that the public comment period may end before the period allotted, following the last call for comments. Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section above to register as a speaker.

Dated: October 16, 2023.

Amy M. Beach,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2023–23085 Filed 10–18–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2379]

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 January 17, 2024.

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–2379, to 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.*

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: 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
Greene County, Missouri and Incorporated Areas Project: 17–07–0862S Preliminary Dates: November 18, 2022 and June 2, 2023	
City of Ash Grove	City Hall, 100 West Main Street, Ash Grove, MO 65604.
City of Fair Grove	City Hall, 81 South Orchard Boulevard, Fair Grove, MO 65648.
City of Republic	City Hall, 213 North Main Avenue, Republic, MO 65738.
City of Springfield	Busch Municipal Building, 840 North Boonville Avenue, Springfield, MO 65802.
City of Strafford	City Hall, 126 South Washington Avenue, Strafford, MO 65757.
City of Willard	City Hall, 224 West Jackson Street, Willard, MO 65781.
Unincorporated Areas of Greene County	Greene County Courthouse, 940 North Boonville Avenue, Springfield, MO 65802.

[FR Doc. 2023–23111 Filed 10–18–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a 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 Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of February 22, 2024 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

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 determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes 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.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(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
Sacramento County, California and Incorporated Areas Docket No.: FEMA–B–2264	
City of Citrus Heights	General Services Department Engineering Division, 6360 Fountain Square Drive, Citrus Heights, CA 95621.
City of Folsom	Public Works Department, 50 Natoma Street, Folsom, CA 95630.
City of Sacramento	Department of Utilities Engineering & Water Resources Division, 1395 35th Avenue, Sacramento, CA 95822.

Community	Community map repository address
Unincorporated Areas of Sacramento County	Sacramento County Department of Water Resources, 827 7th Street, Suite 301, Sacramento, CA 95814.
Clay County, Iowa and Incorporated Areas Docket No.: FEMA–B–2285	
City of Spencer	Planning Department, 101 West 5th Street, Spencer, IA 51301.
Unincorporated Areas of Clay County	Clay County Administration Building, 300 West 4th Street, Spencer, IA 51301.
Winneshiek County, Iowa and Incorporated Areas Docket No.: FEMA–B–2270	
City of Calmar	City Hall, 101 South Washington Street, Calmar, IA 52132.
City of Decorah	City Hall, 400 Claiborne Drive, Decorah, IA 52101.
City of Fort Atkinson	City Hall, 98 Elm Street, Fort Atkinson, IA 52144.
City of Jackson Junction	City Hall, 1201 County Road V68, Jackson Junction, IA 52171.
City of Ossian	City Hall, 123 West Main Street, Ossian, IA 52161.
City of Spillville	City Hall, 438 South Main Street, Spillville, IA 52168.
Unincorporated Areas of Winneshiek County	Winneshiek County Courthouse, 201 West Main Street, Decorah, IA 52101.
Blue Earth County, Minnesota and Incorporated Areas Docket No.: FEMA–B–2128 and FEMA–B–2170	
City of Eagle Lake	City Hall, 705 Parkway Avenue, Eagle Lake, MN 56024.
City of Lake Crystal	City Hall, 100 East Robinson Street, Lake Crystal, MN 56055.
City of Mankato	Intergovernmental Center, 10 Civic Center Plaza, Mankato, MN 56001.
City of Minnesota Lake	City Office, 103 Main Street North, Minnesota Lake, MN 56068.
City of Skyline	Skyline City Hall, 164 South Skyline Drive, Mankato, MN 56001.
City of St. Clair	City Hall, 304 Main Street West, St. Clair, MN 56080.
City of Vernon Center	City Hall, 101 Oak Street North, Vernon Center, MN 56090.
Unincorporated Areas of Blue Earth County	Blue Earth County Government Center, 204 South 5th Street, Mankato, MN 56001.
Emmons County, North Dakota and Incorporated Areas Docket No.: FEMA–B–2281	
City of Linton	City Hall, 101 Northeast 1st Street, Linton, ND 58552.
Unincorporated Areas of Emmons County	Emmons County Courthouse, 100 4th Street NW, Linton, ND 58552.
Lucas County, Ohio and Incorporated Areas Docket No.: FEMA–B–1869 and FEMA–B–2223	
City of Oregon	City Hall, 5330 Seaman Road, Oregon, OH 43616.
City of Toledo	Department of Inspection, One Government Center, Suite 1600, Toledo, OH 43604.
Unincorporated Areas of Lucas County	Lucas County Engineer's Office, 1049 South McCord Road, Holland, OH 43528.
Village of Harbor View	Village Hall, 327 Lakeview Drive, Harbor View, OH 43434.

[FR Doc. 2023–23113 Filed 10–18–23; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0028; OMB No. 1660–0002]

Agency Information Collection Activities: Proposed Collection; Comment Request; Disaster Assistance Registration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning changes to modernize and simplify the disaster assistance registration. The changes will reduce the burden on survivors by only requiring them to answer questions based on the type of assistance they need. This will also reduce the amount of time it takes for survivors to apply either online, or through a call center, therefore allowing call center agents to assist survivors more quickly.

DATES: Comments must be submitted on or before December 18, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *www.regulations.gov* under Docket ID FEMA–2023–0028. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking

Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Brian Thompson, Supervisory Program Specialist, FEMA, Recovery Directorate at 540–686–3602 or *Brian.Thompson6@fema.dhs.gov.* You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (Pub. L. 93–288, *as amended*) (42 U.S.C. 5121–5207) is the legal basis for FEMA to provide financial assistance and services to individuals who apply for disaster assistance benefits in the event of a Presidentially-declared disaster. Housing Assistance is a provision of the Individuals and Households Program, authorized by section 408(c) of the Stafford Act. There are two forms of assistance: financial and direct. Financial Housing Assistance refers to funds provided to eligible applicants for temporary lodging expenses, rental of temporary housing, or repair or replacement of a damaged primary residence. Direct Temporary Housing Assistance includes providing Temporary Housing Units through Multifamily Lease and Repair and Direct Lease, or placing transportable temporary housings, such as manufactured housing units and recreational vehicles or travel trailers, on private, commercial, or group sites.

This program provides financial assistance and, if necessary, direct assistance to eligible individuals and households who, as a direct result of a major disaster, have necessary expenses and serious needs that are unable to be met through other means. Individuals and households may apply for assistance through the Registration Intake process under the Individuals and Households Program in person, via telephone, or the internet. FEMA provides financial assistance under Other Needs Assistance to individuals or households affected by a major disaster to meet disaster-related medical, dental, funeral, childcare, personal property, transportation, moving and storage expenses, and other necessary expenses or serious needs resulting from a major disaster under section 408(e)(1) of the Stafford Act.

The changes to the following forms support Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government* (86 FR 71357, December 16, 2021). The changes will rebuild trust in the Federal Government by promoting transparency of FEMA's Disaster Assistance application process. The major changes will decrease the amount of time to create a new registration and streamline the application process to create a simpler registration progression focused on an individual's specific recovery needs. Streamlining breaks the application process down into specific workflows in a more user-friendly format:

FEMA Forms FF–104–FY–21–123 (formerly 009–0–1T, English) and FF–104–FY–21–123–A (formerly 009–0–1T, Spanish), Tele-Registration Application for Disaster Assistance are being removed due to the addition of the ten Streamline Registration Intake workflows. The ten workflows are: Home Damage, Personal Property Damage, Vehicle Damage, Emergency Needs, Essential Utilities Outage, Funeral Expenses, Childcare Expenses, Lodging Expenses, Medical or Dental Expenses, and Expenses for Miscellaneous items (*e.g.,* chainsaws, generators, etc.).

FEMA Form FF–104–FY–21–123–FA (English), Tele-Registration, is being removed and replaced with FEMA Form FF–104–FY–22–260, Streamline Registration Intake for Funeral Expenses, Disaster Assistance Registration.

FEMA Forms FF–104–FY–21–123 (formerly 009–0–1T, English) and FF–104–FY–21–123–A (formerly 009–0–1T, Spanish), Tele-Registration Application for Disaster Assistance are being removed due to the addition of the ten Streamline Registration Intake flows.

COVID–19 Funeral Assistance will remain in FEMA Template FT–104–FY–22–101, Request for Information (RFI)—Funeral Verification (English) until the COVID–19 application period ends.

This collection contains the proposed changes to the disaster application process that will reduce the time to apply for IHP assistance. This update specifically recognizes post launch usability and the public's responses to the changes which will also be non-substantive throughout as the updates are not specifically content driven. These changes will reduce the burden on survivors by only requiring them to answer questions based on the type of assistance they need.

In documenting all post-registration callouts, auto-dialer contacts and subsequent collection of data, FEMA can determine whether applicants have unmet needs, can process the applicant for financial or direct assistance sharing the results of those contacts directly with external stakeholders. This data is specifically used for FEMA and its stakeholders to determine whether assistance is warranted.

The notice also includes FEMA documenting all post-registration contacts, including callouts, casework, and auto-dialers performed for the purpose of determining whether disaster assistance applicants have unmet needs and may be eligible for additional assistance and/or share the results of those contacts directly with external stakeholders, such as state or local government partners, who can potentially assist those same applicants with assistance or services not provided by FEMA through specific programs directly targeted to disaster survivors.

This notice specifically recognizes post launch usability and feedback from the public. FEMA is seeking the public's comments on identifying ways on making this a more user-friendly collection and more functional to meet the end users-applicants' needs. The changes in this information collection will also be non-substantive throughout as the updates are not specifically content driven. These changes in the application process are, however, designed to not only reduce the burden on the public but also reduce the administrative burden through this modernization update.

Collection of Information

Title: Disaster Assistance Registration.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0002.

FEMA Forms: FEMA Form FF–104–FY–21–122 (formerly 009–0–1, English), Paper Application, Disaster Assistance Registration; FEMA Form FF–104–FY–21–122–A (formerly 009–0–2, Spanish), Solicitud en Papel, Registro Para Asistencia De Desastre; FEMA Form FF–104–FY–21–123 (formerly 009–0–1T, English), Tele-Registration, Disaster Assistance Registration; FEMA Form FF–104–FY–21–123–A (formerly 009–0–1T, Spanish), Tele-Registration, Registro Para Asistencia De Desastre; FEMA Form FF–104–FY–21–123–COVID–FA (English), Tele-Registration, COVID–19 Funeral Assistance; FEMA Form FF–104–FY–21–125 (formerly 009–0–1Int, English), internet, Disaster Assistance Registration; FEMA Form FF–104–FY–21–125–A (formerly 009–0–2Int, Spanish), internet, Registro Para Asistencia De Desastre; FEMA Form FF–

104–FY–21–127 (formerly 009–0–5, English), Manufactured Housing Unit Revocable License and Receipt for Government Property (Revocable License); FEMA Form FF–104–FY–21–127–A (formerly 009–0–6, Spanish), Licencia Revocable para la Unidad de Vivienda Temporera y Recibo para el uso de Propiedad del Gobierno (Licencia Revocable); FEMA Form FF–104–FY–21–128 (formerly 009–0–3, English), Declaration and Release; FEMA Form FF–104–FY–21–128–A (formerly 009–0–4, Spanish), Declaracion Y Autorizacion; FEMA Form FF–104–FY–22–255, Streamline Registration Intake for Home Damage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–256, Streamline Registration Intake for Personal Property Damage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–257, Streamline Registration Intake for Vehicle Property Damage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–258, Streamline Registration Intake for Emergency Needs, Disaster Assistance Registration; FEMA Form FF–104–FY–22–259, Streamline Registration Intake for Essential Utilities Outage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–260, Streamline Registration Intake for Funeral Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–261, Streamline Registration Intake for Childcare Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–262, Streamline Registration Intake for Lodging Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–263, Streamline Registration Intake for Medical or Dental Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–264, Streamline Registration Intake for Expenses for Miscellaneous Items, Disaster Assistance Registration; FEMA Template FT–104–FY–22–101, Request for Information (RFI)—Funeral Verification; FEMA Template FT–104–FY–22–102, Request for Information (RFI)—Ownership Verification; FEMA Template FT–104–FY–22–103, Request for Information (RFI)—Occupancy Verification; FEMA Template FT–104–FY–22–104, Request for Information (RFI)—Medical, Dental, Disability-Accessibility-Related Items.

Abstract: The forms in this collection are used to obtain pertinent information to provide financial assistance, and if necessary, direct assistance to eligible individuals and households who, as a direct result of a disaster or emergency, have uninsured or under-insured, necessary or serious expenses they are unable to meet. This revision of a currently approved information collection will improve the applicant's experience with the disaster assistance registration process by providing a simpler, more intuitive interface and limiting required responses to those needed based on their needs. These changes will help rebuild trust in the Federal Government by promoting transparency of FEMA's Disaster Assistance application process.

Affected Public: Individuals or households.

Estimated Number of Respondents: 2,366,134.

Estimated Number of Responses: 2,366,134.

Estimated Total Annual Burden Hours: 700,954.

Estimated Total Annual Respondent Cost: $30,246,167.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $33,303,400.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–23065 Filed 10–18–23; 8:45 am]

BILLING CODE 9111–24–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2362]

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 January 17, 2024.

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–2362, to 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.*

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: 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
McIntosh County, North Dakota and Incorporated Areas Project: 21–08–0006S Preliminary Date: August 19, 2021	
City of Ashley	McIntosh County Courthouse, 112 1st Street NE, Ashley, ND 58413.
City of Lehr	McIntosh County Courthouse, 112 1st Street NE, Ashley, ND 58413.
City of Venturia	McIntosh County Courthouse, 112 1st Street NE, Ashley, ND 58413.
City of Wishek	McIntosh County Courthouse, 112 1st Street NE, Ashley, ND 58413.
City of Zeeland	McIntosh County Courthouse, 112 1st Street NE, Ashley, ND 58413.
Unincorporated Areas of McIntosh County	McIntosh County Courthouse, 112 1st Street NE, Ashley, ND 58413.
Beadle County, South Dakota and Incorporated Areas Project: 18–08–0008S Preliminary Date: January 13, 2023	
City of Huron	City Hall, 239 Wisconsin Avenue SW, Huron, SD 57350.
City of Wessington	City Hall, 260 South Wessington Street, Wessington, SD 57381.
Town of Broadland	Beadle County Courthouse, 450 3rd Street SW, Huron, SD 57350.
Town of Cavour	Town Hall, 262 Albert Street, Cavour, SD 57324.
Town of Virgil	Beadle County Courthouse, 450 3rd Street SW, Huron, SD 57350.
Town of Wolsey	Beadle County Courthouse, 450 3rd Street SW, Huron, SD 57350.
Unincorporated Areas of Beadle County	Beadle County Courthouse, 450 3rd Street SW, Huron, SD 57350.
Clallam County, Washington and Incorporated Areas Project: 16–10–0561S Preliminary Date: October 31, 2019 and January 31, 2023	
City of Forks	City Hall, 500 East Division Street, Forks, WA 98331.
City of Port Angeles	City Hall, 321 East 5th Street, Port Angeles, WA 98362.
Jamestown S'Klallam Tribe	Jamestown S'Klallam Tribe Government Office, 1033 Old Blyn Highway, Sequim, WA 98382.
Lower Elwha Klallam Tribe	Lower Elwha Klallam Tribe Center, 2851 Lower Elwha Road, Port Angeles, WA 98363.
Unincorporated Areas of Clallam County	Clallam County Courthouse, 223 East 4th Street, Port Angeles, WA 98362.

[FR Doc. 2023–23112 Filed 10–18–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7076–N–17]

60-Day Notice of Proposed Information Collection: Tribal Housing and Urban Development Veteran Administration Supportive Housing Program, OMB Control No.: 2577–NEW

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* December 18, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Leea J. Thornton, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410, telephone number (202) 402–6455. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Thornton.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Tribal Housing and Urban Development Veteran Administration Supportive Housing Program.

OMB Control Number: 2577–Pending.

Type of Request: New Collection.

Agency Form Numbers: Tribal HUD–VASH Family Report and Tribal HUD–VASH Application Materials.

Description of the Need for the Information and Proposed Use: Application materials to obtain benefits under the Tribal Housing and Urban Development Veteran Administration Supportive Housing Program (Tribal HUD–VASH), which provides rental housing assistance and supportive services to Native American veterans who are homeless or at risk of homelessness living on or near a reservation or other Indian areas. Housing assistance under this program is available by grants to Tribes and Tribally Designated Housing Entities that are eligible to receive Indian Housing Block Grant (IHBG) funding under the Native American Housing Assistance and Self-Determination Act (25 U.S.C. 4101) (NAHASDA). Grants and renewal funds are awarded and approved by HUD. Grants include an additional amount for administrative costs and eligible homeless veterans receive case management services through the Department of Veterans Affairs.

Respondents: Tribes and Tribally Designated Housing Entities.

Estimated Annual Reporting and Recordkeeping Burden:

Description	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total hours
Tribal HUD–VASH Family Report	35	25	875.00	1.50	1,312.50
Tribal HUD–VASH application materials	35	1.00	35.00	8.00	280
Totals	70		910		1,592.50

B. Solicitation of Public Comment

This notice is soliciting comments from members of the pubic and affected parties concerning the collection of information described in Section A on the following:

(1) 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) The accuracy of the agency's estimate of 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 those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Nicholas J. Bilka,

Chief Office of Policy, Programs, and Legislative Initiatives.

[FR Doc. 2023–23026 Filed 10–18–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2023–N086; FXES11130300000–234–FF03E00000]

Endangered and Threatened Species; Receipt of Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered

or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before November 20, 2023.

ADDRESSES: *Document availability and comment submission:* Submit requests for copies of the applications and related documents, as well as any comments, by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.,* ESXXXXXX; see table in **SUPPLEMENTARY INFORMATION**):

- *Email (preferred method): permitsR3ES@fws.gov.* Please refer to the respective application number (*e.g.,* Application No. ESXXXXXX) in the subject line of your email message.
- *U.S. Mail:* Regional Director, Attn: Nathan Rathbun, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458.

FOR FURTHER INFORMATION CONTACT: Nathan Rathbun, 612–713–5343 (phone); *permitsR3ES@fws.gov* (email). 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: We, the U.S. Fish and Wildlife Service, invite review and comment from the public and local, State, Tribal, and Federal agencies on applications we have received for permits to conduct certain activities with endangered and threatened species under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17. Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and the Freedom of Information Act.

Background

The ESA prohibits certain activities with endangered and threatened species unless authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies. Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES41671D	Brian Carlson, Morgantown, WV.	Add clubshell (*Pleurobema clava*), northern rifffleshell (*Epioblasma torulosa rangiana*), round hickorynut (*Obovaria subrotunda*), and longsolid (*Fusconaia subrotunda*) to existing authorized species: 12 species of freshwater mussels, big sandy crayfish (*Cambarus callainus*), Guyandotte River crayfish (*Cambarus veteranus*), candy darter (*Etheostoma osburni*).	AL, AR, CT, DE, IL, IN, IA, KS, KY, LA, MD, MA, MI, MN, MS, MO, NH, NJ, NY, NC, OK, OH, PA, TN, VT, VA, WV, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Add—PIT and shell tagging—to existing authorized activites: capture, handle, hold, relocate due to stranding.	Amend.
ES77530A–3	Douglas Kapusinski, Copley, OH.	Add new species—round hickorynut (*Obovaria subrotunda*) and longsolid (*Fusconaia subrotunda*)—to existing authorized 22 freshwater mussel species.	IL, IN, MI, NY, OH, PA, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	Amend.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES70868B	Brian Ortman, Thornville, OH.	Add new species—tricolored bat (*Perimyotis subflavus*)—to existing authorized species: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), gray bat (*M. grisescens*).	AL, AR, GA, IA, IL, IN, KS, KY, MI, MO, MS, NC, NJ, NY, OH, OK, PA, SC, TN, VA, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.
PER3213383	Heidi McMullin, Poplar Bluff, MO.	Tricolored bat (*Perimyotis subflavus*), Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), gray bat (*M. grisescens*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), Virginia big-eared bat (*C. townsendii virginianus*).	AL, AR, CT, DE, FL, GA, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MS, MO, NC, NE, NH, NJ, NY, OH, OK, PA, RI, SC, TN, TX, VA, VT, WV, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets or harp traps, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	New.
PER4830512	Shaun McCoshum, Odessa, TX.	Rusty patched bumble bee (*Bombus affinis*).	IL, IN, IA, ME, MD, MA, MN, NC, OH, PA, TN, VA, WV, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle and release.	New.
PER4875044	Nathaniel Shoobs, Columbus, OH.	*Lampsilis orbiculata orbiculata, Villosa fabalis, Leptodea leptodon, Quadrula cylindrica cylindrica, Pleurobema clava, Cyprogenia stegaria, Potamilus capax, Fusconaia subrotunda, Epioblasma rangiana, Plethobasus cooperianus, Pleurobema plenum, Obovaria subrotunda, Plethobasus cyphyus, Epioblasma triquetra, Cumberlandia monodonta, Epioblasma perobliqua, Plethobasus cicatricosus, Epioblasma obliquata.*	OH, KY	Conduct presence/ absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle and release.	New.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.).

Lori Nordstrom,

Assistant Regional Director, Ecological Service, Midwest Region.

[FR Doc. 2023–23079 Filed 10–18–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–MB–2023–N079; FXMB12610700000–234–FF07M01000; OMB Control Number 1018–0178]

Agency Information Collection Activities; Submission to the Office of Management and Budget; Regulations for the Taking of Migratory Birds for Subsistence Uses in Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew, without change, an information collection.

DATES: Interested persons are invited to submit comments on or before November 20, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted within 30 days of publication of this notice at *https://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. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018–0178'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. 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: In accordance with the Paperwork Reduction Act of 1995 and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

On June 26, 2023, we published in the **Federal Register** (88 FR 41410) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on August 25, 2023. In an effort to increase public awareness of, and participation in, our public commenting processes associated with information collection requests, the Service also published the **Federal Register** notice on *Regulations.gov* (Docket No. FWS–R7–MB–2023–0082) to provide the public with an additional method to submit comments (in addition to the typical *Info_Coll@fws.gov* email and U.S. mail submission methods). We received one comment in response to that notice which did not address the information collection requirements. No response to that comment is required.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency 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 response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be 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.

Abstract: The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712) and the Fish and Wildlife Act of 1956 (16 U.S.C. 742d) designate the Department of the Interior as the key agency responsible for managing migratory bird populations that frequent the United States and for setting harvest regulations that allow for the conservation of those populations. These responsibilities include gathering data on various aspects of migratory bird harvest. We use harvest data to review regulation proposals and to issue harvest regulations.

The Migratory Bird Treaty Act Protocol Amendment (1995) (Amendment) provides for the customary and traditional use of migratory birds and their eggs for subsistence use by Indigenous inhabitants of Alaska. The Amendment states that its intent is not to cause significant increases in the take of species of migratory birds relative to their continental population sizes. A submittal letter from the Department of State to the White House (May 20, 1996) accompanied the Amendment and specified the need for harvest monitoring. The submittal letter stated that the Service, the Alaska Department of Fish and Game (ADF&G), and Alaska Native Organizations would collect harvest information cooperatively within the subsistence-eligible areas. Harvest data help to ensure that customary and traditional subsistence uses of migratory birds and their eggs by Indigenous inhabitants of Alaska do not significantly increase the take of species of migratory birds relative to their continental population sizes.

Information collection currently authorized under the OMB approval number 1018–0178 includes three items related to the spring-summer subsistence harvest of migratory birds in Alaska: (1) invitation of residents of non-eligible regions to participate in harvesting activities in the eligible regions; (2) household registration permit for harvest in the Cordova area; and (3) hunter registration permit for harvest in the Kodiak Island Roaded Area. Harvest monitoring associated with the Cordova and Kodiak permits are authorized under a separate OMB control number (1018–0124).

1. Invitation to Harvest:

- *Tribal Council Invitation Letter*—Regulations at 50 CFR 92.5(d) allow immediate family members (children, parents, grandparents, and siblings

living in excluded areas) of residents of eligible areas to participate in the spring-summer subsistence harvest of migratory birds in a village's subsistence area. The regulations specify that participation of residents of excluded areas in the spring-summer harvest of migratory birds in an eligible area must be pre-authorized by a letter of invitation issued by a local Tribal council within the harvest area.

- *Tribal Council Invitation Permit Request*—The permit request is another method to invite an immediate family member residing in an excluded area to participate in the spring-summer subsistence hunt in a defined eligible area. The permit, issued by the Tribal Council, certifies that the prospective hunter is an immediate family member as defined in 50 CFR 92.4 and is thereby authorized to assist family members in hunting migratory birds in a defined subsistence harvest area. The permit is valid for 2 years from the date of issuance.
- *Tribal Council Notification to Alaska Migratory Bird Co-Management Council (AMBCC)*—Tribal councils will provide copies of all letters of invitation regarding the invitation to hunt and of all issued permits to the Executive Director of the AMBCC.
- *AMBCC Notification to AK Region Office of Law Enforcement*—Upon receiving copies of the letters of invitation and of issued permits from Tribal Councils, the AMBCC Executive Director will inform the Service's Alaska Regional Office of Law Enforcement (AK–OLE) within 2 business days.

2. *Cordova Harvest Household Registration Permit*—The Service's final rule published on April 8, 2014 (79 FR 19454), authorized spring-summer harvest of migratory birds by residents of the community of Cordova in the Gulf of Alaska region. In 2017, the regulations were updated to allow residents of the neighboring communities of Tatitlek and Chenega to harvest in the area defined for the Cordova harvest (April 4, 2017; 82 FR 16298). Local partners, including the Eyak Tribe and the U.S. Forest Service (USFS) Cordova Office's Chugach Subsistence Program, worked in close collaboration with the ADF&G Division of Subsistence to develop a household registration and harvest monitoring system using a post-season mail survey. Household registrations are issued by the Tribal Councils of the communities of Cordova, Tatitlek, and Chenega, as well as by the USFS Cordova Office's Chugach Subsistence Program. The registration form includes fields to write the permit holder's name and mailing address, as well as a field for the permit holder to sign acknowledging the terms of the permit. The permit also has fields to write the names of other household members authorized to harvest under the registration. Registration data are securely disposed of after completion of the annual harvest data collection and analysis.

3. *Kodiak Island Roaded Area Hunter Registration Permit*—On April 19, 2021, we issued a final rule (86 FR 20311) that allows migratory bird hunting and egg gathering by registration permit in the Kodiak Island Roaded Area in the Kodiak Archipelago Region of Alaska for a 3-year experimental season (2021–2023), after which time the regulation will sunset. The rule also finalized regulations for the spring-summer subsistence harvest of migratory birds in the Kodiak Island Roaded Area under a co-management process involving the Service, the ADF&G, and Alaska Native representatives. These regulations include a permit and harvest reporting system developed in collaboration with the AMBCC local partner, the Sun'aq Tribe of Kodiak. The intent of this rule was to allow all residents of the Kodiak Archipelago Region the opportunity to participate in subsistence hunting activities without the need for a watercraft. Previous regulations closed the Roaded Area to all subsistence migratory bird hunting and egg gathering, but allowed these activities in adjacent marine waters beyond 500 feet from shore, including offshore islands, where access requires a watercraft. The mandatory registration permit and the mandatory reporting of hunter activity and harvest in the 2021–2023 experimental hunt will allow estimation of hunter participation, bird and egg harvest, and harvest composition. These data will inform a potential proposal and decision to reopen the Roaded Area to subsistence hunting in the future. To protect species of conservation concern, spring-summer subsistence hunting and egg gathering for Arctic terns, Aleutian terns, mew gulls, and emperor geese will remain closed in the Roaded Area.

Results of harvest monitoring for the 3-year experimental season are expected to be available in fall 2023 for review by the Sun'aq Tribe and other members of the AMBCC, who will make a recommendation on whether to continue the Kodiak Island Roaded Area hunt and whether to continue the requirement for the hunter registration permit and harvest reporting. Based on such forthcoming recommendation, corresponding changes to harvest regulations, if approved, could be implemented for the 2025 Alaska spring-summer migratory bird subsistence harvest season.

Enforcement of regulations for the Kodiak Island Roaded Area will be the responsibility of the Service's Office of Law Enforcement. Enforcement personnel are aware of cultural and traditional practices of migratory bird subsistence harvest by rural residents of Alaska who are eligible to participate for this permit hunt concurrent with the need to ensure conservation of migratory birds, particularly species of conservation concern; of the necessary adherence to specific regulations requiring a permit and mandatory harvest reporting; and that hunting and egg gathering of Arctic terns, Aleutian terns, mew gulls, and emperor geese will remain closed in the Kodiak Island Roaded Area.

The Sun'aq Tribe of Kodiak worked in close collaboration with the ADF&G Division of Subsistence to develop a permit and harvest monitoring system. Permits are issued by the Sun'aq Tribe of Kodiak to individual harvesters. The Sun'aq Tribe provides copies of issued permits to the ADF&G Division of Subsistence, which uses this information to manage the harvest reporting system. The permit includes fields to write the permit holder's name and mailing address, as well as a field for the permit holder to sign acknowledging the terms of the permit. The permit also includes a map of the harvest area and description of the harvest regulations, including the list of species open to harvest. Permit data are securely disposed of after completion of the annual harvest data collection and analysis.

You may request copies of the referenced permit applications by submitting a request to the Service Information Collection Clearance Officer using one of the methods identified in the **ADDRESSES** section of this notice.

Title of Collection: Regulations for the Taking of Migratory Birds for Subsistence Uses in Alaska, 50 CFR part 92.

OMB Control Number: 1018–0178.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals/households and Tribal governments within subsistence-eligible areas of Alaska.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: None.

Activity/respondents	Average number of annual respondents	Average number of submissions each	Average number of annual responses	Completion time per response (min)	Total annual burden hours *
Tribal Council Invitation Letter (50 CFR 92.5):					
Tribal Governments	1	1	1	30	1
Tribal Council Invitation Permit Request (50 CFR 92.5):.					
Tribal Governments	1	1	1	30	1
Tribal Council Notification to AMBCC (50 CFR 92.5):					
Tribal Governments	1	1	1	30	1
Kodiak Island Roaded Area Hunter Registration Permit (50 CFR 92.31):					
Individuals	100	1	100	15	25
Cordova Household Registration Permit (50 CFR 92.31):					
Individuals	50	1	50	15	13
Totals	154		154		42

* Rounded.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–23029 Filed 10–18–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–MB–2023–N083; FXMB12610700000–234–FF07M01000; OMB Control Number 1018–0124]

Agency Information Collection Activities; Submission to the Office of Management and Budget; Alaska Subsistence Bird Harvest Survey

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew, without change, a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before November 20, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted within 30 days of publication of this notice at *https://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. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018-0124'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. 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: In accordance with the Paperwork Reduction Act of 1995 and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

On June 26, 2023, we published in the **Federal Register** (88 FR 41415) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on August 25, 2023. In an effort to increase public awareness of, and participation in, our public commenting processes associated with information collection requests, the Service also published the **Federal Register** notice on *Regulations.gov* (Docket No. FWS–R7–MB–2023–0081) to provide the public with an additional method to submit comments (in addition to the typical *Info_Coll@fws.gov* email and U.S. mail submission methods). We received one comment in response to that notice which did not address the information collection requirements. No response to that comment is required.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency 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 response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying

information in your comment, you should be aware that your that your entire comment—including your personal identifying information—may be 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.

Abstract: The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712) and the Fish and Wildlife Act of 1956 (16 U.S.C. 742d) designate the Department of the Interior as the key agency responsible for managing migratory bird populations that frequent the United States and for setting harvest regulations that allow for the conservation of those populations. These responsibilities include gathering data on various aspects of migratory bird harvest. We use harvest data to review regulation proposals and to issue harvest regulations.

The Migratory Bird Treaty Act Protocol Amendment (1995) (Amendment) provides for the customary and traditional use of migratory birds and their eggs for subsistence use by Indigenous inhabitants of Alaska. The Amendment states that its intent is not to cause significant increases in the take of species of migratory birds relative to their continental population sizes. A submittal letter from the Department of State to the White House (May 20, 1996) accompanied the Amendment and specified the need for harvest monitoring. The submittal letter stated that the Service, the Alaska Department of Fish and Game (ADF&G), and Alaska Native Organizations would collect harvest information cooperatively within the subsistence-eligible areas. Harvest data help to ensure that customary and traditional subsistence uses of migratory birds and their eggs by Indigenous inhabitants of Alaska do not significantly increase the take of species of migratory birds relative to their continental population sizes. The Alaska Migratory Bird Co-Management Council (AMBCC) was created in 2000, including the Service, the ADF&G, and the Alaska Native Caucus, to implement provisions related to the amendment of the Migratory Bird treaty Act allowing the spring-summer subsistence harvest of migratory birds in Alaska.

Information collection authorized under Control Number 1018–0124 includes three items:

1. Five-Region Alaska Migratory Bird Co-Management Council Harvest Survey—We monitored subsistence harvest of migratory birds using household surveys in the Yukon-Kuskokwim Delta region during the period 1985–2002, and in the Bristol Bay region during 1995–2002. Since 2004, the AMBCC Harvest Assessment Program has been conducting regular surveys across Alaska to document the subsistence harvest of birds and their eggs. The statewide harvest assessment program helps to describe geographical and seasonal harvest patterns, and to track trends in harvest levels. The program relies on collaboration among the Service, the ADF&G, and diverse Alaska Native Organizations.

We collect harvest data for about 60 bird species/categories and their eggs (ducks, geese, swans, cranes, seabirds, shorebirds, grebes and loons, and grouse and ptarmigan) in the subsistence-eligible areas of Alaska. The survey covers spring, summer, and fall harvest in most regions.

In collaboration with Alaska Native Organizations, we hire local resident surveyors to collect the harvest data. The surveyors list all households in the communities, randomly select households to be surveyed, and interview households that have agreed to participate. To ensure anonymity of harvest information, we identify each household by a numeric code. Since the beginning of the survey in 2004, twice we have re-evaluated and revised survey methods to streamline procedures and minimize respondent burden. The five-region AMBCC harvest survey uses the following currently approved forms for household participation:

- *Tracking Sheet and Household Consent (Form 3–2380)*—The surveyor visits each household selected to participate in the survey to obtain household consent to participate. The surveyor uses this form to record household consent.
- *Harvest Reports (Forms 3–2381–1, 3–2381–2, 3–2381–3, 3–2381–4, and 3–2381–5)*—The Harvest Report forms include drawings of bird species most commonly available for harvest in different regions of Alaska, with fields for recording numbers of birds and eggs taken. Each form has up to four sheets, one sheet for each surveyed season. Because bird species available for harvest vary in different regions of Alaska, there are four versions of the harvest report form, each for a different set of species. This helps to prevent users from erroneously recording bird species as harvested in areas where they do not usually occur. The Western and Interior forms (3–2381–1 and 3–2381–3) have three sheets (spring, summer, and fall). We use the Southern Coastal form (3–2381–2) only in the Bristol Bay region. The North Slope form (3–2381–4) has two sheets (spring and summer). Each seasonal sheet has black and white drawings of bird species, next to which are fields to record the number of birds and eggs harvested.

2. Cordova Permit Household Harvest Report (Form 3–2381–5)—Federal regulations allow residents of the community of Cordova (final rule published on April 8, 2014; 79 FR 19454) and the neighboring communities of Tatitlek and Chenega (final rule published April 4, 2017; 82 FR 16298) to harvest in the area defined for the Cordova harvest. Local partners, including the Eyak Tribe and the U.S. Forest Service Cordova Office's Chugach Subsistence Program, worked in close collaboration with the ADF&G Division of Subsistence to develop a household registration and harvest monitoring system. Data collection for the household registration is approved under OMB control number 1018–0178. Data collection for the associated harvest reporting is approved under OMB control number 1018–0124. Harvest monitoring for the Cordova harvest is done using a post-season mail survey (three mailings). The Cordova harvest report form (3–2381–5) has only one sheet (spring).

3. Kodiak Island Roaded Area Permit Hunter Harvest Report (Forms 3–2381–6 and 3–2381–7)—On April 19, 2021, we issued a final rule (RIN 1018–BF08; 86 FR 20311) that allows migratory bird hunting and egg gathering by registration permit in the Kodiak Island Roaded Area in the Kodiak Archipelago Region of Alaska for a 3-year experimental season (2021–2023). We developed regulations for the spring-summer subsistence harvest of migratory birds in the Kodiak Island Roaded Area under a co-management process involving the Service, the ADF&G, and Alaska Native representatives. To participate in the Kodiak roaded area harvest, harvesters must obtain a permit and to complete a harvest report form, even if they did not harvest. Staff from the ADF&G Division of Subsistence worked in close collaboration with the Sun'aq Tribe of Kodiak to develop the permit and harvest reporting system, which started in 2021. The Sun'aq Tribe issues the permits. Information collection for the permit is authorized under OMB Control Number 1018–0178. Information collection for the associated harvest monitoring is authorized under Control Number 1018–0124.

The Sun'aq Tribe requested in-season harvest reporting. Permit holders receive the Kodiak Roaded Area In-Season Harvest Report (Form 3–2381–6) at the time the permit is issued. Harvesters must record their harvest using this form along the season. At the

end of the season (early September), all permit holders must submit the completed Kodiak Roaded Area In-Season Harvest Report (Form 3–2381–7) indicating whether they harvested birds and eggs, and if so, the kinds and amounts of birds and eggs harvested. Permit holders submit the completed form by mail to the ADF&G for data analysis (the form includes the return address and is postage-paid). To ensure a more complete harvest reporting, the ADF&G will mail a post-season harvest survey to permit holders who did not submit a completed in-season harvest log. The post-season mail survey includes two reminders. Reported harvests will be extrapolated to represent all permit holders, based on statistical methods. Forms 3–2381–6 and 3–2381–7 are only completed twice per year (spring and summer seasons).

Title of Collection: Alaska Migratory Bird Subsistence Harvest Household Survey.

OMB Control Number: 1018–0124.

Form Numbers: Forms 3–2380, and 3–2381–1 through 3–2381–7.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Households within subsistence-eligible areas of Alaska.

Total Estimated Number of Annual Respondents: 2,271.

Total Estimated Number of Annual Responses: 4,371.

Estimated Completion Time per Response: 5 minutes.

Total Estimated Number of Annual Burden Hours: 364.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–23028 Filed 10–18–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NV_FRN_MO4500175288]

Notice of Extension of Segregation of Public Lands for the Rough Hat Clark County Solar Project, Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of segregation extension.

SUMMARY: The Bureau of Land Management (BLM) segregated public lands included in the right-of-way application (N–099406) for the Rough Hat Clark County Solar Project from appropriation under the public land laws, including the Mining Law, but not the mineral leasing or material sales acts, for a period of 2 years on October 20, 2021, subject to valid existing rights. This 2-year extension of the segregation is necessary to allow the BLM to complete review of the Rough Hat Clark County Solar Project application and reach a decision on the application.

DATES: This segregation extension for the lands identified in this notice is effective on October 20, 2023.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to the project mailing list, send requests to: Whitney Wirthlin, Southern Nevada District Energy and Infrastructure Team, at telephone (702) 515–5084; address 4701 North Torrey Pines Drive, Las Vegas, NV 89130–2301; or email *BLM_NV_SND_EnergyProjects@blm.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 for contacting Whitney Wirthlin. 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: This notice extends the segregation published in the **Federal Register** on October 20, 2021 (86 FR 58301) for an additional 2 years. Candela Renewables, LLC, submitted a right-of-way application to the BLM Las Vegas Field Office for the Rough Hat Clark County Solar Project requesting authorization to construct, operate, maintain, and eventually decommission a 400-megawatt photovoltaic solar electric generating facility, battery storage facilities, associated generation tie-line, and access road facilities. The BLM has made substantial progress in the review of the Rough Hat Clark County Solar Project right-of-way application; however, the BLM needs additional time to complete its review and make a decision on the application.

The BLM completed the variance process required by the solar programmatic environmental impact statement and determined it was appropriate to continue processing the application. On October 21, 2022, the BLM published in the **Federal Register** (87 FR 68187) a Notice of Intent to amend the Las Vegas Resource Management Plan (RMP) and prepare an environmental impact statement (EIS) for the proposed Rough Hat Clark County Solar Project in Clark County, Nevada. The BLM is currently preparing the draft RMP amendment/EIS.

Authority: 43 CFR 2091.3–1(e) and 43 CFR 2804.25(f).

Jon K. Raby,

Nevada State Director.

[FR Doc. 2023–23057 Filed 10–18–23; 8:45 am]

BILLING CODE 4331–21–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AZ_FRN_MO4500175809]

Notice of Filing of Plats of Survey; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described land were officially filed in the Bureau of Land Management (BLM), Arizona State Office, Phoenix, Arizona on the dates indicated. The surveys announced in this notice are necessary for the management of lands administered by the agency indicated.

ADDRESSES: These plats will be available for inspection in the Arizona State Office, Bureau of Land Management, One North Central Avenue, Suite 800, Phoenix, Arizona 85004–4427. Protests of any of these surveys should be sent to the Arizona State Director at the above address.

FOR FURTHER INFORMATION CONTACT: Geoffrey A. Graham, Chief Cadastral Surveyor of Arizona; (602) 417–9558; *ggraham@blm.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:

The Gila and Salt River Meridian, Arizona

The plat, in one sheet, representing the survey of a portion of the Third Guide Meridian East (west boundary), the subdivisional lines and the subdivision of certain sections, Township 23 North, Range 13 East, accepted September 19, 2023, and officially filed September 21, 2023, for Group 1224, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat, in one sheet, representing the dependent resurvey of a portion of the Fourth Guide Meridian East (east boundary), the south, west and north boundaries and the subdivisional lines, and the subdivision of certain sections, Township 23 North, Range 16 East, accepted September 19, 2023, and officially filed September 21, 2023, for Group 1222, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat, in two sheets, representing the dependent resurvey of a portion of the Seventh Auxiliary Guide Meridian East (west boundary), the south, east and north boundaries and the subdivisional lines, and the subdivision of certain sections, Township 23 North, Range 29 East, accepted September 19, 2023, and officially filed September 21, 2023, for Group 1221, Arizona.

This plat was prepared at the request of the Bureau of Indian Affairs.

The plat, in one sheet, representing the dependent resurvey of a portion of the subdivisional lines and a metes-and-bounds survey in fractional section 9, fractional Township 11 North, Range 18 West, accepted August 29, 2023, and officially filed September 1, 2023, for Group 1228, Arizona.

This plat was prepared at the request of the Bureau of Land Management.

A person or party who wishes to protest any of these surveys must file a written notice of protest within 30 calendar days from the date of this publication with the Arizona State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within 30 days after the protest is filed. Before including your address, or other personal information in your protest, please be aware that your entire protest, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. chap. 3.

Geoffrey A. Graham,

Chief Cadastral Surveyor of Arizona.

[FR Doc. 2023–23032 Filed 10–18–23; 8:45 am]

BILLING CODE 4331–12–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint *Certain Disposable Vaporizer Devices and Components and Packaging Thereof, DN 3700;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of R.J. Reynolds Tobacco Company and R.J. Reynolds Vapor Company on October 13, 2023. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain disposable vaporizer devices and components and packaging thereof. The complaint names as respondents: Affiliated Imports, LLC of Pflugerville, TX; American Vape Company, LLC a/k/a American Vapor Company, LLC of Pflugerville, TX; Breeze Smoke, LLC of West Bloomfield, MI; Dongguan (Shenzhen) Shikai Technology Co., Ltd. of China; EVO Brands, LLC of Wilmington, DE; Flawless Vape Shop Inc. of Anaheim, CA; Flawless Vape Wholesale & Distribution Inc. of Anaheim, CA; Guangdong Qisitech Co., Ltd. of China; iMiracle (Shenzhen) Technology Co. Ltd. of China; Magellan Technology Inc. of Buffalo, NY; Pastel Cartel, LLC of Pflugerville, TX; Price Point Distributors Inc. d/b/a Prince Point NY of Farmingdale, NY; PVG2, LLC of Wilmington, DE; Shenzhen Daosen Vaping Technology Co., Ltd. of China; Shenzhen Fumot Technology Co., Ltd. of China; Shenzhen Funyin Electronic Co., Ltd. of China; Shenzhen Han Technology Co., Ltd. of China; Shenzhen Innokin Technology Co., Ltd. of China; Shenzhen IVPS Technology Co., Ltd. of China; Shenzhen Noriyang Technology Co., Ltd. of China; Shenzhen Pingray Technology of China; Shenzhen Weiboli Technology Co. Ltd. of China; SV3 LLC d/b/a Mi-One Brands of Phoenix, AZ; Thesy, LLC d/b/a Element Vape of El Monte, CA; Vapeonly Technology Co. Ltd. of China; and VICA Trading Inc. d/b/a Vapesourcing of Tustin, CA. The complainant requests that the Commission issue a general exclusion order, a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3700'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: October 13, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–23045 Filed 10–18–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–049]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 24, 2023 at 11 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agendas for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. No. 731–TA–1593 (Final) (Freight Rail Couplers and Parts Thereof from Mexico). The Commission currently is scheduled to complete and file its determinations and views of the Commission on November 6, 2023.
5. *Outstanding action jackets:* none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Supervisory Hearings and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting. Earlier notification of this meeting was not possible.

By order of the Commission.

Issued: October 17, 2023.

Sharon Bellamy,

Supervisory Hearings and Information Officer.

[FR Doc. 2023–23158 Filed 10–17–23; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 20, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0050 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0050.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards,

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401.

Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–021–C.

Petitioner: Peabody Midwest Mining, LLC, CR 725 East, Francisco, Indiana 47699.

Mine: Francisco Underground Pit, MSHA ID No. 12–02295, located in Gibson County, Indiana.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

Modification Request: The petitioner requests a modification of 30 CFR 75.500(d) to permit the use of non-permissible battery powered portable radios in or inby the last open crosscut.

The petitioner states that:

(a) The petitioner currently uses Motorola and Kenwood permissible radios in its underground mine to enable communication between miners and management. Communication via these permissible radios facilitates movement of equipment, assignment of necessary work, communication with the surface control room, and communication in case of emergency situations such as injuries.

(b) Some sections of the mine use two continuous mining machines, and the use of radios permits coordination between the two continuous mining machines and coordination of the coal hauler, as well as communication near working pillars.

(c) In addition to using the radios, the petitioner uses wired communication systems, as well as the communication and tracking systems required in the mine's Emergency Response Plan.

(d) Effective communication is critical to the safety of the miners at the mine.

(e) Motorola and Kenwood have discontinued the manufacture and sale of the MSHA approved permissible radios. These radios were the only permissible radios available for the underground coal mine industry.

The petitioner proposes the following alternative method:

(a) Non-permissible portable radios to be used include:

(1) Motorola XPR 3300e, XPR 3500e, XPR 7350e, XPR 7380e, and XPR 580e. HAZ LOC certified by UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMNN4489A.

(2) New R7 portable radios. HAZ LOC certified of UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMN 4810.

(3) Other testing and diagnostic equipment may be used if approved in advance by the District Manager.

(b) All non-permissible radios used in or inby the last open crosscut shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible radios in or inby the last open crosscut.

(d) Non-permissible radios shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible radios are being used, the radios shall be de-energized immediately and withdrawn from the affected area.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All radios shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Personnel who use non-permissible radios shall be trained to recognize the hazards and limitations associated with use of the equipment.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–23082 Filed 10–18–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 20, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0052 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0052.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401.

Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–023–C.

Petitioner: Peabody Midwest Mining, LLC, CR 725 East, Francisco, Indiana 47699.

Mine: Francisco Underground Pit, MSHA ID No. 12–02295, located in Gibson County, Indiana.

Regulation Affected: 30 CFR 75.507–1(a), (Electrical equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

Modification Request: The petitioner requests a modification of 30 CFR 75.507–1(a) to permit the use of non-permissible battery powered portable radios in return air outby the last open crosscut.

The petitioner states that:

(a) The petitioner currently uses Motorola and Kenwood permissible radios in its underground mine to enable communication between miners and management. Communication via these permissible radios facilitates movement of equipment, assignment of necessary work, communication with the surface control room, and communication in case of emergency situations such as injuries.

(b) Some sections of the mine use two continuous mining machines, and the use of radios permits coordination between the two continuous mining machines and coordination of the coal hauler, as well as communication near working pillars.

(c) In addition to using the radios, the petitioner uses wired communication systems, as well as the communication and tracking systems required in the mine's Emergency Response Plan.

(d) Effective communication is critical to the safety of the miners at the mine.

(e) Motorola and Kenwood have discontinued the manufacture and sale of the MSHA approved permissible radios. These radios were the only permissible radios available for the underground coal mine industry.

The petitioner proposes the following alternative method:

(a) Non-permissible portable radios to be used include:

(1) Motorola XPR 3300e, XPR 3500e, XPR 7350e, XPR 7380e, and XPR 580e. HAZ LOC certified by UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMNN4489A.

(2) New R7 portable radios. HAZ LOC certified of UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMN 4810.

(3) Other testing and diagnostic equipment may be used if approved in advance by the District Manager.

(b) All non-permissible radios used in the return air outby the last open crosscut shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible radios in the return air outby the last open crosscut.

(d) Non-permissible radios shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the radios are being used, the radios shall be de-energized immediately and withdrawn from the affected area.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All radios shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Personnel who use non-permissible radios shall be trained to recognize the hazards and limitations associated with use of the equipment.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–23081 Filed 10–18–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of

Standards, Regulations, and Variances on or before November 20, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0050 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0050.

2. *Fax:* 202–693–9441.

3. *Email: petitioncomments@dol.gov.*

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–021–C.

Petitioner: Peabody Gateway North Mining LLC, 12968 State 13, Coulterville, Illinois 62237.

Mine: Gateway North Mine, MSHA ID No. 11–03235, located in Randolph County, Illinois.

Regulation Affected: 30 CFR 75.500(d), (Permissible electric equipment).

Modification Request: The petitioner requests a modification of 30 CFR 75.500(d) to permit the use of non-permissible battery powered portable radios in or inby the last open crosscut.

The petitioner states that:

(a) The petitioner currently uses Motorola and Kenwood permissible radios in its underground mine to enable communication between miners and management. Communication via these permissible radios facilitates movement of equipment, assignment of necessary work, communication with the surface control room, and communication in case of emergency situations such as injuries.

(b) Some sections of the mine use two continuous mining machines, and the use of radios permits coordination between the two continuous mining machines and coordination of the coal hauler, as well as communication near working pillars.

(c) In addition to using the radios, the petitioner uses wired communication systems, as well as the communication and tracking systems required in the mine's Emergency Response Plan.

(d) Effective communication is critical to the safety of the miners at the mine.

(e) Motorola and Kenwood have discontinued the manufacture and sale of the MSHA approved permissible radios. These radios were the only permissible radios available for the underground coal mine industry.

The petitioner proposes the following alternative method:

(a) Non-permissible portable radios to be used include:

(1) Motorola XPR 3300e, XPR 3500e, XPR 7350e, XPR 7380e, and XPR 580e. HAZ LOC certified by UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMNN4489A.

(2) New R7 portable radios. HAZ LOC certified of UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMN 4810.

(3) Other testing and diagnostic equipment may be used if approved in advance by the District Manager.

(b) All non-permissible testing and diagnostic equipment used in or inby the last open crosscut shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible radios in or inby the last open crosscut.

(d) Non-permissible radios shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible electronic equipment is being used, the equipment shall be de-energized immediately and withdrawn from the affected area.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All radios shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Personnel who use non-permissible radios shall be trained to recognize the hazards and limitations associated with use of the equipment.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–23078 Filed 10–18–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 20, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0048 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0048.

2. *Fax:* 202–693–9441.

3. *Email: petitioncomments@dol.gov.*

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401.

Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–019–C.

Petitioner: Peabody Gateway North Mining LLC, 12968 State 13, Coulterville, Illinois 62237.

Mine: Gateway North Mine, MSHA ID No. 11–03235, located in Randolph County, Illinois.

Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

Modification Request: The petitioner requests a modification of 30 CFR 75.1002(a) to permit the use of non-permissible battery powered portable radios within 150 feet of pillar workings or longwall faces.

The petitioner states that:

(a) The petitioner currently uses Motorola and Kenwood permissible radios in its underground mine to enable communication between miners and management. Communication via these permissible radios facilitates movement of equipment, assignment of necessary work, communication with the surface control room, and communication in case of emergency situations such as injuries.

(b) Some sections of the mine use two continuous mining machines, and the use of radios permits coordination between the two continuous mining machines and coordination of the coal hauler, as well as communication near working pillars.

(c) In addition to using the radios, the petitioner uses wired communication systems, as well as the communication and tracking systems required in the mine's Emergency Response Plan.

(d) Effective communication is critical to the safety of the miners at the mine.

(e) Motorola and Kenwood have discontinued the manufacture and sale of the MSHA approved permissible radios. These radios were the only permissible radios available for the underground coal mine industry.

The petitioner proposes the following alternative method:

(a) Non-permissible portable radios to be used include:

(1) Motorola XPR 3300e, XPR 3500e, XPR 7350e, XPR 7380e, and XPR 580e. HAZ LOC certified by UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMNN4489A.

(2) New R7 portable radios. HAZ LOC certified of UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMN 4810.

(3) Other testing and diagnostic equipment may be used if approved in advance by the District Manager.

(b) All non-permissible testing and diagnostic equipment used within 150 feet of pillar workings or longwall faces shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible radios within 150 feet of pillar workings or longwall faces.

(d) Non-permissible radios shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible electronic equipment is being used, the equipment shall be de-energized immediately and withdrawn from the affected area.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All radios shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Personnel who use non-permissible radios shall be trained to recognize the hazards and limitations associated with use of the equipment.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–23080 Filed 10–18–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 20, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0049 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0049.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–020–C.

Petitioner: Peabody Gateway North Mining LLC, 12968 State 13, Coulterville, Illinois 62237.

Mine: Gateway North Mine, MSHA ID No. 11–03235, located in Randolph County, Illinois.

Regulation Affected: 30 CFR 75.507–1(a), (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

Modification Request: The petitioner requests a modification of 30 CFR 75.507–1(a) to permit the use of non-permissible battery powered portable radios in return air outby the last open crosscut.

The petitioner states that:

(a) The petitioner currently uses Motorola and Kenwood permissible radios in its underground mine to enable communication between miners and management. Communication via these permissible radios facilitates movement of equipment, assignment of necessary work, communication with the surface control room, and communication in case of emergency situations such as injuries.

(b) Some sections of the mine use two continuous mining machines, and the use of radios permits coordination between the two continuous mining machines and coordination of the coal hauler, as well as communication near working pillars.

(c) In addition to using the radios, the petitioner uses wired communication systems, as well as the communication and tracking systems required in the mine's Emergency Response Plan.

(d) Effective communication is critical to the safety of the miners at the mine.

(e) Motorola and Kenwood have discontinued the manufacture and sale of the MSHA approved permissible radios. These radios were the only permissible radios available for the underground coal mine industry.

The petitioner proposes the following alternative method:

(a) Non-permissible portable radios to be used include:

(1) Motorola XPR 3300e, XPR 3500e, XPR 7350e, XPR 7380e, and XPR 580e. HAZ LOC certified by UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMNN4489A.

(2) New R7 portable radios. HAZ LOC certified of UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMN 4810.

(3) Other testing and diagnostic equipment may be used if approved in advance by the District Manager.

(b) All non-permissible testing and diagnostic equipment used in the return air outby the last open crosscut shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible radios in the return air outby the last open crosscut.

(d) Non-permissible radios shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible electronic equipment is being used, the equipment shall be de-energized immediately and withdrawn from the affected area.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All radios shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Personnel who use non-permissible radios shall be trained to recognize the hazards and limitations associated with use of the equipment.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same

measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–23073 Filed 10–18–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standard

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before November 20, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0051 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments for MSHA–2023–0051.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov*.
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2023–022–C.

Petitioner: Peabody Midwest Mining, LLC, CR 725 East, Francisco, Indiana 47699.

Mine: Francisco Underground Pit, MSHA ID No. 12–02295, located in Gibson County, Indiana.

Regulation Affected: 30 CFR 75.1002(a) (Installation of electrical equipment and conductors; permissibility).

Modification Request: The petitioner requests a modification of 30 CFR 75.1002(a) to permit the use of non-permissible battery powered portable radios on the longwall face or within 150 feet of pillar workings.

The petitioner states that:

(a) The petitioner currently uses Motorola and Kenwood permissible radios in its underground mine to enable communication between miners and management. Communication via these permissible radios facilitates movement of equipment, assignment of necessary work, communication with the surface control room, and communication in case of emergency situations such as injuries.

(b) Some sections of the mine use two continuous mining machines, and the use of radios permits coordination between the two continuous mining machines and coordination of the coal hauler, as well as communication near working pillars.

(c) In addition to using the radios, the petitioner uses wired communication systems, as well as the communication and tracking systems required in the mine's Emergency Response Plan.

(d) Effective communication is critical to the safety of the miners at the mine.

(e) Motorola and Kenwood have discontinued the manufacture and sale of the MSHA approved permissible radios. These radios were the only permissible radios available for the underground coal mine industry.

The petitioner proposes the following alternative method:

(a) Non-permissible portable radios to be used include:

(1) Motorola XPR 3300e, XPR 3500e, XPR 7350e, XPR 7380e, and XPR 580e. HAZ LOC certified by UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMNN4489A.

(2) New R7 portable radios. HAZ LOC certified of UL standards ANSI/TIA 4950 and CAN/CSA 22.2 No. 157–92. Classification Rating Division 1, Class I, Groups C, D; Class II Group E, F, G; Class III T3C. Tomb = 25 degrees Celsius to 60 degrees Celsius and Classification Rating Division 2, Class 1, Groups A, B, C, D. Intrinsically safe when used with Motorola battery PMN 4810.

(3) Other testing and diagnostic equipment may be used if approved in advance by the District Manager.

(b) All non-permissible radios used within 150 feet of pillar workings shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible radios within 150 feet of pillar workings.

(d) Non-permissible radios shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible radios are being used, the radios shall be de-energized immediately and withdrawn from the affected area.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All radios shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Personnel who use non-permissible radios shall be trained to

recognize the hazards and limitations associated with use of the equipment.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–23075 Filed 10–18–23; 8:45 am]

BILLING CODE 4520–43–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 23–08]

Notice of Open Meeting

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, the Millennium Challenge Corporation (MCC) Economic Advisory Council was established as a discretionary advisory committee on October 5, 2018. Its charter was most recently renewed on September 30, 2022. The MCC Economic Advisory Council serves MCC solely in an advisory capacity and provides advice and guidance to MCC economists, evaluators, leadership of the Department of Policy and Evaluation and senior MCC leadership regarding relevant trends in development economics, applied economic and evaluation methods, and poverty analytics, as well as modeling, measuring, and evaluating development interventions. In doing so, the MCC Economic Advisory Council helps sharpen MCC's analytical methods and capacity in support of the agency's economic development goals. It also serves as a sounding board and reference group for assessing and advising on strategic policy innovations and methodological directions in MCC.

DATES: Friday, November 3, 2023, from 10 a.m.–12:30 p.m. ET.

ADDRESSES: The meeting will be held in a hybrid format, both in-person at 1099 14th Street NW, Suite 700, Washington, DC 20005, and via WebEx.

FOR FURTHER INFORMATION CONTACT: Mesbah Motamed, 202.521.7874, *MCCEACouncil@mcc.gov* or visit *www.mcc.gov/about/org-unit/economic-advisory-council.*

SUPPLEMENTARY INFORMATION:

Agenda: During this meeting of the MCC Economic Advisory Council, members will receive an overview of MCC's work and the context and function of the MCC Economic Advisory Council within MCC's mission. The MCC Economic Advisory Council will also discuss issues related to MCC's core functions, including a focus on MCC's climate-related analytics and investments.

Public Participation: The meeting will be open to the public. Members of the public may file written statements before or after the meeting. If you plan to participate, please submit your name and affiliation no later than Friday, October 27, 2023, to *MCCEACouncil@mcc.gov* to receive instructions on how to attend.

(Authority: Federal Advisory Committee Act, 5 U.S.C. App.)

Dated: October 16, 2023.

Gina Porto Spiro,

Acting Vice President, General Counsel, and Corporate Secretary.

[FR Doc. 2023–23109 Filed 10–18–23; 8:45 am]

BILLING CODE 9211–03–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for STEM Education; 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: Advisory Committee for STEM Education (EDU) (#1119) (Hybrid Meeting).

Date and Time: November 15, 2023; 9:30 a.m.–5:30 p.m. (EST); November 16, 2023, 9:30 a.m.–2:00 p.m. (EST).

Place: National Science Foundation, 2415 Eisenhower Avenue, Room 3450, Alexandria, VA 22314.

Hybrid participation is for members and speakers only. Public participants may attend the meeting virtually, using *https://nsf.zoomgov.com/webinar/register/WN_wP2IYrRAQMGMHxWh5v8Mfg.*

All visitors must register at least 48 hours prior to the meeting. The final agenda for the meeting will be posted to: *https://www.nsf.gov/edu/advisory.jsp.*

Type of Meeting: Open.

Contact Person: Keaven Stevenson, Directorate Administrative Coordinator, Room C 11044, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Contact Information: (703) 292–8663/*kstevens@nsf.gov.*

Summary of Minutes: Minutes and meeting materials will be available on the EDU Advisory Committee website at *https://www.nsf.gov/edu/advisory.jsp* or can be obtained from Dr. Lee Zia, National Science Foundation, 2415 Eisenhower Avenue, Room C 11000, Alexandria, VA 22314; Telephone: (703) 292–8600; email: *ehr_ac@nsf.gov.*

Purpose of Meeting: To provide advice with respect to the Foundation's science, technology, engineering, and mathematics (STEM) education programming.

Agenda

Theme: A Time To Reflect, a Time To Progress

Wednesday, November 15, 2023, 9:30 a.m.–5:30 p.m. (EST)

- Opening
- Session 1: A Year in Review by EDU's Assistant Director
- Session 2: Broadening Participation in STEM in the Context of the New Legal Landscape
- Session 3: Reflecting Upon DEIA & NSF
- Session 4: Reflecting Upon STEM Education Priorities
- Session 5: Committee of Visitors for the Division on Research and Learning

Thursday, November 16, 2023, 9:30 a.m.–2:00 p.m. (EST)

- Opening
- Session 6: Further Reflection Upon Session 2
- Session 7: CEOSE Reflections: Making Visible the Invisible
- Preparation for Meeting with Director and Chief Operating Officer
- Meet with the Director and Chief Operating Officer
- Closing Session

Dated: October 13, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–23033 Filed 10–18–23; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0145]

Draft Interim Staff Guidance: Radiological Survey and Dose Modeling of the Subsurface To Support License Termination

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guidance; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on draft Interim Staff Guidance (ISG), DUWP–ISG–02,

''Radiological Survey and Dose Modeling of the Subsurface to Support License Termination.'' The purpose of this draft ISG is to provide guidance on surveys of open surfaces in the subsurface, including open excavations, materials planned for reuse, and substructures. This draft ISG also provides guidance on the use of commonly used decommissioning dose modeling codes for submerged and partially submerged substructures to develop clean-up levels, and on methods to evaluate risk from existing groundwater contamination. This draft ISG supplements guidance found in NUREG–1757, Volume 2, Revision 2, which pertains to licensees subject to the license termination rule found in NRC regulations. If finalized, this ISG is intended for use by applicants, licensees, and NRC staff. The guidance is also available to Agreement States and the public.

DATES: Submit comments by December 18, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website.

- *Federal rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2023–0145. 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.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Cynthia Barr, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–4015; email: *Cynthia.Barr@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0145 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0145.
- *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 draft ISG, DUWP–ISG–02, ''Radiological Survey and Dose Modeling of the Subsurface to Support License Termination,'' is available in ADAMS under Accession No. ML23177A008.
- *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.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0145 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

The NRC is issuing this draft ISG to supplement guidance provided in NUREG–1757, Volume 2, Revision 2, ''Consolidated Decommissioning Guidance, Characterization, Survey, and Determination of Radiological Criteria,'' which was issued in July 2022 (ADAMS Accession No. ML22194A859). The draft ISG provides additional guidance developed after Revision 2 to NUREG–1757, Volume 2, was published related to surveys of open surfaces in the subsurface, including open excavations, materials planned for reuse, and substructures. The draft ISG also provides guidance on the use of commonly used decommissioning dose modeling codes to develop clean-up levels for submerged and partially submerged substructures, and on methods to evaluate risk from existing groundwater contamination. The NRC staff held two subsurface investigations workshops on July 14–15, 2021, and May 11, 2022, to help support the development of this proposed ISG, and contracted with Oak Ridge Associated Universities to develop guidance on acceptable survey methods.

The NRC staff recognizes that the draft ISG includes significant advancements in methods to perform radiological surveys and dose modeling for subsurface residual radioactivity. Licensees may choose to take advantage of these advancements immediately. However, this draft ISG is being published for comment, and the NRC staff may make revisions and corrections in the final ISG. Such changes from the draft ISG would not be a change in position because a draft guidance document issued for comment does not constitute a staff position.

The draft regulatory analysis for the draft ISG is available in ADAMS under ML23177A009 and is also available for comment.

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of this ISG, if finalized, would not (i) constitute backfitting as defined in section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Backfitting,'' 70.76, ''Backfitting,'' and 72.62, ''Backfitting,'' and as described in Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; (ii) affect issue finality of any approval issued under 10 CFR part 52, ''Licenses,

Certifications, and Approvals for Nuclear Power Plants''; or (iii) constitute forward fitting as that term is defined and described in MD 8.4, because licensees would not be required to comply with the positions set forth in this ISG, if finalized.

Dated: October 16, 2023.

For the Nuclear Regulatory Commission.

Jane E. Marshall,

Director, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–23114 Filed 10–18–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–196; MC2024–11 and CP2024–11]

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:* October 23, 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

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).:* CP2020–196; *Filing Title:* Notice of the United States Postal Service of Filing Modification Three to Global Reseller Expedited Package 2 Negotiated Service Agreement; *Filing Acceptance Date:* October 13, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* October 23, 2023.

2. *Docket No(s).:* MC2024–11 and CP2024–11; *Filing Title:* USPS Request to Add USPS Ground Advantage Contract 5 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 13, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 23, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–23089 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–FW–P

[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).

POSTAL SERVICE

Product Change—Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 11, 2022, it filed with the Postal Regulatory Commission a *USPS Request to Add Parcel Return Service Contract 20 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–5, CP2024–5.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23016 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 2, 2023,

it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 69 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–1, CP2024–1.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23019 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 12, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 73 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–8, CP2024–8.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23023 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 10, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 70 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–3, CP2024–3.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23020 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 13, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Ground Advantage® Contract 5 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–11, CP2024–11.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23018 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 10, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 71 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–4, CP2024–4.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23021 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 11, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 72 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–6, CP2024–6.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23022 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 6, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Ground Advantage® Contract 4 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–2, CP2024–2.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23017 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 12, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 74 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–9, CP2024–9.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23024 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* October 19, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 12, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 75 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–10, CP2024–10.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–23025 Filed 10–18–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98746; File No. 10–240]

MIAX Sapphire, LLC; Notice of Filing of Application for Registration as a National Securities Exchange Under Section 6 of the Securities Exchange Act of 1934

October 13, 2023.

On September 26, 2023, MIAX Sapphire, LLC (''MIAX Sapphire'' or ''Applicant'') submitted to the Securities and Exchange Commission (''Commission'') a Form 1 application under the Securities Exchange Act of 1934 (''Exchange Act''), seeking registration as a national securities exchange under section 6 of the Exchange Act.

The Commission is publishing this notice to solicit comments on MIAX Sapphire's Form 1 application. The Commission will take any comments it receives into consideration in making its determination about whether to grant MIAX Sapphire's request to be registered as a national securities exchange. The Commission will grant the registration if it finds that the requirements of the Exchange Act and the rules and regulations thereunder with respect to MIAX Sapphire are satisfied.[1]

The Applicant's Form 1 application provides detailed information on how MIAX Sapphire proposes to satisfy the requirements of the Exchange Act. The Form 1 application also provides that MIAX Sapphire would operate a fully automated electronic trading platform for the trading of listed options. It also provides that liquidity would be derived from quotes as well as orders to buy and orders to sell submitted to MIAX Sapphire electronically by its registered broker-dealer members from remote locations. The Form 1 application further provides that there would be a physical trading floor located in Miami, Florida. MIAX Sapphire would have two types of members on the electronic trading platform, market makers and electronic exchange members, and two types of floor participants, floor brokers and floor market makers. Further, the Form 1 application states that MIAX Sapphire would be wholly-owned by its parent company, Miami International Holdings, Inc. (''Miami Holdings''), which is also the parent company of four existing national securities exchanges, Miami International Securities Exchange, LLC, MIAX PEARL, LLC, MIAX Emerald, LLC, and Minneapolis Grain Exchange, LLC.[2]

A more detailed description of the manner of operation of MIAX Sapphire's proposed system can be found in Exhibit E to MIAX Sapphire's Form 1 application. The proposed rulebook for the proposed exchange can be found in Exhibit B to MIAX Sapphire's Form 1 application, and the governing documents for both MIAX Sapphire and Miami Holdings can be found in Exhibit A and Exhibit C to MIAX Sapphire's Form 1 application, respectively. A listing of the officers and directors of MIAX Sapphire can be found in Exhibit J to MIAX Sapphire's Form 1 application. A complete set of forms concerning membership and access can be found in Exhibit F to MIAX Sapphire's Form 1 application.

MIAX Sapphire's Form 1 application, including all of the Exhibits referenced above, is available online at *www.sec.gov/rules/other.shtml* as well as in the Commission's Public Reference Room. Interested persons are invited to submit written data, views, and

[1] 15 U.S.C. 78s(a).

[2] Minneapolis Grain Exchange, LLC is also a designated contract market and derivatives clearing organization that operates under the regulatory oversight of the Commodity Futures Trading Commission pursuant to section 5 of the Commodity Exchange Act. 7 U.S.C. 7.

arguments concerning MIAX Sapphire's Form 1, including whether the application is consistent with the Exchange Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number 10–240 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 10–240. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to MIAX Sapphire's Form 1 filed with the Commission, and all written communications relating to the application 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 10–240 and should be submitted on or before December 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[3]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23036 Filed 10–18–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98752; File No. SR–MIAX–2023–39]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify Certain Connectivity and Port Fees

October 13, 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 October 2, 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 Members [3] and non-Members; and (2) amend the monthly port fee for additional Limited Service MIAX Express Interface (''MEI'') Ports [4] available to Market Makers.[5] The 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

[3] 17 CFR 200.30–3(a)(71)(i).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[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 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.*

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 a revised proposal (SR–MIAX–2023–30) (the ''Fifth Proposal'').[16] Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with this further revised proposal (SR–MIAX–2023–39) (the ''Sixth Proposal'').

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth and Fifth 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 Emerald[17] (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, Fourth and Fifth Proposals, the fees themselves have not changed since the Initial, Second, Third, Fourth or Fifth 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*[18] 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 it 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.[19] 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.[20] 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

[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, 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] *See* Securities Exchange Act Release No. 98173 (August 21, 2023), 88 FR 58378 (August 25, 2023) (SR–MIAX–2023–30). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. *See* Securities Exchange Act Release No. 98657 (September 29, 2023) (SR–MIAX–2023–30).

[17] The term ''MIAX Emerald'' means MIAX Emerald, LLC. *See* Exchange Rule 100.

[18] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[19] *Id.*

[20] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

Order'').[21] 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.'' [22] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[23] 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.'' [24] 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.[25] 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.'' [26] 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.'' [27] 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.'' [28]

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* [29] and remanded for further proceedings consistent with its opinion.[30] 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.'' [31] 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.[32] 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.*'' [33] 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.[34]

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.'' [35] 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'').[36] The

[21] *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).

[22] *Id.* at page 2.

[23] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[24] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[25] *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).

[26] *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'').

[27] *Id.*

[28] *Id.*

[29] *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.

[30] *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.*

[31] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[32] *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'').

[33] *Id.*

[34] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[35] *See supra* note 29, at page 2.

[36] 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

Continued

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 filings [37] 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.[38] 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 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.[39] 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 2020 [40] and $80,383,000 for 2021.[41] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [42] and $22,843,000 for 2021.[43] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [44] and $44,800,000 for 2021.[45] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [46] and $30,687,000 for 2021.[47] 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.[48] 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.'' [49]

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,[50] 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),[51]

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.*

[37] 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 flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[38] *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).

[39] 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.

[40] 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.*

[41] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[42] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[43] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[44] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[45] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[46] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[47] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[48] 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.*

[49] *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.

[50] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[51] *See, e.g.,* Cboe Fee Schedule, Page 4, Affiliate Volume Plan, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf*

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. 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. 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 the Act[54] 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 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.[57]

* * * * *

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.[58] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the

(providing that if a market maker or its affiliate receives a credit under Cboe's Volume Incentive Program (''VIP''), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) *and* NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf* (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

[52] *See supra* note 26, at note 1.

[53] *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 FR9711 (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).

[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.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_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.

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.[59] 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 networks[60] 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'').[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 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 amend the monthly port fee for Limited Service MEI Ports available to Market Makers.[62] The Exchange currently allocates two (2) Full Service MEI Ports[63] and two (2) Limited Service MEI Ports[64] per matching engine[65] 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. Prior to the Exchange's proposals to adopt a tiered fee structure for Limited Service MEI Ports, Market Makers were 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 (before the proposals to adopt a tiered fee structure).[66]

Limited Service MEI Port Fee Changes

The Exchange now proposes to amend the monthly fee per Limited Service MEI Port and increase the number of free Limited Service MEI Ports per matching engine from two (2) to four (4). Specifically, the Exchange will now provide the first, second, third, and fourth Limited Service MEI Ports for each matching engine free of charge. For additional Limited Service MEI Ports after the first four ports per matching engine that are provided for free (*i.e.,* beginning with the fifth Limited Service MEI Port), the Exchange proposes to increase the monthly fee from $100 to $275 per Limited Service MEI Port per matching engine.

Market Makers that elect to purchase more than the number of Limited Service Ports that are provide for free do so due to the nature of their business and their perceived need for numerous ports to access the Exchange. Meanwhile, Market Makers who utilize the free Limited Service MEI Ports do so based on their business needs.

The Exchange notes that it last proposed to increase its monthly Limited Service MEI Port fees in 2016 (other than the prior proposals to adopt a tiered fee structure for Limited Service MEI Ports),[67] and such increase proposed herein is designed to recover a portion of the ever increasing costs

[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/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.'').

[62] The Exchange notes that in its prior filings (the Initial, Second, Third, Fourth and Fifth Proposals), the Exchange proposed to adopt a tiered-pricing structure for Limited Service MEI Ports.

[63] 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.

[64] 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.

[65] 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.

[66] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[67] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

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 Act [68] in general, and furthers the objectives of section 6(b)(4) of the Act [69] 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 Act [70] 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 Order [71] 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.

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, 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]

[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 25.

[72] *See supra* note 26.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[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 sessions.''). MEMX's market share has increased

Continued

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]

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 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 (as proposed) (equity options market share of 6.20% for the month of August 2023) [a].	10Gb ULL connection	$13,500.
	Limited Service MEI Ports	1–4 ports: FREE. 5 or more ports: $275 each.
NASDAQ [b] (equity options market share of 5.80% for the month of August 2023) [c].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port [d]	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 5.58% for the month of August 2023) [f].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	$1,100 per port.
NYSE American LLC (''NYSE American'') [g] (equity options market share of 7.34% for the month of August2023) [h].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	1–40 ports: $450 per port. 41 or more ports: $150 per port.

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)).

[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 26.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
NASDAQ GEMX, LLC (''GEMX'') [i] (equity options market share of 3.03% for the month of August 2023) [j].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$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 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.[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, MIAX, and BOX, 42 firms access only one of the three exchanges.[89] The Exchange and its affiliated options markets, MIAX Pearl Options 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 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.[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

[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.

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 access [94] 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 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 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. 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 MIAX Pearl Options when MIAX Pearl commenced operations as a national securities exchange on February 7, 2017.[98] The Exchange and MIAX 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 MIAX 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 MIAX 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 MIAX Pearl Options

[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* US 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 MIAX 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 MIAX Pearl's affiliate, MIAX, 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–MIAX–2022–48).

and the operations of the Exchange and MIAX Pearl Options on a single shared 10Gb ULL network is no longer feasible. This required constant System [100] 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 Pearl Options' Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.[101]

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 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 MIAX 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 MIAX Pearl Options had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX 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 MIAX 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 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.[102] 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

[100] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[101] 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.

[102] *See supra* note 9.

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,[103] and Rule 19b–4 thereunder,[104] with respect to the types of information exchanges should provide when filing fee changes, and section 6(b) of the Act,[105] which requires, among other things, that exchange fees be reasonable and equitably allocated,[106] not designed to permit unfair discrimination,[107] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[108] 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.[109] 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-Members [110]) 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 Pearl Options. The Exchange also proposes to modify its Fee Schedule to amend the monthly fee for additional Limited Service MEI Ports and provide two additional ports free of charge for a total of four free Limited Service MEI Ports per matching engine to which each Member connects.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[111] 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,[112] 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.

[103] 15 U.S.C. 78s(b)(1).

[104] 17 CFR 240.19b–4.

[105] 15 U.S.C. 78f(b).

[106] 15 U.S.C. 78f(b)(4).

[107] 15 U.S.C. 78f(b)(5).

[108] 15 U.S.C. 78f(b)(8).

[109] *See supra* note 25.

[110] 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.

[111] The Exchange frequently updates it 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.

[112] 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.

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 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]	Percent 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' time to 10Gb ULL connectivity (less than 18%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

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, 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 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. 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.[113] 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

[113] 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.

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 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.[114] 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.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 49.1% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 49.1% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintiain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 18 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 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

[114] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

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.

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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]	Percent 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 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).[115] 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 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 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 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 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, 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

[115] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26).

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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 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.[116]

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Approximate Cost per Limited Service MEI Port per Month

Based on August 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 utilized by Members in August, which was 1,781 (and includes free and charged ports), resulting in an approximate cost of $101 per port per month (when rounding to the nearest dollar). The Exchange used the total number of Limited Service MEI Ports it maintained in August for all Members and included free and charged ports. However, in 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 when the Exchange discussed the approximate cost per port per month, but did include the two free Limited Service MEI Ports in the total expense amounts. As described herein, the Exchange changed its proposed fee structure since past filings to now offer four free Limited Service MEI Ports per matching engine to which each Member connects. After the first four free Limited Service MEI Ports, the Exchange proposes to charge $275 per Limited Service MEI Port per matching engine, up to a total of twelve (12) Limited Service MEI Ports per matching engine.

For the sake of clarity, if a Member wanted to connect to all 24 of the Exchange's matching engines and utilize the maximum number of Limited Service MEI Ports on each matching engine (*i.e.,* 12), that Member would have a total of 288 Limited Service MEI Ports (24 matching engines multiplied by 12 Limited Service MEI Ports per matching engine). With the proposed increase to now provide four Limited Service MEI Ports for free on each matching engine, that particular Member would receive 96 free Limited Service MEI Ports (4 free Limited Service MEI Ports multiplied by 24 matching engines), and be charged for the remaining 192 Limited Service MEI Ports (288 total Limited Service MEI Ports across all matching engines minus 96 free Limited Service MEI Ports across all matching engines).

As mentioned above, Members utilized a total of 1,781 Limited Service MEI Ports in the month of August 2023 (free and charged ports combined). Using August 2023 data to extrapolate out after the proposed changes herein go into effect, the total number of Limited Service MEI Ports that the Exchange would not charge for as a result of this increase in free ports is 940 (meaning the Exchange would charge for only 841 ports) and amounts to a total expense of $98,980 per month to the Exchange ($101 per port multiplied by 980 free Limited Service MEI Ports).

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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 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

[116] 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 additional resources and expenditures associated with maintaining its recently enhanced low latency network.

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 [117]

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 the cost of providing 10Gb ULL connectivity services, which could decrease over time.[118] Importantly, the Exchange's affiliated markets submitted similar filings to also amend their fees for 10Gb ULL connectivity [119] and, when considering the profit margins attributed to 10Gb ULL connectivity for

[117] 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 MIAX Pearl Options.

[118] 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 September 22, 2023).

[119] *See* SR–PEARL–2023–51, SR–PEARL–2023–55, and SR–EMERALD–2023–27.

the affiliated markets and the Exchange collectively, the overall profit margin based on projected revenue and costs for the Exchange and its affiliated markets for 10Gb ULL connectivity is only 9.5%. This margin is in line with the profit margin MEMX anticipated making in a recent similar proposal to adopt connectivity fees, including fees for 10Gb connectivity, that the Commission Staff did not suspend and remains in effect today.[120]

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal $2,157,178. Based on August 2023 data for Limited Service MEI Port usage and counting for the proposed increase in free Limited Service MEI Ports and proposed increase in the monthly fee from $100 to $275 per port, the Exchange would generate annual revenue of approximately $2,775,300. The Exchange believes this would result in an estimated profit margin of 22% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.[121] 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, utilizing August 2023 data, MIAX Market Makers utilized 1,781 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).[122] 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).[123] 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.[124] 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

[120] *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity and stating that MEMX would earn approximately 8.5% to 15% margin). MEMX's projected profit margin being for a single exchange and the Exchange and its affiliated markets aggregated profit margin being for four separate markets is not a material difference as both profit margins reflect the profit of the overall corporate entities that operate the exchange(s).

[121] *Id.*

[122] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[123] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[124] 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/vprr/2300/23007741.pdf.*

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 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.[125] 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 proposed changes to the monthly fee for Limited Service MEI Ports is not unfairly discriminatory because it would apply to all Market Makers equally. All Market Makers would now be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same monthly rate regardless of the number of additional Limited Service MEI Ports they purchase. Certain market participants choose to purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and feel they need a certain number of connections to the Exchange to execute on those strategies. Other market participants may continue to choose to only utilize the free Limited Service MEI Ports to accommodate their own trading or quoting strategies, or other business models. All market participants elect to receive or purchase the amount of Limited Service MEI Ports they require based on their own business decisions and all market participants would be subject to the same fee structure and flat fee. Every market participant may receive up to four (4) free Limited Service MEI Ports and those that choose to purchase additional Limited Service MEI Ports may elect to do so based on their own business decisions and would continue to be subject to the same flat fee. The Exchange notes that it filed to amend this fee in 2016 and that filing contained the same fee structure, *i.e.,* a certain number of free Limited Service MEI Ports coupled with a flat fee for additional Limited Service MEI Ports.[126] At that time, the Commission did not find the structure to be unfairly

[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* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

discriminatory by virtue of that proposal surviving the 60-day suspension period. Therefore, the proposed changes to the fees for Limited Service MEI Ports is not unfairly discriminatory because it would continue to apply to all market participants equally and provides a fee structure that includes four free Limited Service MEI Ports for one monthly rate that was previously in place and filed with the Commission.

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 it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[127] 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.

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 has operated at a cumulative net annual loss since it launched operations in 2012 [128] 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, 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 proposed changes to the monthly rate for Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants. All market participants would be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be

[127] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[128] *See supra* note 124.

[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.

subject to the same flat fee regardless of the number of additional Limited Service MEI Ports they purchase. 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.

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,[131] 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.[132] 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.'' [133] 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.[134]

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[135] 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.[136] 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.'' [137] 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.[138]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[139] Cboe reasoned that purchasing additional Certification Logical Ports,

[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] *See* Cboe Fee Schedule, Page 12, Logical Connectivity Fees, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (BOE/FIX logical monthly port fees of $750 per port for ports 1–5 and $800 per port for port 6 or more; and BOE Bulk logical monthly port fees of $1,500 per port for ports 1–5, $2,500 per port for ports 6–30, and $3,000 for port 31 or more).

[132] *Id.* at 71676.

[133] *Id.*

[134] *Id.* at 71676.

[135] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *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'').

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.[140]

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.[141] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[142] 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.[143] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[144] BZX,[145] and Cboe EDGA Exchange, Inc.[146]

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, one comment letter on the Fourth Proposal and one comment letter on the Fifth Proposal, all from the same commenter.[147] 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,[148] and Rule 19b–4(f)(2)[149] 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–2023–39 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–2023–39. 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

[140] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[141] *Id.* at 18426.

[142] *Id.*

[143] *Id.*

[144] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[145] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[146] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

[147] *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, July 24, 2023 and September 18, 2023.

[148] 15 U.S.C. 78s(b)(3)(A)(ii).

[149] 17 CFR 240.19b–4(f)(2).

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–2023–39 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[150]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23040 Filed 10–18–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98753; File No. SR–PEARL–2023–55]

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

October 13, 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 October 2, 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 Members[4] 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

[150] 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.*

[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.

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 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 a revised proposal (SR–PEARL–2023–35) (the ''Fifth Proposal'').[18] Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with this further revised proposal (SR–PEARL–2023–55) (the ''Sixth Proposal'').

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth and Fifth 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 Emerald [19] (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, Fourth and Fifth Proposals, the fees themselves have not changed since the Initial, Second, Third, Fourth or Fifth 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* [20] 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 it 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.[21] 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.[22] 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'').[23] 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.'' [24] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[25] 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

[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.

[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] *See* Securities Exchange Act Release No. 98180 (August 21, 2023), 88 FR 58404 (August 25, 2023) (SR–PEARL–2023–35). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. *See* Securities Exchange Act Release No. 98658 (September 29, 2023) (SR–PEARL–2023–35).

[19] The term ''MIAX Emerald'' means MIAX Emerald, LLC. *See* Exchange Rule 100.

[20] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[21] *Id.*

[22] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[23] *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).

[24] *Id.* at page 2.

[25] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

court's mandate.'' [26] 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.[27] 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.'' [28] 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.'' [29] 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.'' [30]

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* [31] and remanded for further proceedings consistent with its opinion.[32] 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.'' [33] 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.[34] 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.*'' [35] 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.[36]

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.'' [37] 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'').[38] 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 filings [39]

[26] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[27] *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).

[28] 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'').

[29] *Id.*

[30] *Id.*

[31] *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.

[32] *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.*

[33] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[34] *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'').

[35] *Id.*

[36] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[37] *See supra* note 31, at page 2.

[38] 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.*

[39] 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

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.[40] 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 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.[41] 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 2020[42] and $80,383,000 for 2021.[43] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[44] and $22,843,000 for 2021.[45] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[46] and $44,800,000 for 2021.[47] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[48] and $30,687,000 for 2021.[49] 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.[50] 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.''[51]

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,[52] 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),[53] 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. There is little doubt that

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 flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[40] *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).

[41] 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.

[42] 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.*

[43] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[44] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[45] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[46] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[47] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[48] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[49] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[50] 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.*

[51] *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.

[52] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[53] *See, e.g.,* Cboe Fee Schedule, Page 4, Affiliate Volume Plan, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing that if a market maker or its affiliate receives a credit under Cboe's Volume Incentive Program (''VIP''), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) *and* NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf* (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

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 . . .'',[54] 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.[55] 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 Act [56] 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,[57] 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; [58] 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.[59]

* * * * *

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.[60] 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.[61] 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

[54] *See supra* note 28, at note 1.

[55] *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).

[56] 15 U.S.C. 78f(b)(4).

[57] 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.

[58] 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.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[59] 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.

[60] *See supra* note 9.

[61] *Id.*

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 networks[62] 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'').[63] 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 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,[64] a Full Service MEO Port-Single,[65] and a Limited Service MEO Port.[66] For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine[67] 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 Affiliates[68] on the Exchange, across all origin types, not including Excluded Contracts,[69] as compared to the Total Consolidated Volume (''TCV''),[70] 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 Makers[71] and Electronic Exchange Members[72] (''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,

[62] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[63] 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.'').

[64] ''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.

[65] ''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.

[66] ''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.

[67] A ''Matching Engine'' is a part of the Exchange's electronic system that processes options orders and trades on a symbol-by-symbol basis. *See* the Definitions Section of the Fee Schedule.

[68] ''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.

[69] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[70] ''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.

[71] 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.

[72] 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 proprietary trading. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

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.[73] 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 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.[74]

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.[75] 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.[76] 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

[73] *See* MIAX Fee Schedule, Section 5)d)ii) and MIAX Emerald Fee Schedule, Section 5)d)ii).

[74] *See id.*

[75] 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.

[76] *See* MIAX Fee Schedule, Section 5)d)ii), note ''*'' and MIAX Emerald Fee Schedule, Section 5)d)ii), note ''■''.

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,[77] 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 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.[78] This fee had been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[79] 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

[77] *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 (SQF) 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 SQF Interface Specification''). The NASDAQ SQF 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 SQF Interface Specification provides that the SQF 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.

[78] *Id. See also infra* table on page 129 and accompanying text.

[79] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

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,[80] 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.[81] 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 Act[82] in general, and furthers the objectives of section 6(b)(4) of the Act[83] 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 Act[84] 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 Order[85] and the Staff Guidance,[86] 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]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [87] 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.'' [88] 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.'' [89]

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, 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 2017[90] 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.[91] 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

[80] *See id.*

[81] *See* MIAX Fee Schedule, Section 5)d)ii); MIAX Emerald Fee Schedule, Section 5)d)ii).

[82] 15 U.S.C. 78f(b).

[83] 15 U.S.C. 78f(b)(4).

[84] 15 U.S.C. 78f(b)(5).

[85] *See supra* note 27.

[86] *See supra* note 28.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *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.*

[91] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10).

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.[92]

Later in 2018, as the Exchange's market share increased,[93] the Exchange adopted nominal fees for Full Service MEO Ports.[94] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[95] 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'. . . .'' [96]

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.'' [97]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [98] 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.'' [99] 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.'' [100] 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.'' [101]

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.

[92] *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–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).

[93] 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.*

[94] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[95] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[96] *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)).

[97] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[98] *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.'').

[99] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[100] *Id.*

[101] *See* Staff Guidance, *supra* note 28.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Pearl Options (as proposed) (equity options market share of 6.36% for the month of August 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).
NASDAQ [b] (equity options market share of 5.80% for the month of August 2023) [c].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port [d]	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 5.58% for the month of August 2023) [f].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	$1,100 per port.
NYSE American LLC ("NYSE American") [g] (equity options market share of 7.34% for the month of August 2023) [h].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	1–40 ports: $450 per port. 41 or more ports: $150 per port.
NASDAQ GEMX, LLC ("GEMX") [i] (equity options market share of 3.03% for the month of August 2023) [j].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$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.[102] 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.[103] A very small number

[102] *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.

[103] 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

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.[104]

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.[105] 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 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. 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.[106] If the Exchange is not at the national best bid or offer (''NBBO''),[107] 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.[108]

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,[109] or request sponsored access[110] through a member of an exchange in order to submit a trade directly to an options exchange.[111] 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).[112] 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.[113] Particularly, in the event that a market participant views the Exchange's direct

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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.''

[104] Service Bureaus may obtain ports on behalf of Members.

[105] *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.

[106] *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.*

[107] *See* Exchange Rule 100.

[108] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[109] 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.

[110] 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.

[111] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[112] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* US 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).

[113] 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.

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 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. 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 MIAX when MIAX Pearl Options commenced operations as a national securities exchange on February 7, 2017.[114] The 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,[115] 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.[116]

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

[114] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 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).

[115] *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).

[116] 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.

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.[117] 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 elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAX, or chose 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 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,[118] and Rule 19b–4 thereunder,[119] with respect to the types of information exchanges should provide when filing fee changes, and section 6(b) of the Act,[120] which requires, among other things, that exchange fees be reasonable and equitably allocated,[121] not designed to permit unfair discrimination,[122] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[123] 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.[124] 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-Members[125]) 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'').[126] 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

[117] *See supra* note 9.

[118] 15 U.S.C. 78s(b)(1).

[119] 17 CFR 240.19b–4.

[120] 15 U.S.C. 78f(b).

[121] 15 U.S.C. 78f(b)(4).

[122] 15 U.S.C. 78f(b)(5).

[123] 15 U.S.C. 78f(b)(8).

[124] *See* Staff Guidance, *supra* note 28.

[125] 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.

[126] The Exchange frequently updates it 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.

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,[127] 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 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

[127] 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.

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.[128] The Exchange confirms 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

[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 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

[128] *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 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).

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' time to 10Gb ULL connectivity (less than 17%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

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 42.9% 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 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 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.[129] 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 its allocated depreciation costs to providing physical 10Gb ULL connectivity.

[129] 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 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.

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 that 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.[130] 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.

[130] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

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.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 49.2% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 49.2% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 38 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 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).[131] 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized

[131] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26).

1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 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 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 under gone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it having more hardware that 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 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.

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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.

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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 [132]

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.[133] Importantly, the Exchange's affiliated markets submitted similar filings to also amend their fees for 10Gb ULL connectivity [134] and, when considering the profit margins attributed to 10Gb ULL connectivity for the affiliated markets and the Exchange collectively, the overall profit margin based on projected revenue and costs for the Exchange and its affiliated markets for 10Gb ULL connectivity is only 9.5%. This margin is in line with the profit margin MEMX anticipated making in a recent similar proposal to adopt connectivity fees, including fees for 10Gb connectivity, that the Commission Staff did not suspend and remains in effect today.[135]

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.[136]

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 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).[137] 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).[138] 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

[132] 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.

[133] 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 September 22, 2023).

[134] *See* SR–PEARL–2023–51, SR–MIAX–2023–39, and SR–EMERALD–2023–27.

[135] *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity and stating that MEMX would earn approximately 8.5% to 15% margin). MEMX's projected profit margin being for a single exchange and the Exchange and its affiliated markets aggregated profit margin being for four separate markets is not a material difference as both profit margins reflect the profit of the overall corporate entities that operate the exchange(s).

[136] *Id.*

[137] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[138] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

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.[139] 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 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

[139] 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/vprr/2300/23007743.pdf.*

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.[140] 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.[141] 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 it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[142] 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,[143] 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.[144] 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).

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 2017 [145] 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

[140] 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[141] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[142] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[143] *See supra* table on page 129 and accompanying text.

[144] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[145] *See supra* note 135.

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.[146] 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 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.[147] 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,[148] 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.[149] 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.'' [150]

[146] 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 135. 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.

[147] *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.

[148] *See* Cboe Fee Schedule, Page 12, Logical Connectivity Fees, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (BOE/FIX logical monthly port fees of $750 per port for ports 1–5 and $800 per port for port 6 or more; and BOE Bulk logical monthly port fees of $1,500 per port for ports 1–5, $2,500 per port for ports 6–30, and $3,000 for port 31 or more).

[149] *See supra* note 147 at 71676.

[150] *Id.*

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.[151]

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[152] 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.[153] 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.'' [154] 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.[155]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[156] 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.[157]

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.[158] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[159] 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.[160] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[161] BZX,[162] and Cboe EDGA Exchange, Inc.[163]

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

[151] *Id.* at 71676.

[152] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *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'').

[157] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe-2022–011).

[158] *Id.* at 18426.

[159] *Id.*

[160] *Id.*

[161] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[162] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[163] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

comment letter on the Second Proposal, one comment letter on the Third Proposal, one comment letter on the Fourth Proposal, and one comment letter on the Fifth Proposal, all from the same commenter.[164] 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,[165] and Rule 19b–4(f)(2) [166] 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–2023–55 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–2023–55. 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–2023–55 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[167]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23044 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

[164] *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, July 24, 2023 and September 18, 2023.

[165] 15 U.S.C. 78s(b)(3)(A)(ii).

[166] 17 CFR 240.19b–4(f)(2).

[167] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98749; File No. SR–GEMX–2023–12]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

October 13, 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 September 29, 2023, Nasdaq GEMX, LLC (''GEMX'' 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 the Exchange's GPS antenna fees at General 8, Section 1, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/gemx/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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange offers a GPS antenna, which allows customers to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service. The Exchange proposes to increase the monthly fee to $600 for the Service. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted.[3] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the datacenter and for inter-cabinet connections to other customers in the datacenter, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[4] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[5]

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[6] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. 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' . . . .'' [8]

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.'' [9]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [10] As a result, 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.'' [11] Accordingly, ''the existence of significant competition provides a

[3] *See* Securities Exchange Act Release No. 81902 (October 19, 2017), 82 FR 49453 (October 25, 2017) (SR–GEMX–2017–48).

[4] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[5] For example, Pico, Guava Tech, and SFTI provide GPS time synchronization services.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] *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)).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] *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.'').

[11] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [12] In its 2019 guidance on fee proposals, 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.'' [13]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors.[14] Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[15] In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on the design of the firm's systems and whether they use such time information to trigger trading decisions. The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[16] Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all customers that choose to subscribe. The proposed fees would apply to all customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any customer under the same fees as any other customer, and any market participant that wishes to purchase a GPS antenna 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.[17] 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–GEMX–2023–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–GEMX–2023–12. 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

[12] *Id.*

[13] *See* U.S. Securities and Exchange Commission, ''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*.

[14] Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option.

[15] Of the Exchange's customers that subscribe to the Service, approximately 9% of such customers purchase both the dedicated and the shared options of the Service.

[16] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

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–GEMX–2023–12 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23041 Filed 10–18–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98747; File No. SR–MRX–2023–19]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

October 13, 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 September 29, 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 the Exchange's GPS antenna fees at General 8, Section 1, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

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 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 offers a GPS antenna, which allows customers to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service. The Exchange proposes to increase the monthly fee to $600 for the Service. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted.[3] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the datacenter and for inter-cabinet connections to other customers in the datacenter, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[4] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced

[18] 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. 81907 (October 19, 2017), 82 FR 49447 (October 25, 2017) (SR–MRX–2017–21).

[4] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

time synchronization services) from other vendors.[5]

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[6] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. 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'. . . .'' [8]

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.'' [9]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [10] As a result, 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.'' [11] 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.'' [12] In its 2019 guidance on fee proposals, 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.'' [13]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors.[14] Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[15] In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on the design of the firm's systems and whether they use such time information to trigger trading decisions. The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[16] Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all customers that choose to subscribe. The proposed fees would apply to all customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other

[5] For example, Pico, Guava Tech, and SFTI provide GPS time synchronization services.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] *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)).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] *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.'').

[11] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[12] *Id.*

[13] *See* U.S. Securities and Exchange Commission, ''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.*

[14] Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option.

[15] Of the Exchange's customers that subscribe to the Service, approximately 9% of such customers purchase both the dedicated and the shared options of the Service.

[16] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any customer under the same fees as any other customer, and any market participant that wishes to purchase a GPS antenna 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.[17] 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–MRX–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–MRX–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–MRX–2023–19 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23035 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98751; File No. SR–EMERALD–2023–27]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify Certain Connectivity and Port Fees

October 13, 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 October 2, 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 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 Members [3] and non-Members; and (2) amend the monthly port fee for additional Limited Service MIAX Emerald Express Interface (''MEI'') Ports [4] 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, 2023, the Exchange withdrew the Fourth Proposal and replaced it with a revised proposal (SR–EMERALD–2023–19) (the ''Fifth Proposal'').[14] Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with this further revised proposal (SR–EMERALD–2023–27) (the ''Sixth Proposal'').

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth and Fifth 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

[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.

[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 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] *See* Securities Exchange Act Release No. 98176 (August 21, 2023), 88 FR 58341 (August 25, 2023) (SR–EMERALD–2023–19). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. *See* Securities Exchange Act Release No. 98656 (September 29, 2023) (SR–EMERALD–2023–19).

Pearl Equities) and MIAX [15] (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, Fourth and Fifth Proposals, the fees themselves have not changed since the Initial, Second, Third, Fourth or Fifth 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* [16] 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 it 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.[17] 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.[18] 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'').[19] 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.'' [20] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[21] 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.'' [22] 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.[23] 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.'' [24] 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.'' [25] 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.'' [26]

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* [27] and remanded for further proceedings consistent with its opinion.[28] 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.'' [29] 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.[30] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed,

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[15] The term ''MIAX'' means Miami International Securities Exchange, LLC. *See* Exchange Rule 100.

[16] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[17] *Id.*

[18] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[19] *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).

[20] *Id.* at page 2.

[21] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[22] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[23] *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).

[24] *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'').

[25] *Id.*

[26] *Id.*

[27] *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.

[28] *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.*

[29] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[30] *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'').

and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC*.'' [31] 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.[32]

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.'' [33] 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'').[34] 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 filings [35] 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.[36] 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 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.[37] 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 2020 [38] and $80,383,000 for 2021.[39] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [40] and $22,843,000 for 2021.[41] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity

[31] *Id.*

[32] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[33] *See supra* note 27, at page 2.

[34] 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.*

[35] 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 flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[36] *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).

[37] 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.

[38] 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.*

[39] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[40] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[41] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

fee'' revenue of $38,387,000 for 2020[42] and $44,800,000 for 2021.[43] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[44] and $30,687,000 for 2021.[45] 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.[46] 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.''[47]

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,[48] 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),[49] 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. 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 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.[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 Act[52] 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

[42] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[43] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[44] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[45] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[46] 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.*

[47] *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.

[48] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[49] *See, e.g.,* Cboe Fee Schedule, Page 4, Affiliate Volume Plan, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing that if a market maker or its affiliate receives a credit under Cboe's Volume Incentive Program (''VIP''), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) *and* NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf* (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

[50] *See supra* note 24, at note 1.

[51] *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); 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).

[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.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

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]

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks[56] 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'').[57]

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 amend the monthly port fee for Limited Service MEI Ports available to Market Makers.[58] The Exchange currently allocates two (2) Full Service MEI Ports[59] and two (2) Limited Service MEI Ports[60] per matching engine[61] 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. Prior to the Exchange's proposals to adopt a tiered fee structure for Limited Service MEI Ports, Market Makers were 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 (before the proposals to adopt a tiered fee structure).

Limited Service MEI Port Fee Changes

The Exchange now proposes to amend the monthly fee per Limited Service MEI Port and increase the number of free Limited Service MEI Ports per matching engine from two (2) to four (4). Specifically, the Exchange will now provide the first, second, third and fourth Limited Service MEI Ports for each matching engine free of charge. For additional Limited Service MEI Ports after the first four ports per matching engine that are provided for free (*i.e.,* beginning with the fifth Limited Service MEI Port), the Exchange proposes to increase the monthly fee from $100 to $420 per Limited Service MEI Port per matching engine.[62]

Market Makers that elect to purchase more than the number of Limited Service Ports that are provide for free do

[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 enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[56] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[57] 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.'').

[58] The Exchange notes that in its prior filings (the Initial, Second, Third, Fourth and Fifth Proposals), the Exchange proposed to adopt a tiered-pricing structure for Limited Service MEI Ports.

[59] 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.

[60] 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 administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[61] 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.

[62] 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''. The Exchange proposes to make a related change to add the term ''Limited Service MEI Ports'' after the word ''fourteen'' in the Fee Schedule.

so due to the nature of their business and their perceived need for numerous ports to access the Exchange. Meanwhile, Market Makers who utilize the free Limited Service MEI Ports do so based on their business needs.

The Exchange notes that it last proposed to increase its monthly Limited Service MEI Port fees in 2020 (other than the prior proposals to adopt a tiered fee structure for Limited Service MEI Ports),[63] and such increase proposed herein is designed to recover a portion of the ever increasing costs associated with directly accessing the Exchange.

The Exchange also proposes to make corresponding changes to the Definitions section of the Fee Schedule and the paragraph describing the cap on the number of Limited Service MEI Ports each Market Maker may receive in Section (5)(d)(ii) of the Fee Schedule to account for the proposed change to now provide the first four (4) Limited Service MEI Ports for free per matching engine. Accordingly, the Exchange proposes to amend the last sentence of the paragraph describing the fees for Limited Service MEI Ports in Section (5)(d)(ii) of the Fee Schedule to now state that Market Makers are limited to ten additional Limited Service MEI Ports per matching engine, for a total of fourteen Limited Service MEI Ports per matching engine.

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 Act[64] in general, and furthers the objectives of section 6(b)(4) of the Act[65] 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 Act[66] 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 Order[67] and the Staff Guidance,[68] 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]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [69] 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.'' [70] 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.'' [71]

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, 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

[63] *See supra* note 6.

[64] 15 U.S.C. 78f(b).

[65] 15 U.S.C. 78f(b)(4).

[66] 15 U.S.C. 78f(b)(5).

[67] *See supra* note 23.

[68] *See supra* note 24.

[69] *Id.*

[70] *Id.*

[71] *Id.*

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.[72]

Later in 2020, as the Exchange's market share increased,[73] 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.[74] 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'. . . .'' [75]

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.'' [76]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [77] 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.'' [78] 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.'' [79] 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.'' [80]

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.

[72] *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–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).

[73] 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/.*

[74] *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).

[75] *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)).

[76] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[77] *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.'').

[78] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[79] *Id.*

[80] *See* Staff Guidance, *supra* note 24.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Emerald (as proposed) (equity options market share of 2.69% for the month of August 2023) [a].	10Gb ULL connection	$13,500.
	Limited Service MEI Ports	1–4 ports: FREE. 5 or more ports: $420 each.
NASDAQ [b] (equity options market share of 5.80% for the month of August 2023) [c].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	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 5.58% for the month of August 2023) [e].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port [f]	$1,100 per port.
NYSE American LLC (“NYSE American”) [g] (equity options market share of 7.34% for the month of August 2023) [h].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	1–40 Ports: $450 per port. 41 or more Ports: $150 per port.
NASDAQ GEMX, LLC (“GEMX”) [i] (equity options market share of 3.03% for the month of August 2023) [j].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$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, 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.[81] 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.[82]

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.[83] 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

[81] 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.’’

[82] Service Bureaus may obtain ports on behalf of Members.

[83] *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.

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.[84] If the Exchange is not at the national best bid or offer (''NBBO''),[85] 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.[86]

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,[87] or request sponsored access [88] through a member of an exchange in order to submit a trade directly to an options exchange.[89] 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).[90] 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.[91] 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 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. 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,[92] and Rule 19b–4 thereunder,[93] with respect to the types of information exchanges should provide when filing fee changes, and section 6(b) of the Act,[94] which requires,

[84] *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.*

[85] *See* Exchange Rule 100.

[86] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[87] 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.

[88] 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.

[89] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[90] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at* US 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).

[91] 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.

[92] 15 U.S.C. 78s(b)(1).

[93] 17 CFR 240.19b–4.

[94] 15 U.S.C. 78f(b).

among other things, that exchange fees be reasonable and equitably allocated,[95] not designed to permit unfair discrimination,[96] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[97] 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.[98] 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 [99]) 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 amend the monthly fee for additional Limited Service MEI Ports and provide two additional ports free of charge for a total of four free Limited Service MEI Ports per matching engine to which each Member connects.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[100] 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,[101] 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

[95] 15 U.S.C. 78f(b)(4).

[96] 15 U.S.C. 78f(b)(5).

[97] 15 U.S.C. 78f(b)(8).

[98] *See* Staff Guidance, *supra* note 24.

[99] 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.

[100] The Exchange frequently updates it 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.

[101] 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.

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 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' time to 10Gb ULL connectivity (less than 20%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

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, 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 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.[102] 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

[102] 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.

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.[103] 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 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.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 51.3% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 51.3% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintiain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 18 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 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

[103] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

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).[104] 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.

[104] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26).

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 August 2023, MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports and MIAX Market Makers utilized 1,781 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 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 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 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 August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 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.[105]

* * * * *

Approximate Cost per Limited Service MEI Port per Month

Based on August 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 utilized by Members in August, which was 1,030 (and includes free and charged ports), resulting in an approximate cost of $144 per port per month (when rounding to the nearest dollar). The Exchange used the total number of Limited Service MEI Ports it maintained in August for all Members and included free and charged ports. However, in 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 when the Exchange discussed the approximate cost per port per month, but did include the two free Limited Service MEI Ports in the total expense amounts. As described herein, the Exchange changed its proposed fee structure since past filings to now offer four free Limited Service MEI Ports per matching engine to which each Member connects. After the first four free Limited Service MEI Ports, the Exchange proposes to charge $420 per Limited Service MEI Port per matching engine, up to a total of fourteen (14) Limited Service MEI Ports per matching engine.

For the sake of clarity, if a Member wanted to connect to all 12 of the Exchange's matching engines and utilize the maximum number of Limited Service MEI Ports on each matching engine (*i.e.,* 14), that Member would have a total of 168 Limited Service MEI Ports (12 matching engines multiplied by 14 Limited Service MEI Ports per matching engine). With the proposed increase to now provide four Limited Service MEI Ports for free on each matching engine, that particular Member would receive 48 free Limited Service MEI Ports (4 free Limited Service MEI Ports multiplied by 12 matching engines), and be charged for the remaining 120 Limited Service MEI Ports (168 total Limited Service MEI Ports across all matching engines minus 48 free Limited Service MEI Ports across all matching engines).

As mentioned above, Members utilized a total of 1,030 Limited Service MEI Ports in the month of August 2023 (free and charged ports combined). Using August 2023 data to extrapolate out after the proposed changes herein go into effect, the total number of Limited Service MEI Ports that the Exchange would not charge for as a result of this increase in free ports is 468 (meaning the Exchange would charge for only 562 ports) and amounts to a total expense of $67,392 per month to the Exchange ($144 per port multiplied by 468 free Limited Service MEI Ports).

* * * * *

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 (42.4%) 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,

[105] 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.

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.[106] Importantly, the Exchange's affiliated markets submitted similar filings to also amend their fees for 10Gb ULL connectivity[107] and, when considering the profit margins attributed to 10Gb ULL connectivity for the affiliated markets and the Exchange collectively, the overall profit margin based on projected revenue and costs for the Exchange and its affiliated markets for 10Gb ULL connectivity is only 9.5%. This margin is in line with the profit margin MEMX anticipated making in a recent similar proposal to adopt connectivity fees, including fees for 10Gb connectivity, that the Commission Staff did not suspend and remains in effect today.[108]

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal $1,779,066. Based on August 2023 data for Limited Service MEI Port usage and counting for the proposed increase in free Limited Service MEI Ports and proposed increase in the monthly fee from $100 to $420 per port, the Exchange would generate annual

[106] 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 September 22, 2023).

[107] *See* SR–PEARL–2023–51, SR–PEARL–2023–55, and SR–MIAX–2023–39.

[108] *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity and stating that MEMX would earn approximately 8.5% to 15% margin). MEMX's projected profit margin being for a single exchange and the Exchange and its affiliated markets aggregated profit margin being for four separate markets is not a material difference as both profit margins reflect the profit of the overall corporate entities that operate the exchange(s).

revenue of approximately $2,832,480. 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.[109] 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, utilizing August 2023 data, MIAX Emerald Market Makers utilized 1,030 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 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).[110] 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).[111] 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.[112] 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

[109] *Id.*

[110] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[111] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[112] 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/vprr/2300/23007742.pdf.*

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.[113] 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 proposed changes to the monthly fee for Limited Service MEI Ports is not unfairly discriminatory because it would apply to all Market Makers equally. All Market Makers would now be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same monthly rate regardless of the number of additional Limited Service MEI Ports they purchase. Certain market participants choose to purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and feel they need a certain number of connections to the Exchange to execute on those strategies. Other market participants may continue to choose to only utilize the free Limited Service MEI Ports to accommodate their own trading or quoting strategies, or other business models. All market participants elect to receive or purchase the amount of Limited Service MEI Ports they require based on their own business decisions and all market participants would be subject to the same fee structure and flat fee. Every market participant may receive up to four (4) free Limited Service MEI Ports and those that choose to purchase additional Limited Service MEI Ports may elect to do so based on their own business decisions and would continue to be subject to the same flat fee. The Exchange notes that it filed to amend this fee in 2020 and that filing contained the same fee structure, *i.e.,* a certain number of free Limited Service MEI Ports coupled with a flat fee for additional Limited Service MEI Ports.[114] At that time, the Commission did not find the structure to be unfairly discriminatory by virtue of that proposal surviving the 60-day suspension period. Therefore, the proposed changes to the fees for Limited Service MEI Ports is not unfairly discriminatory because it would continue to apply to all market participants equally and provides a fee structure that includes four free Limited Service MEI Ports for one monthly rate that was previously in place and filed with the Commission.

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 it surveillance

[113] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[114] *See supra* note 6.

program and to satisfy its record keeping requirements under the Exchange Act.[115] 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.

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 2021 [116] 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.[117]

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 proposed changes to the monthly rate for Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants. All market participants would be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same flat fee regardless of the number of additional Limited Service MEI Ports they purchase. 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

[115] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[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/vprr/2200/22001164.pdf.*

[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* 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.

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, one comment letter on the Fourth Proposal and one comment letter on the Fifth 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–2023–27 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–2023–27. 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–2023–27 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[121]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23038 Filed 10–18–23; 8:45 am]

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[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, July 24, 2023 and September 18, 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).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98748; File No. SR–ISE–2023–21]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

October 13, 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 September 29, 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 the Exchange's GPS antenna fees at General 8, Section 1, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

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 Exchange offers a GPS antenna, which allows customers to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service. The Exchange proposes to increase the monthly fee to $600 for the Service. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted.[3] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the datacenter and for inter-cabinet connections to other customers in the datacenter, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[4] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[5]

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[6] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 81903 (October 19, 2017), 82 FR 49450 (October 25, 2017) (SR–ISE–2017–91).

[4] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[5] For example, Pico, Guava Tech, and SFTI provide GPS time synchronization services.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. 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'. . . .'' [8]

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.'' [9]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [10] As a result, 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.'' [11] 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.'' [12] In its 2019 guidance on fee proposals, 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.'' [13]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors.[14] Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[15] In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on the design of the firm's systems and whether they use such time information to trigger trading decisions. The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[16] Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all customers that choose to subscribe. The proposed fees would apply to all customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any customer under the same fees as any other customer, and any market participant that wishes to purchase a GPS antenna can do so on a non-discriminatory basis.

[8] *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)).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] *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.'').

[11] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[12] *Id.*

[13] *See* U.S. Securities and Exchange Commission, ''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.*

[14] Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option.

[15] Of the Exchange's customers that subscribe to the Service, approximately 9% of such customers purchase both the dedicated and the shared options of the Service.

[16] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

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.[17] 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–ISE–2023–21 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–2023–21. 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–2023–21 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23042 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98743; File No. SR–Phlx–2023–46]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

October 13, 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 September 29, 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 amend the Exchange's GPS antenna fees at General 8, Section 1, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

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 Exchange offers a GPS antenna, which allows customers to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The Exchange currently charges a monthly fee of $200 for the Service. The Exchange proposes to increase the monthly fee to $600 for the Service. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted in 2010.[3] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the datacenter and for inter-cabinet connections to other customers in the datacenter, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[4] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[5]

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[6] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. 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'. . . .''[8]

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.''[9]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' ''[10] As a result, 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.''[11] 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.''[12] In its 2019 guidance on fee proposals, 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.''[13]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors.[14] Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[15] In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may

[3] *See* Securities Exchange Act Release No. 62395 (June 28, 2010), 75 FR 38584 (July 2, 2010) (SR–Phlx–2010–18).

[4] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[5] For example, Pico, Guava Tech, and SFTI provide GPS time synchronization services.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] *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)).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] *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.'').

[11] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[12] *Id.*

[13] *See* U.S. Securities and Exchange Commission, ''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.*

[14] Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option.

[15] Of the Exchange's customers that subscribe to the Service, approximately 9% of such customers purchase both the dedicated and the shared options of the Service.

depend, among other factors, on the design of the firm's systems and whether they use such time information to trigger trading decisions. The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[16] Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all customers that choose to subscribe. The proposed fees would apply to all customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any customer under the same fees as any other customer, and any market participant that wishes to purchase a GPS antenna 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.[17]

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–2023–46 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–2023–46. 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–2023–46 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23037 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

[16] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98744; File No. SR–NASDAQ–2023–039]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

October 13, 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 September 29, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's GPS antenna fees at General 8, Section 1, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange offers a GPS antenna, which allows customers to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service. The Exchange proposes to increase the monthly fee to $600 for the Service. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted in 2010.[3] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the datacenter and for inter-cabinet connections to other customers in the datacenter, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[4] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[5]

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[6] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several

[3] *See* Securities Exchange Act Release No. 61488 (February 3, 2010), 75 FR 6748 (February 10, 2010) (SR–NASDAQ–2010–019).

[4] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[5] For example, Pico, Guava Tech, and SFTI provide GPS time synchronization services. 211.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. 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'. . . .'' [8]

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.'' [9]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [10] As a result, 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.'' [11] 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.'' [12] In its 2019 guidance on fee proposals, 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.'' [13]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors.[14] Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[15] In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on the design of the firm's systems and whether they use such time information to trigger trading decisions. The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[16] Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all customers that choose to subscribe. The proposed fees would apply to all customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any customer under the same fees as any other customer, and any market participant that wishes to purchase a GPS antenna can do so on a non-discriminatory basis.

[8] *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)).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] *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.'').

[11] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[12] *Id.*

[13] *See* U.S. Securities and Exchange Commission, ''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.*

[14] Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option.

[15] Of the Exchange's customers that subscribe to the Service, approximately 9% of such customers purchase both the dedicated and the shared options of the Service.

[16] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

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.[17]

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–NASDAQ–2023–039 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NASDAQ–2023–039. 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–NASDAQ–2023–039 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23039 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–146, OMB Control No. 3235–0134]

Submission for OMB Review; Comment Request; Extension: Rule 15c1–7

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of FOIA Services, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 15c1–7 (17 CFR 240.15c1–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 15c1–7 states that any act of a broker-dealer designed to effect securities transactions with or for a customer account over which the broker-dealer (directly or through an agent or employee) has discretion will be considered a fraudulent, manipulative, or deceptive practice under the federal securities laws, unless a record is made of the transaction immediately by the broker-dealer. The record must include (a) the name of the customer, (b) the name, amount, and price of the security, and (c) the date and time when such transaction took place. The Commission estimates that 350 respondents collect information related to approximately 400,000 transactions annually under Rule 15c1–7 and that each respondent would spend approximately 5 minutes on the collection of information for each transaction, for a total time burden of approximately 33,333 hours per year (approximately 95.2 hours per respondent).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by November 20, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 16, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23096 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98745; File No. SR–BX–2023–025]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

October 13, 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 September 29, 2023, Nasdaq BX, Inc.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(''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 the Exchange's GPS antenna fees at General 8, Section 1, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

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 Exchange offers a GPS antenna, which allows customers to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service. The Exchange proposes to increase the monthly fee to $600 for the Service. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted in 2010.[3] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the datacenter and for inter-cabinet connections to other customers in the datacenter, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[4] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[5]

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[6] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. 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'. . . .'' [8]

[3] *See* Securities Exchange Act Release No. 62396 (June 28, 2010), 75 FR 38585 (July 2, 2010) (SR–BX–2010–012).

[4] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[5] For example, Pico, Guava Tech, and SFTI provide GPS time synchronization services.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No.

Continued

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.'' [9]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [10] As a result, 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.'' [11] 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.'' [12] In its 2019 guidance on fee proposals, 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.'' [13]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors.[14] Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[15] In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on the design of the firm's systems and whether they use such time information to trigger trading decisions. The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[16] Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all customers that choose to subscribe. The proposed fees would apply to all customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any customer under the same fees as any other customer, and any market participant that wishes to purchase a GPS antenna 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.[17]

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

59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[9] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] *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.'').

[11] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[12] *Id.*

[13] *See* U.S. Securities and Exchange Commission, ''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.*

[14] Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option.

[15] Of the Exchange's customers that subscribe to the Service, approximately 9% of such customers purchase both the dedicated and the shared options of the Service.

[16] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

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–BX–2023–025 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–2023–025. 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–2023–025 and should be submitted on or before November 9, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23043 Filed 10–18–23; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18244 and #18245; MONTANA Disaster Number MT–00174]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Montana

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 Montana (FEMA–4745–DR), dated 10/11/2023.

Incident: Flooding.

Incident Period: 06/01/2023 through 06/08/2023.

DATES: Issued on 10/11/2023.

Physical Loan Application Deadline Date: 12/11/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 07/11/2024.

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: Alan 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 10/11/2023, 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:

Carbon, Daniels, Fergus, Garfield, Golden Valley, Musselshell, Petroleum, Phillips, Stillwater, Treasure.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 18244 6 and for economic injury is 18245 0.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–23060 Filed 10–18–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18061 and #18062; HAWAII Disaster Number HI–00073]

Presidential Declaration Amendment of a Major Disaster for the State of Hawaii

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Hawaii (FEMA–4724–DR), dated 08/10/2023.

Incident: Wildfires, including High Winds.

Incident Period: 08/08/2023 and continuing.

DATES: Issued on 10/11/2023.

Physical Loan Application Deadline Date: 11/09/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/10/2024.

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: Alan 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: The notice of the President's major disaster declaration for the State of Hawaii, dated 08/10/2023, is hereby amended to expand the incident for this disaster to include high winds.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–23061 Filed 10–18–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18016 and #18017; Vermont Disaster Number VT–00046]

Presidential Declaration Amendment of a Major Disaster for the State of Vermont

AGENCY: Small Business Administration.

ACTION: Amendment 7.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Vermont (FEMA–4720–DR), dated 07/14/2023.

Incident: Severe Storms, Flooding, Landslides, and Mudslides.

Incident Period: 07/07/2023 through 07/21/2023.

DATES: Issued on 10/10/2023.

Physical Loan Application Deadline Date: 10/31/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 04/15/2024.

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: Alan 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: The notice of the President's major disaster declaration for the State of Vermont, dated 07/14/2023, is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 10/31/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–23063 Filed 10–18–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12237]

Notice of Renewal of the Charter of the Department of State's Advisory Committee on Private International Law

The Department of State has renewed the Charter of the Advisory Committee on Private International Law for two more years. Through the Committee, the Department of State obtains the views of the public with respect to significant private international law issues that arise in international organizations of which the United States is a Member State, in international bodies in whose work the United States has an interest, or in the foreign relations of the United States. The Committee is comprised of representatives from other government agencies, representatives of national organizations, experts and professionals active in the field of international law. Comments should be sent to the Office of the Assistant Legal Adviser for Private International Law at *PIL@state.gov.* Copies of the Charter may be obtained by contacting Tricia Smeltzer at *smeltzertk@state.gov.*or found online at *https://www.facadatabase.gov/FACA/FACAPublicPage.*

Authority: 41 CFR 102–3.65 and 22 U.S.C. 2651a.

Joseph N. Khawam,

Attorney-Adviser, Office of Private International Law, Office of the Legal Adviser, Department of State.

[FR Doc. 2023–23059 Filed 10–18–23; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Meetings; Commercial Space Transportation Advisory Committee

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

ACTION: Notice of Commercial Space Transportation Advisory Committee (COMSTAC) meeting.

SUMMARY: This notice announces a meeting of the Commercial Space Transportation Advisory Committee.

DATES: The meeting will take place on November 8, 2023, from 12 p.m. to 4 p.m. eastern time.

ADDRESSES: The FAA will post instructions on how to virtually attend the meeting, copies of meeting minutes, and a detailed agenda will be posted on the COMSTAC website at: *https://www.faa.gov/space/additional_information/comstac/.*

FOR FURTHER INFORMATION CONTACT: Brian A. Verna, Designated Federal Officer, U.S. Department of Transportation, telephone (202) 267–1710; email *brian.verna@faa.gov.* Submit any committee-related request to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Department of Transportation created the Commercial Space Transportation Advisory Committee under the Federal Advisory Committee Act (FACA) in accordance with Public Law 92–463. Since its inception, industry-led COMSTAC has provided information, advice, and recommendations to the U.S. Department of Transportation through FAA regarding technology, business, and policy issues relevant to oversight of the U.S. commercial space transportation sector.

II. Proposed Agenda

- Welcome Remarks
  - Designated Federal Officer
  - COMSTAC Chair and Vice Chair
  - Associate Administrator for AST
- Speaker: Deputy Secretary of Transportation Polly Trottenberg (tentative)
- FAA ARP ''Aeronautical Activity'' Definition Update
- Lessons Learned Information System—FAA and COMSTAC discussion
- FAA feedback on recent recommendations and COMSTAC discussion
- COMSTAC membership discussion
- COMSTAC discuss and assign tasks for Spring 2024
- Public Comment Period
- Closing Comments
- Adjournment

III. Public Participation

The meeting listed in this notice will be open to the public virtually. Please see the website no later than five working days before the meeting for details on viewing the meeting on YouTube.

If you are in need of assistance or require a reasonable accommodation for this meeting, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section at least 10 calendar days before the meeting. The FAA can make sign and oral interpretation available if it is requested 10 calendar days before the meeting.

Interested members of the public may submit relevant written statements for the COMSTAC members to consider

under the advisory process. Statements may concern the issues and agenda items mentioned above and/or additional issues that may be relevant to the U.S. commercial space transportation industry. Interested parties wishing to submit written statements should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section in writing (mail or email) by November 5, 2023, so that the information is available to COMSTAC members for their review and consideration before the meeting. Written statements should be in the following formats: One hard copy with original signature and/or one electronic copy via email. The preference for email submissions is Portable Document Format (PDF) attachments. A detailed agenda will be posted on the FAA website at *https://www.faa.gov/space/additional_information/comstac/.*

Issued in Washington, DC.

Brian A. Verna,

Designated Federal Officer, Commercial Space Transportation Advisory Committee, Federal Aviation Administration, Department of Transportation.

[FR Doc. 2023–23086 Filed 10–18–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–32]

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, this notice announces that FRA is forwarding the Information Collection Requests (ICRs) summarized below to the Office of Management and Budget (OMB) for review and comment. These ICRs describes the information collection and its expected burden. On August 8, 2023, FRA published a notice providing a 60-day period for public comment on the two ICRs.

DATES: Interested persons are invited to submit comments on or before November 20, 2023.

ADDRESSES: Written comments and recommendations for the proposed ICRs should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

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 issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On August 8, 2023, FRA published a 60-day notice in the **Federal Register** soliciting public comment on the ICRs for which it is now seeking OMB approval. *See* 88 FR 53581. FRA has received no comments related to the proposed collections of information.

Before OMB decides whether to approve the proposed collections of information, it must provide 30-days' notice for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICRs regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information 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 to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summaries below describe the ICRs that FRA will submit for OMB clearance as the PRA requires:

Title: Passenger Train Emergency Procedures.

OMB Control Number: 2130–0545.

Abstract: The railroad passenger train emergency preparedness regulations under 49 CFR part 239, set forth FRA's requirements for railroads to meet Federal standards for the preparation, adoption, and implementation of emergency preparedness plans connected with the operation of passenger trains, including freight railroads hosting passenger rail service operations. Part 239 also requires each affected railroad to instruct its employees on the provisions of its plan. The information collected is necessary for compliance with the regulation.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses (Railroads).

Form(s): N/A.

Respondent Universe: 34 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 1,572.

Total Estimated Annual Burden: 353 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $30,342.

Title: Passenger Train Emergency Systems.

OMB Control Number: 2130–0576.

Abstract: This information collection is related to passenger train emergency systems regulations under 49 CFR part 238. The purpose of this part is to prevent collisions, derailments, and other occurrences involving railroad passenger equipment that cause injury or death to railroad employees, railroad passengers, or the general public, and to mitigate the consequences of such occurrences to the extent they cannot be prevented. Some of the regulations FRA established under this part include requirements for emergency passage through vestibule and other interior passageway doors and enhanced emergency egress and rescue signage; [1] requirements for low-location emergency exit path markings to assist occupants in reaching and operating emergency exits, particularly under conditions of limited visibility; and standards to ensure emergency lighting systems are provided in all passenger cars and enhanced requirements for the survivability of emergency lighting systems in new passenger cars.

[1] 78 FR 71785 (Nov. 29, 2013).

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses (railroads).

Form(s): N/A.

Respondent Universe: 34 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 8,335.

Total Estimated Annual Burden: 755.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $64,841.

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. 2023–23068 Filed 10–18–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0077]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Comment; Alcohol-Impaired Driving Segmentation Study

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a request for approval of a new information collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) summarized below will be submitted to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected burden. This document describes a new information collection for consumer research purposes regarding a one-time online voluntary study to better understand attitudes and behaviors related to alcohol-impaired driving that will enhance and refine communication strategy and tactics. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on June 7, 2023, Document 2023–12102. Two (2) comments were received before the closing date of August 7, 2023.

DATES: Comments must be submitted on or before November 20, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection, including suggestions for reducing burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function.

FOR FURTHER INFORMATION CONTACT: For additional information or access to background documents, contact Kil-Jae Hong, Marketing Specialist, Office of Communications and Consumer Information (NCO–200), 202–493–0524, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), a Federal agency must receive approval from the Office of Management and Budget (OMB) before it collects certain information from the public and a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In compliance with these requirements, this notice announces that the following information collection request will be submitted OMB.

Title: Alcohol-Impaired Driving Segmentation Study.

OMB Control Number: 2127–New.

Form Number: NHTSA Form 1710, NHTSA Form 1711.

Type of Request: Request for approval of a new information collection.

Type of Review Requested: Regular.

Length of Approval Requested: Three years from approval date.

Summary of the Collection of Information: The National Highway Traffic Safety Administration (NHTSA), under the U.S. Department of Transportation (USDOT), was established to reduce the number of deaths, injuries and economic losses resulting from motor vehicle crashes on the nation's highways. In keeping with this mission and to fulfill a congressional mandate to improve highway traffic safety, NHTSA's Office of Communications and Consumer Information (OCCI) is dedicated to eliminating risky behaviors on our nation's roads through public awareness campaigns. One of the most significant NHTSA's OCCI seeks to address through these efforts is drunk driving.

Drunk driving is a significant cause of highway fatalities, injuries and economic losses. Alcohol-impaired driving fatalities totaled 11,654 in 2020, accounting for 30% of all motor-vehicle-crash fatalities.[1] On average, in 2020, there was an alcohol-impaired driving fatality every 45 minutes.[2] Among motorcycle riders, in particular, 27% of riders in fatal crashes were legally drunk—a rate exceeding that of passenger car drivers (23%) and the highest among all vehicle types measured.[3] Aside from the fatalities, alcohol-impaired driving crashes carried an economic cost of an estimated $44 billion in 2010 (the most recent year for which cost data is available).[4]

In order for NHTSA's public awareness campaigns on drunk driving to be effective, they must effectively ''compete'' for audience attention in the public domain among hundreds of other major marketers, including those in the alcoholic beverage industry that strategically target messages to particular groups of the public marketplace. In the consumer marketing context and environment, NHTSA must work to convince members of the driving/riding public not to operate vehicles when impaired by alcohol. Accordingly, NHTSA finds that it is necessary to conduct research, as authorized by the National Traffic Motor Vehicle Safety Act, to conduct research that will allow NHTSA to better tailor its communication strategies.

Specifically, NHTSA believes a segmentation analysis would be especially useful to NHTSA. More closely understanding and segmenting drunk drivers and motorcycle riders will enable more effective communications programs. Insights about drunk drivers'/motorcycle riders' lifestyle characteristics, alcohol-consumption behaviors and attitudes towards drunk driving will provide useful, pragmatic information for NHTSA's continuing efforts to address the drunk driving/motorcycle riding issue responsible for so many deaths.

Accordingly, NHTSA is seeking approval to conduct a one-time voluntary study to obtain information to better understand attitudes and

[1] 2020 Alcohol Impaired Driving (Traffic Safety Facts. Report No. DOT HS 813 294).

[2] Ibid.

[3] Ibid.

[4] National Center for Statistics and Analysis. (2015, July). Overview: 2013 data. (Traffic Safety Facts. Report No. DOT HS 812 169). Washington, DC: National Highway Traffic Safety Administration.

behaviors related to alcohol-impaired driving that will be used to enhance and refine communication strategy and tactics (*i.e.,* more effectively target and message at-risk drivers and motorcycle riders). The study will survey drivers and motorcycle riders ages 21- to 54-years-old because this age range represents the greatest number of alcohol-related driving/riding fatalities according to NHTSA's Fatality Analysis Reporting System (FARS).[5]

The research study will include two components, both being one-time collections. The first component will involve a series of online webcam interviews that will collect qualitative information that will serve as a cognitive test to improve the quantitative survey that will be administered in the second component. The quantitative survey will be administered online and by phone (and potentially supplemented by mail if needed). After collecting the data, segmentation analysis will be done to classify drivers and motorcycle riders according to segments based on common demographics, drinking behaviors, attitudes about drinking and driving/motorcycle riding, and lifestyle characteristics. The segmentation profiles will be used by NHTSA's Office of Communications and Consumer Information (OCCI) to better target and reach intended audiences with communications messages and techniques that are relevant and meaningful to people within the target market.

60-Day Notice: A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on June 7, 2023 (FR Doc. 2023–12102). NHTSA received two (2) comments. NHTSA received comments from the National Association of Mutual Insurance Companies (NAMIC) and Responsibility.org. Both NAMIC and Responsibility.org supported NHTSA's alcohol-segmentation study efforts to inform communications initiatives to prevent alcohol-impaired driving and both requested future consideration to collaborate on communications efforts. [insert whether we received comments and if so, how many.

NHTSA Response: NHTSA appreciates the support from NAMIC and Responsibility.org. NHTSA recognizes the actions that both are taking to help communicate the dangers of impaired driving and the efforts that they are taking to decrease this behavior on US roadways. NHTSA looks forward to completing this study, sharing the results, and having discussions with both NAMIC and Responsibility.org on how we can work together to decrease impaired-driving crashes, injuries and fatalities in the US.

Affected Public: Vehicle Drivers and Motorcycle Riders ages 21–54 (English and Spanish-speaking).

Estimated Number of Respondents: 5,400.

Frequency: One-time.

Number of Responses: 5,400.

Estimated Total Annual Burden Hours: 3,574.67.

Estimated Total Annual Burden Cost: $119,250.99.

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) 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) 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; (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 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29A.

Issued on October 16, 2023.

Juliette Marie Vallese,

Associate Administrator, Office of Communications and Consumer Information.

[FR Doc. 2023–23076 Filed 10–18–23; 8:45 am]

BILLING CODE 4910–59–P

[5] 2020 Alcohol Impaired Driving (Traffic Safety Facts. Report No. DOT HS 813 294).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[DOT–OST–2023–0137]

Advisory Committee on Transportation Equity (ACTE); Notice of Public Meeting

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: DOT OST announces a meeting of ACTE, which will take place via Zoom.

DATES: The meeting will be held Friday, November 3, 2023, from 2:30 to 4:30 p.m. Eastern Time. Requests for accommodations because of a disability must be received by Friday, October 27. Requests to submit questions must be received no later than Friday, October 27. The registration form will close on Friday, October 27.

ADDRESSES: The meeting will be held via Zoom. Those members of the public who would like to participate virtually should go to *https://www.transportation.gov/civil-rights/acte/meetinginfo* to access the meeting, a detailed agenda for the entire meeting, meeting minutes, and additional information on ACTE and its activities.

FOR FURTHER INFORMATION CONTACT: Sandra Norman, Senior Advisor and Designated Federal Officer, Departmental Office of Civil Rights, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, (804) 836–2893, *ACTE@dot.gov.* Any ACTE-related request or submissions should be sent via email to the point of contact listed above.

SUPPLEMENTARY INFORMATION:

Background

Purpose of the Committee

ACTE was established to provide independent advice and recommendations to the Secretary of Transportation about comprehensive, interdisciplinary issues related to civil rights and transportation equity in the planning, design, research, policy, and advocacy contexts from a variety of transportation equity practitioners and community leaders. Specifically, the Committee will provide advice and recommendations to inform the Department's efforts to:

Implement the Agency's Equity Action Plan and Strategic Plan, helping to institutionalize equity into Agency programs, policies, regulations, and activities;

Strengthen and establish partnerships with overburdened and underserved communities who have been historically underrepresented in the Department's outreach and engagement, including those in rural and urban areas;

Empower communities to have a meaningful voice in local and regional transportation decisions; and

Ensure the compliance of Federal funding recipients with civil rights laws and nondiscrimination programs, policies, regulations, and activities.

Meeting Agenda

The agenda for the meeting will consist of:

Setting the full committee schedule
Formalizing committee goals
Reviewing community agreements

Announcing subcommittee leaders and members
Defining expectations for subcommittee work products including the first deliverables
An open discussion with the public
Discussing next steps
Meeting Participation

Advance registration is required. Please register at *https://strategixmanagement.zoom.us/webinar/register/WN_1wT0xl2pQgysQPzGXwg7Qw#/registration* by the deadline referenced in the **DATES** section. The meeting will be open to the public for its entirety. The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the points of contact listed in the **FOR FURTHER INFORMATION CONTACT** section. Questions from the public will be answered during the public comment period only at the discretion of the ACTE chair, vice chair, and designated Federal officer. Members of the public may submit written comments and questions to the points of contact listed in the **FOR FURTHER INFORMATION CONTACT** section on the topics to be considered during the meeting by the deadline referenced in the **DATES** section.

Dated: October 16, 2023.

Irene Marion,

Director, Departmental Office of Civil Rights.

[FR Doc. 2023–23094 Filed 10–18–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0706]

Agency Information Collection Activity: Application for Reimbursement of National Exam Fee; Withdrawn

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice; withdrawal.

SUMMARY: On Thursday October, 13, 2023 the Veterans Benefits Administration (VA), published a notice in the **Federal Register** announcing an opportunity for public comment on the proposed collection Application for Reimbursement of National Exam Fee VA Form 22–0810. This notice was published in error; therefore, this document corrects that error by withdrawing this FR notice, document number 2023–19049.

DATES: As of Thursday October, 13, 2023, the FR notice published at 88 FR 19049 on Thursday October, 13, 2023, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.*

SUPPLEMENTARY INFORMATION: FR Doc. 2023–19049, published on Thursday October, 13, 2023 88 FR 19049, is withdrawn by this notice.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–23090 Filed 10–18–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0850]

Agency Information Collection Activity Under OMB Review: Requirements for Recognition as a VA Accredited Organization

AGENCY: Office of General Counsel, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Office of General Counsel (OGC), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: 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. Refer to ''OMB Control No. 2900–0850''.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0850'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 5902; 38 CFR 14.628.

Title: Requirements for Recognition as a VA Accredited Organization.

OMB Control Number: 2900–0850.

Type of Review: Extension of a currently approved collection.

Abstract: In order for an organization to provide representation to claimants before VA regarding claims for VA benefits, the organization must be recognized by VA for that purpose. Section 5902(a) of title 38, United States Code, authorizes VA to recognize organizations for the limited purpose of ensuring competent representation of veterans in claims for benefits administered by VA. VA implemented this authority in 38 CFR 14.628. An organization must apply for VA recognition, supplying information as specified in section 14.628 to demonstrate that it satisfies the legal requirements for recognition. (Organizations may provide services to veterans without VA recognition if the services do not include the preparation, presentation, and prosecution of claims for VA benefits.) The information submitted by the organizations in conjunction with a request for recognition is used by VA in reviewing accreditation applications to determine whether organizations meet the requirements for VA recognition under section 14.628. VA relies on this information to ensure that it is granting recognition only to organizations that can provide long-term, competent representation to VA claimants.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at: Vol. 88, No. 155, Monday, August 14, 2023, page 55124 (88 FR 55124).

Affected Public: Individuals, not-for-profit institutions, and state, local, or tribal governments.

Estimated Annual Burden: 50 hours.

Estimated Average Burden per Respondent: 5 hours.

Frequency of Response: One time.

Estimated Number of Respondents: 10.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–23066 Filed 10–18–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 88 Thursday,
No. 201 October 19, 2023

Part II

Environmental Protection Agency

40 CFR Parts 84, 261, 262, et al.
Phasedown of Hydrofluorocarbons: Management of Certain Hydrofluorocarbons and Substitutes Under Subsection (h) of the American Innovation and Manufacturing Act of 2020; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 84, 261, 262, 266, 270, and 271

[EPA–HQ–OAR–2022–0606; FRL–10105–01–OAR]

Phasedown of Hydrofluorocarbons: Management of Certain Hydrofluorocarbons and Substitutes Under Subsection (h) of the American Innovation and Manufacturing Act of 2020

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking and advance notice of proposed rulemaking.

SUMMARY: The U.S. Environmental Protection Agency is proposing to issue regulations to implement certain provisions of the American Innovation and Manufacturing Act of 2020. This rulemaking proposes to establish a program for the management of hydrofluorocarbons that includes requirements for leak repair and use of automatic leak detection systems for certain equipment using refrigerants containing hydrofluorocarbons and certain substitutes; requirements for the use of reclaimed hydrofluorocarbons in certain sectors or subsectors; the use of recycled hydrofluorocarbons in fire suppression equipment; recovery of hydrofluorocarbons from cylinders; container tracking; and certain recordkeeping, reporting, and labeling requirements. The Environmental Protection Agency is also proposing alternative Resource Conservation and Recovery Act standards for spent ignitable refrigerants being recycled for reuse. Finally, EPA requests advance comment on approaches for establishing requirements for technician training and/or certification.

DATES: Comments on this notice of proposed rulemaking must be received on or before December 18, 2023. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best ensured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 20, 2023. The Environmental Protection Agency (EPA) will hold a virtual public hearing on or about November 3, 2023. The date, time, and other relevant information for the virtual public hearing will be available at *https://www.epa.gov/climate-hfcs-reduction.*

ADDRESSES: You may send comments, identified by docket identification number EPA–HQ–OAR–2022–0606, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. The EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* as there may be a delay in processing mail. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

You may find the following suggestions helpful for preparing your comments: Direct your comments to specific sections of this proposed rulemaking and note where your comments may apply to future separate actions where possible; explain your views as clearly as possible; describe any assumptions that you used; provide any technical information or data you used that support your views; provide specific examples to illustrate your concerns; offer alternatives; and, make sure to submit your comments by the comment period deadline. Please provide any published studies or raw data supporting your position. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*e.g.,* on the web, cloud, or other file sharing system).

Do not submit any information you consider to be Confidential Business Information (CBI) through *https://www.regulations.gov.* For submission of confidential comments, please work with the person listed in the **FOR FURTHER INFORMATION CONTACT** section. 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://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Christian Wisniewski, Stratospheric Protection Division, Office of Atmospheric Protection (Mail Code 6205A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–0417; email address: *wisniewski.christian@epa.gov.* You may also visit EPA's website at *https://www.epa.gov/climate-hfcs-reduction* for further information.

For information related to the proposed alternative standards for certain ignitable spent refrigerants under the Resource Conservation and Recovery Act (RCRA), please contact Tracy Atagi, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery (5304T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 566–0511; email address: *atagi.tracy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' ''the Agency,'' or ''our'' is used, we mean EPA. Acronyms that are used in this rulemaking that may be helpful include:

AC—Air Conditioning
AHRI—Air-Conditioning, Heating, and Refrigeration Institute
ALD—Automatic Leak Detection
AIM Act—American Innovation and Manufacturing Act of 2020
APF—Air Permitting Forum
ASHRAE—American Society of Heating, Refrigerating and Air-Conditioning Engineers
ASTM—American Society for Testing and Materials
CAA—Clean Air Act
CARB—California Air Resources Board
CBI—Confidential Business Information
CBP—U.S. Customs and Border Protection
CFC—Chlorofluorocarbon
CFR—Code of Federal Regulations
CO_2e—Carbon Dioxide Equivalent
DOT—Department of Transportation
ECHO—Enforcement and Compliance History Online
e-GGRT—Electronic Greenhouse Gas Reporting Tool
ENGO—Environmental Non-governmental Organization
E.O.—Executive Order
EPA—Environmental Protection Agency

EVe—Exchange Value Equivalent
FEMA—Fire Equipment Manufacturers Association
FOIA—Freedom of Information Act
FR—Federal Register
FSSA—Fire Suppression Systems Association
FSTOC—Fire Suppression Technical Options Committee
GHG—Greenhouse gas
GHGRP—Greenhouse Gas Reporting Program
GWP—Global Warming Potential
HAP—Hazardous Air Pollutant
HARC—Halon Alternatives Research Corporation
HCFC—Hydrochlorofluorocarbon
HD—Heavy-duty
HEEP—HFC Emissions Estimating Program
HFC—Hydrofluorocarbon
HFO—Hydrofluoroolefin
HSWA—Hazardous and Solid Waste Amendments of 1984
HTOC—Halons Technical Options Committee
ICR—Information Collection Request
IPCC—Intergovernmental Panel on Climate Change
IPR—Industrial Process Refrigeration
IWG—Interagency Working Group on the Social Cost of Greenhouse Gases
ISO—International Organization for Standardization
MACS—Mobile Air Climate Systems Association
$MMTCO_2e$—Million Metric Tons of Carbon Dioxide Equivalent
MMTEVe—Million Metric Tons of Exchange Value Equivalent
MTEVe—Metric Tons of Exchange Value Equivalent
MVAC—Motor vehicle air conditioner
NAAQS—National Ambient Air Quality Standards
NAICS—North American Industrial Classification System
NAFED—National Association of Fire Equipment Distributors
NATA—National Air Toxics Assessment
NEDA/CAP—National Environmental Development Association's Clean Air Project
NEI—National Emissions Inventory
NFPA—National Fire Protection Association
NODA—Notice of Data Availability
NRDC—Natural Resources Defense Council
ODP—Ozone Depletion Potential
ODS—Ozone depleting substances
OEM—Original Equipment Manufacturer
OLEM—Office of Land and Emergency Management
OMB—Office of Management and Budget
ppm—Parts Per Million
PRA—Paperwork Reduction Act
R4 Program—Refrigerant Recovery, Reclaim, and Reuse Requirements (CARB Program)
RACHP—Refrigeration, Air Conditioning, and Heat Pumps
RCOP—Recycling Code of Practice
RCRA—Resource Conservation and Recovery Act
RFA—Regulatory Flexibility Act
RIA—Regulatory Impact Analysis
RRA—Refrigerant Reclaim Australia
SC–HFC—Social Cost of Hydrofluorocarbons
SISNOSE—Significant Economic Impact on a Substantial Number of Small Entities
SNAP—Significant New Alternatives Policy
VCOP—Voluntary Code of Practice
TRI—Toxics Release Inventory
VRF—Variable Refrigerant Flow
VSQG—Very Small Quantity Generator

Table of Contents

I. Executive Summary

A. What is the purpose of this proposed regulatory action?

The Environmental Protection Agency (EPA) is proposing regulations that would implement certain provisions of the American Innovation and Manufacturing Act of 2020, codified at 42 U.S.C. 7675 (AIM Act or the Act). The AIM Act authorizes EPA to address hydrofluorocarbons (HFCs) in three main ways: phasing down HFC production and consumption through an allowance allocation program; facilitating the transition to next-generation technologies by restricting use of these HFCs in the sector or subsectors in which they are used; and promulgating certain regulations for purposes of maximizing reclaiming and minimizing releases of HFCs from equipment and ensuring the safety of technicians and consumers. This proposal focuses on the third area—establishing certain regulations for HFCs and their substitutes for the purposes of maximizing reclaiming and minimizing releases of HFCs from equipment and ensuring the safety of technicians and consumers.

More specifically, subsection (h) of the AIM Act, entitled ''Management of regulated substances,'' directs EPA to promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment that involves: a regulated substance (used interchangeably with ''HFCs'' in this proposed rulemaking), a substitute for a regulated substance, the reclaiming of a regulated substance used as a refrigerant, or the reclaiming of a substitute for a regulated substance used as a refrigerant.

This proposed rulemaking addresses how EPA intends to start implementing the provisions of subsection (h), including its authority to issue regulations to control such practices, processes, and activities, particularly as related to the management, use, and reuse of HFCs and substitutes in equipment. Further, this action proposes provisions to support implementation of, compliance with, and enforcement of requirements under subsection (h) of the AIM Act. Additionally, EPA is proposing alternative Resource Conservation and Recovery Act (RCRA) standards for certain spent ignitable refrigerants being recycled for reuse, as that term is proposed to be used under RCRA.[1] These proposed standards would involve regulatory changes to 40 CFR parts 261–271 and not be part of the regulations under subsection (h)(1) of the AIM Act.

B. What is the summary of this proposed regulatory action?

This section of the preamble describes a summary of the proposed provisions of this rulemaking, which are described in more detail in the relevant sections of this proposal.

Management of regulated substances. EPA is proposing to establish a program for the management of HFCs that includes requirements with compliance dates ranging between 60 days after publication of the final rule to January 1, 2028, for:

- Leak repair of appliances containing HFCs and/or certain substitutes for HFCs (whether the appliance uses the HFC or substitute for an HFC neat or in a blend with other substances). The leak repair requirements would apply to appliances containing 15 pounds or more of a refrigerant that contains an HFC or contains a substitute for an HFC with a global warming potential (GWP) above 53 with specific exceptions;
- Use of automatic leak detection (ALD) systems for certain new and existing appliances containing 1,500 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53;
- A proposed reclamation standard;
- The use of reclaimed HFCs in certain refrigeration, air conditioning, and heat pump (RACHP) sectors or subsectors and applications for the initial charge or installation of equipment and servicing and/or repair of existing equipment and the use of recycled HFCs in the initial charge or servicing and/or repair of fire suppression equipment;
- The servicing, repair, disposal, or installation of fire suppression equipment that contains HFCs, with the purpose of minimizing the release of HFCs from that equipment, as well as requirements related to technician training in the fire suppression sector;
- Recovery of HFCs from disposable cylinders prior to disposal;
- Container tracking for HFCs that could be used in the servicing, repair, and/or installation of refrigerant-containing or fire suppression equipment; and
- Recordkeeping, reporting, and labeling.

Amendments to Resource Conservation and Recovery Act (RCRA) hazardous waste regulations. EPA is proposing alternative standards for spent ignitable refrigerants when recycled for reuse, as that term is proposed to be used under RCRA. EPA is proposing that the 40 CFR part 266 Subpart Q RCRA alternative standards would apply to HFCs and other substitutes that do not belong to flammability Class 3 as classified by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 34–2022.[2] EPA is proposing to limit the alternative standards to lower flammability substitutes (Class 1, 2, and

[1] The terms ''reclaim'' and ''recycle'' have different regulatory purposes and definitions under RCRA than under the CAA and the AIM Act. Under RCRA, a material is ''reclaimed'' if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents (See 40 CFR 261.1(c)(4)). Reclamation is one of the four types of ''recycling'' identified in 40 CFR 261.2(c) that can involve management of a solid waste under RCRA.

[2] ASHRAE Standard 34–2022 assigns a safety group classification for each refrigerant which consists of two alphanumeric characters (*e.g.,* A2 or B1). The capital letter indicates the toxicity class (''A'' for lower toxicity) and the numeral denotes the flammability. ASHRAE recognizes three classifications and one subclass for refrigerant flammability. The three main flammability classifications are Class 1, for refrigerants that do not propagate a flame when tested as per the ASHRAE 34 standard, ''Designation and Safety Classification of Refrigerants;'' Class 2, for refrigerants of lower flammability; and Class 3, for highly flammable refrigerants, such as the hydrocarbon refrigerants. ASHRAE recently updated the safety classification matrix to include a new flammability subclass 2L, for flammability Class 2 refrigerants that burn very slowly.

2L) because of the lower risk of fire from the collection and recycling for reuse of these refrigerants, and the greater market value of these refrigerants, which supports the conclusion that these spent refrigerants will be recycled for reuse and not stockpiled, mismanaged, or abandoned.

Enforcement and compliance. To support compliance with the proposed requirements, EPA is proposing labeling, reporting, and recordkeeping requirements as described in this action. EPA is also requiring reporting and recordkeeping for the reduction of HFC emissions for the fire suppression sector. The Agency is proposing to use the same reporting platform used in prior AIM Act rules and the Greenhouse Gas Reporting Program (GHGRP).[3]

Additionally, EPA requests advance comment on approaches for establishing requirements for RACHP technician training and/or certification. Specifically, EPA is seeking advance comment on whether, through a separate rulemaking, EPA should propose to establish training and/or service requirements for technicians under subsection (h), in particular, for flammable refrigerants. And, if so, how such a training program might be managed.

The Agency is not proposing any regulatory requirements under subsection (h) for HFCs and substitutes for HFCs used in applications besides RACHP and fire suppression sectors at this time. However, the Agency will continue to monitor the use and emissions of HFCs more generally and such information may inform future rulemakings under subsection (h).

C. What is the summary of the costs and benefits?

EPA is providing information on the costs and benefits for the provisions related to managing regulated substances and their substitutes in this proposed rule. The analyses, presented in the *Analysis of the Economic Impact and Benefits of the Proposed Rule* technical support document (TSD) and in a regulatory impact analysis (RIA) addendum to the Allocation Framework Rule RIA, are contained in the docket to this proposed rule and are intended to provide the public with information on the relevant costs and benefits of this action, if finalized as proposed, and to comply with executive orders. EPA notes that the costs and benefits associated with the management of regulated substances and their substitutes under the AIM Act are described and calculated separately from those associated with the proposed amendments to the RCRA hazardous waste regulations. These analyses—as summarized below—highlight economic cost and benefits, including benefits from leak repair and emissions reductions.

Given that the provisions EPA is proposing concern HFCs, which are subject to the phasedown of production and consumption under the AIM Act, EPA relied on its previous estimates of the impacts of already finalized AIM Act rules as a starting point for the assessment of costs and benefits of this rule. Specifically, the Allocation Framework Rule, ''Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act'' (86 FR 55116, October 5, 2021) and the 2024 Allocation Rule, ''Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years'' (88 FR 46836, July 20, 2023) [4] are assumed as a baseline for this proposed rule. In this way, EPA analyzed the potential incremental impacts of the proposed rule, attributing benefits only insofar as they are additional to those already assessed in the Allocation Framework Rule RIA and the 2024 Allocation Rule RIA addendum (collectively referred to as ''Allocation Rules'' in this discussion). For example, a mitigation option in the marginal abatement cost (MAC) analysis for the Allocation Rules assumed a reduction in refrigerant leaks; all costs and benefits calculated for this rule are for leak reductions over and above those assumed in the previous analysis.

As detailed in the RIA addendum, the number, charge sizes, leak rates, and other characteristics of potentially affected RACHP equipment were estimated using EPA's Vintaging Model.[5] The leak repair and ALD system provisions proposed are assumed to lead leaking systems to be repaired earlier than they otherwise would have, leading to reduced emissions of HFCs. Provisions requiring the use of reclaimed refrigerant, requirements for the fire suppression sector, and provisions related to the handling of disposable cylinders are further estimated to result in incremental reductions in HFC emissions. These reductions in HFC emissions result in climate benefits due to reduced climate forcing as calculated by multiplying avoided emissions by the social cost of each HFC (SC–HFCs).

In the years 2025–2050, the proposed rule provisions would prevent an estimated 142 million metric tons of CO_2 equivalent ($MMTCO_2e$) in HFC emissions, and the present value of economic benefit of avoiding the damages associated with those emissions is estimated at $9.8 billion (in 2022 dollars, discounted to 2024 using a three percent discount rate). The annual benefits are estimated to decrease over time due to the HFC phasedown and the transition out of the higher-GWP HFCs, lowering the average GWP of later emissions. For example, it is estimated that the leak repair and ALD system provisions would prevent 3.8 $MMTCO_2e$ of HFC emissions in 2030 and 2.8 $MMTCO_2e$ in the year 2040.

Reducing HFC emissions due to fixing leaks earlier would also be anticipated to lead to savings for some system owner/operators, as less new refrigerant would need to be purchased to replace leaked refrigerant. In 2025, it is estimated that the proposed leak repair and ALD provisions would lead to savings of $13 million (2022$). EPA acknowledges that these savings would not completely offset leak repair compliance costs and may not accrue uniformly to all regulated entities, and EPA requests comment on this estimate. Further, while these provisions have been estimated to result in savings, EPA understands that entities that would be affected by these proposed regulations might not perform the practices, processes, or activities that would result in cost savings absent regulation. When entities are reviewing their own economic analyses, some factors may be pertinent that make new technologies or economically favorable best practices less attractive than existing practices, or some market failure may exist that acts as a barrier to businesses' adoption of

[3] The GHGRP requires reporting of greenhouse gas (GHG) data and other relevant information from large GHG emission sources, fuel and industrial gas suppliers, and carbon dioxide (CO_2) injection sites in the United States. The program generally requires reporting when emissions from covered sources are greater than 25,000 metric tons of CO_2e per year. Publicly available information includes facility names, addresses, and latitude/longitude information.

[4] EPA recently finalized two separate rulemakings to update the regulations established in the HFC Allocation Framework Rule. The first rule, ''Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years,'' established the methodology for allocating HFC production and consumption allowances starting with calendar year 2024 allowances and adjusted the consumption baseline downward by less than 0.5% to reflect corrected data, among other changes (88 FR 46836, July 20, 2023). The second, ''Phasedown of Hydrofluorocarbons: Adjustment to the Hydrofluorocarbon Baseline,'' amended the production baseline downward by 0.005% to reflect corrected data (88 FR 44220, July 12, 2023).

[5] U.S. Environmental Protection Agency (EPA). 2023. EPA's Vintaging Model representing the Allocation Framework Rule as modified by the 2024 Allocation Rule RIA addendum. VM IO file_v4.4_02.04.16_2024 Allocation Rule.

the most profitable course.[6] For example, market failures may exist where there are imperfect information or split incentives; such as decision-makers not knowing the percentage of energy use associated with refrigeration or the costs of replacing refrigerant lost from leaking appliances.

The compliance costs of the proposed rule include recordkeeping and reporting costs, the costs of purchasing and operating ALD systems, costs of required inspections, the cost of repairing leaks earlier than would have been necessary without the proposed provisions, and the cost of proposed disposable cylinder management requirements. In the years 2025–2050, these provisions would result in compliance costs (inclusive of refrigerant savings) with a present value estimated at $3.7 billion in 2022 dollars at a 3 percent discount rate or $2.4 billion at a 7 percent discount rate.

Taking into account both benefits and compliance costs over the 2025–2050 time period, it is estimated that the proposed rule would result in present value net benefit (benefits minus compliance costs), of $6.1 billion (with compliance costs discounted at three percent) to $7.4 billion (with compliance costs discounted at seven percent).

As detailed in the draft RIA addendum, these values represent a conservative estimate of potential incremental benefits and assume potential HFC consumption- and emissions-reducing activities required by some of the proposed rule's provisions could be offset to the extent that available consumption and production allowances are shifted to meet demand in subsectors not covered by the proposed rule. Given the inherent uncertainty of future industry behavior, in the draft RIA addendum EPA has also provided estimates under an additional scenario in which these offsetting effects to not occur and additional incremental benefits accrue.

Some of the information regarding projected impacts of certain aspects of the proposal was considered by EPA as it developed this proposed rule. To the extent that EPA has considered such information it is compiled in the *Analysis of the Economic Impact and Benefits of the Proposed Rule* draft TSD, which is in the docket for this rulemaking.

Although EPA is using SC–HFCs for purposes of some of the analysis in the RIA addendum, this proposed action does not rely on those estimates of these costs as a record basis for the Agency action, and EPA would reach the proposed conclusions even in the absence of the social costs of HFCs. Additional information on these analyses can be found in section VI. of this document, as well as the RIA addendum and the *Analysis of the Economic Impact and Benefits of the Proposed Rule* draft TSD, which is in the docket for this rulemaking.

II. General Information

A. Does this action apply to me?

You may be potentially affected by this rule if you own, operate, service, repair, recycle, dispose, or install equipment containing HFCs or their substitutes, as well as if you recover, recycle, or reclaim HFCs or their substitutes. You may also be potentially affected if you manufacture or sell equipment containing HFCs or their substitutes. Potentially affected categories, by North American Industry Classification System (NAICS) code, are included in Table 1.

TABLE 1—NAICS CLASSIFICATION OF POTENTIALLY AFFECTED ENTITIES

NAICS code	NAICS industry description
236118	Residential Remodelers.
236220	Commercial and Institutional Building Construction.
238220	Plumbing, Heating, and Air–Conditioning Contractors.
238990	All Other Specialty Trade Contractors.
311812	Commercial Bakeries.
321999	All Other Miscellaneous Wood Product Manufacturing.
322299	All Other Converted Paper Product Manufacturing.
324191	Petroleum Lubricating Oil and Grease Manufacturing.
324199	All Other Petroleum and Coal Products Manufacturing.
325199	All Other Basic Organic Chemical Manufacturing.
325211	Plastics Material and Resin Manufacturing.
325412	Pharmaceutical Preparation Manufacturing.
325414	Biological Product (except Diagnostic) Manufacturing.
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing.
326299	All Other Rubber Product Manufacturing.
327999	All Other Miscellaneous Nonmetallic Mineral Product Manufacturing.
332812	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers.
332999	All Other Miscellaneous Fabricated Metal Product Manufacturing.
333415	Air–Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.
333511	Industrial Mold Manufacturing.
333912	Air and Gas Compressor Manufacturing.
333999	All Other Miscellaneous General Purpose Machinery Manufacturing.
334413	Semiconductor and Related Device Manufacturing.
334419	Other Electronic Component Manufacturing.
334516	Analytical Laboratory Instrument Manufacturing.
335220	Major Household Appliance Manufacturing.
336120	Heavy Duty Truck Manufacturing.
336212	Truck Trailer Manufacturing.
336214	Travel Trailer and Camper Manufacturing.
3363	Motor Vehicle Parts Manufacturing.
3364	Aerospace Product and Parts Manufacturing.
336411	Aircraft Manufacturing.
336611	Ship Building and Repairing.

[6] Klemick, Heather & Kopits, Elizabeth & Wolverton, Ann. ''Potential Barriers to Improving Energy Efficiency in Commercial Buildings: The Case of Supermarket Refrigeration.'' Journal of Benefit-Cost Analysis. 8, 2017, pp. 1–31.

TABLE 1—NAICS CLASSIFICATION OF POTENTIALLY AFFECTED ENTITIES—Continued

NAICS code	NAICS industry description
336612	Boat Building.
339112	Surgical and Medical Instrument Manufacturing.
339113	Surgical Appliance and Supplies Manufacturing.
339999	All Other Miscellaneous Manufacturing.
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers.
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers.
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers.
423620	Household Appliances, Electric Housewares, and Consumer Electronics Merchant Wholesalers.
423690	Other Electronic Parts and Equipment Merchant Wholesalers.
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers.
423730	Warm Air Heating and Air–Conditioning Equipment and Supplies Merchant Wholesalers.
423740	Refrigeration Equipment and Supplies Merchant Wholesalers.
423830	Industrial Machinery and Equipment Merchant Wholesalers.
423840	Industrial Supplies Merchant Wholesalers.
423850	Service Establishment Equipment and Supplies Merchant Wholesalers.
423860	Transportation Equipment and Supplies (except Motor Vehicle) Merchant Wholesalers.
423990	Other Miscellaneous Durable Goods Merchant Wholesalers.
424690	Other Chemical and Allied Products Merchant Wholesalers.
424820	Wine and Distilled Alcoholic Beverage Merchant Wholesalers.
441310	Automotive Parts and Accessories Stores.
443141	Household Appliance Stores.
444190	Other Building Material Dealers.
445110	Supermarkets and Other Grocery (except Convenience) Stores.
445131	Convenience Retailers.
445298	All Other Specialty Food Retailers.
446191	Food (Health) Supplement Stores.
449210	Electronics and Appliance Retailers.
452311	Warehouse Clubs and Supercenters.
453998	All Other Miscellaneous Store Retailers (except Tobacco Stores).
45711	Gasoline Stations With Convenience Stores.
481111	Scheduled Passenger Air Transportation.
488510	Freight Transportation Arrangement.
493110	General Warehousing and Storage.
531120	Lessors of Nonresidential Buildings (except Mini warehouses).
541330	Engineering Services.
541380	Testing Laboratories.
541512	Computer Systems Design Services.
541519	Other Computer Related Services.
541620	Environmental Consulting Services.
561210	Facilities Support Services.
561910	Packaging and Labeling Services.
561990	All Other Support Services.
562111	Solid Waste Collection.
562211	Hazardous Waste Treatment and Disposal.
562920	Materials Recovery Facilities.
621498	All Other Outpatient Care Centers.
621999	All Other Miscellaneous Ambulatory Health Care Services.
72111	Hotels (Except Casino Hotels) and Motels.
72112	Casino Hotels.
72241	Drinking Places (Alcoholic Beverages).
722511	Full-service Restaurants.
722513	Limited-Service Restaurants.
722514	Cafeterias, Grill Buffets, and Buffets.
722515	Snack and Nonalcoholic Beverage Bars.
81119	Other Automotive Repair and Maintenance.
811219	Other Electronic and Precision Equipment Repair and Maintenance.
811412	Appliance Repair and Maintenance.
922160	Fire Protection.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA expects could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity may be regulated by this action, you should carefully examine the proposed regulatory text at the end of this document. If you have questions regarding the applicability of this action to a particular entity, consult the people listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

On December 27, 2020, the AIM Act was enacted as section 103 in Division S, Innovation for the Environment, of the Consolidated Appropriations Act, 2021 (42 U.S.C. 7675). In subsection (k)(1)(A), the AIM Act provides EPA with the authority to promulgate

necessary regulations to carry out EPA's functions under the Act, including its obligations to ensure that the Act's requirements are satisfied (42 U.S.C. 7675(k)(1)(A)). Subsection (k)(1)(C) of the Act also provides that Clean Air Act (CAA) sections 113, 114, 304, and 307 apply to the AIM Act and any regulations EPA promulgates under the AIM Act as though the AIM Act were part of CAA Title VI (42 U.S.C. 7675(k)(1)(C)). Accordingly, this rulemaking is subject to CAA section 307(d) (see 42 U.S.C. 7607(d)(1)(I)) (CAA section 307(d) applies to ''promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection)'').

The AIM Act authorizes EPA to address hydrofluorocarbons (HFCs) in three main ways: phasing down HFC production and consumption through an allowance allocation program; facilitating the transition to next-generation technologies by restricting use of these HFCs in the sector or subsectors in which they are used; and promulgating certain regulations for purposes of maximizing reclaiming and minimizing releases of HFCs from equipment and ensuring the safety of technicians and consumers. This proposal focuses on the third area—establishing certain regulations for HFCs and their substitutes for the purposes of maximizing reclaiming [7] and minimizing releases of HFCs from equipment and ensuring the safety of technicians and consumers.

The identification of regulated substances is addressed under subsection (c) of the Act. The Act lists 18 saturated HFCs, and by reference any of their isomers not so listed, that are covered by the statute's provisions, referred to as ''regulated substances'' [8] under the Act (42 U.S.C. 7675(c)(1)). Congress also assigned an ''exchange value'' [9] [10] to each regulated substance. EPA is also authorized to designate additional substances that meet certain criteria as regulated substances; for example, to be listed, the substance must be a saturated HFC that has an exchange value greater than 53 (which is also the lowest exchange value for a regulated substance listed in subsection (c)(1) of the Act) (42 U.S.C. 7675(c)(3)).

The regulated substances addressed in this proposal may be used neat (*i.e.,* as a single component substance) or in a blend with other substances, which may include other regulated substances and/or substitutes for regulated substances. The requirements proposed in this rulemaking for regulated substances would apply regardless of whether the regulated substance is used neat or in blend. In taking this approach, EPA is not proposing that a blend that uses one or more regulated substances is itself a regulated substance. Rather, the Agency is proposing to regulate the regulated substance(s) used within a ''blend of substances'' (42 U.S.C. 7675(c)(3)(B)(ii)), such that the proposed requirements would also affect equipment that uses regulated substances in blends. This is consistent with approaches that the Agency has taken under the Allocation Framework Rule (86 FR 55133, 55142, October 5, 2021) and proposed for the Technology Transitions Rule (87 FR 76744, 76753, December 15, 2022).[11] Furthermore, subsection (h)(1) requires EPA to promulgate regulations addressing certain practices, processes, or activities involving, among other things, a regulated substance or a substitute for a regulated substance (*see* 42 U.S.C. 7675(h)(1)(A)–(B)). Consistent with those provisions, regulatory requirements under subsection (h) may also apply with respect to substitutes for regulated substances, regardless of whether the substitute is used neat or in a blend. In taking this approach for substitutes for a regulated substance, EPA is not proposing that a blend that uses one or more such substitutes that are so regulated would be designated a regulated substance under subsection (c) of the Act, nor that the substitute would be so designated. Rather, such substitutes would simply be addressed, as appropriate, under the regulations implementing subsection (h).

Subsection (h) of the AIM Act is entitled ''Management of regulated substances.'' For purposes of maximizing reclaiming and minimizing releases of HFCs from equipment and ensuring the safety of technicians and consumers, subsection (h)(1) directs EPA to promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment that involves: a regulated substance, a substitute for a regulated substance, the reclaiming of a regulated substance used as a refrigerant, or the reclaiming of a substitute for a regulated substance used as a refrigerant (42 U.S.C. 7675(h)(1)). Subsection (h)(1) further provides that this includes requiring, where appropriate, that any such servicing, repair, disposal, or installation be performed by a trained technician meeting minimum standards, as determined by EPA.

Under subsection (h)(2)(A) of the AIM Act, the Agency ''shall consider the use of authority available . . . under this section to increase opportunities for the reclaiming of regulated substances used as refrigerants.'' Subsection (h)(2)(B) of the Act further provides that a ''regulated substance used as a refrigerant that is recovered shall be reclaimed before the regulated substance is sold or transferred to a new owner, except where the recovered regulated substance is sold or transferred to a new owner solely for the purposes of being reclaimed or destroyed.''

Further, subsection (h)(3) provides that in promulgating regulations to carry out subsection (h), EPA may coordinate those regulations with ''any other regulations promulgated by the [EPA] that involve—(A) the same or a similar practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment; or (B) reclaiming.'' EPA interprets this provision of the AIM Act as leaving the Agency discretion as to whether or not to coordinate regulations under subsection (h) with other EPA regulations, as well as with discretion to consider the particular circumstances in which it is appropriate to undertake such coordination. Congress did not define the term ''coordinate'' in the AIM Act. EPA interprets the term, as used in this context, as encompassing a variety of forms of coordination that could potentially be used for the specified types of regulatory provisions, and interprets (h)(3) as conveying discretion

[7] EPA views ''reclaim,'' ''reclaiming,'' and ''reclamation'' as interchangeable terms.

[8] As noted previously in this action, ''regulated substance'' and ''HFC'' are used interchangeably in this action.

[9] EPA has determined that the exchange values included in subsection (c) of the AIM Act are identical to the global warming potentials (GWPs) included in the Intergovernmental Panel on Climate Change (IPCC) (2007). EPA uses the terms ''global warming potential'' and ''exchange value'' interchangeably in this proposal.

[10] IPCC (2007): Solomon, S., D. Qin, M. Manning, R.B. Alley, T. Berntsen, N.L. Bindoff, Z. Chen, A. Chidthaisong, J.M. Gregory, G.C. Hegerl, M. Heimann, B. Hewitson, B.J. Hoskins, F. Joos, J. Jouzel, V. Kattsov, U. Lohmann, T. Matsuno, M. Molina, N. Nicholls, J. Overpeck, G. Raga, V. Ramaswamy, J. Ren, M. Rusticucci, R. Somerville, T.F. Stocker, P. Whetton, R.A. Wood and D. Wratt, 2007: Technical Summary. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA *https://www.ipcc.ch/report/ar4/wg1.*

[11] In affirming this aspect of the HFC Allocation Framework Rule, the D.C. Circuit held that ''EPA has statutory authority to regulate HFCs within blends . . . because an HFC within a blend remains a regulated HFC under the Act.'' *Heating, Air Conditioning & Refrigeration Distributors Int'l* v. *EPA,* 71 F.4th 59, 64 (D.C. Cir. 2023).

to EPA to select the form or forms of coordination that are appropriate for the particular circumstances and regulatory provisions under consideration in a given action.

In this proposal, EPA describes where and whether we are coordinating with regulations that involve the same or similar practices, processes, or activities regarding the servicing, repair, disposal, or installation of equipment or reclaiming, and our rationale on the appropriateness of coordinating with these regulations. For example, coordination could include establishing parallel requirements under subsection (h) as in another regulatory regime so that a similar practice, process, or activity in similar equipment is held to similar standards, where appropriate. It could also include deciding not to establish requirements under subsection (h) in certain situations, such as when an existing requirement already applies to a similar practice, process, or activity under another set of regulations that EPA views as adequate to also address the purposes of subsection (h). Coordination could also mean coordinating rulemaking schedules or timing for certain requirements under subsection (h) that cover a similar practice, process, or activity as covered in a previous regulation and would meet the purposes of subsection (h). Finally, coordination may also mean coordinating the requirements under subsection (h) with revisions to regulations under other statutory authorities that address related practices, processes, or activities, with the goal of developing independent regulatory regimes that operate well together to achieve their stated goals.

Subsection (h)(4) expressly states that any rulemaking under subsection (h) shall not apply to a regulated substance or a substitute for a regulated substance that is contained in a foam. Thus, the requirements proposed in this rulemaking would not apply to regulated substances or substitutes for regulated substances when those substances are contained in foams.

Finally, subsection (h)(5) provides that, subject to availability of appropriations, EPA shall establish a grant program to award small business grants for the purchase of new specialized equipment for the recycling, recovery, or reclamation of a substitute for a regulated substance, including the purchase of approved refrigerant recycling equipment for recycling, recovery, or reclamation in the service or repair of a motor vehicle air conditioner (MVAC) systems. Funds have not been appropriated for this grant program. The establishment of this program is outside the scope of this rulemaking and EPA intends to address it in a future action.

Through this rulemaking, EPA is proposing to establish an HFC management program that includes requirements for:

- Leak repair for certain equipment that contain HFC refrigerants or their substitutes, as applicable,
- ALD systems,
- Use of reclaimed HFCs in certain RACHP subsectors,
- The fire suppression sector,
- Recovery of HFCs from cylinders, and
- Container tracking.

Under subsection (h)(1), EPA is directed to promulgate certain regulations for ''purposes of maximizing the reclaiming and minimizing the release of a regulated substance from equipment and ensuring the safety of technicians and consumers.'' Subsection (h) further specifies that those regulations are to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment that involves: a regulated substance, a substitute for a regulated substance, the reclaiming of a regulated substance used as a refrigerant, or the reclaiming of a substitute for a regulated substance used as a refrigerant. Together, the proposed provisions as outlined above in this section and explained in greater detail in the relevant sections of this NPRM are aimed at achieving those three purposes described in subsection (h)(1) (*i.e.,* (1) maximizing the reclaiming, (2) minimizing the release of a regulated substance from equipment, and (3) ensuring the safety of technicians and consumers), while also being consistent with the scope of regulatory authority under that provision. As EPA interprets the statutory text, the suite of regulations established under subsection (h)(1) of the Act, taken together, would be focused on serving these purposes, though the individual regulatory provisions under subsection (h)(1) need not each connect to all three purposes. This interpretation is integral to establishing an effective regulatory program, as some regulatory provisions that might be considered under (h)(1) may be highly efficacious at addressing one of the regulatory purposes but not address the other two, or alternatively, may be important to support the functioning of the regulatory program as a whole, but not be focused on any of the specific purposes. Accordingly, this understanding of the statutory text will support EPA's ability to develop regulations that work together to help achieve the statutory purposes.

Together the provisions proposed in this action would serve the purposes described in (h)(1), with certain provisions more geared towards one or two of the purposes identified in subsection (h)(1). For example, the provisions related to leak repair as proposed in this action are directed at the purpose of minimizing the release of a regulated substance, but also help serve the purpose of maximizing the reclaiming of a regulated substance. Those proposed provisions would set requirements for when and how equipment must be serviced and leaks in equipment must be repaired. Taking these actions would minimize the release of regulated substances through such leaks, as the sooner a leak is found and repaired, the less HFC will be released from that leak. Further, by limiting the amount of regulated substances released from leaks in equipment, the opportunity to recover and subsequently reclaim these regulated substances increases. Thus, the proposed provisions related to leak repair also help serve the purpose of maximizing the reclaiming of regulated substances.

Another example is the proposed provisions for the use of ALD systems which would help address the purposes articulated in subsection (h)(1) similarly. In general, ALD systems would alert an owner or operator of leaks in equipment sooner than discovering a leak due to decreased performance by the equipment. Identifying and repairing leaks sooner as a result of detecting the leak with an ALD system would further limit the amount of regulated substance released from the leak and maintain more of the regulated substance within the equipment, where it would be available for eventual recovery and reclamation.

In addition to proposing requirements for the management of HFCs and substitutes, this proposal includes provisions designed to support enforcement and compliance, including recordkeeping and reporting. As noted earlier in this section, subsection (k)(1)(C) of the AIM Act states that CAA section 114 applies to the AIM Act and rules promulgated under it as if the AIM Act were included in CAA Title VI. Thus, CAA section 114, which provides authority to the EPA Administrator to require recordkeeping and reporting in carrying out provisions of the CAA, also applies to and supports this rulemaking. These provisions may be examples of provisions that are integral to establishing an effective regulatory program, and thus are important to the overall efficacy of the HFC management program at achieving the purposes

articulated in subsection (h)(1), even if they may be less directly connected to those purposes if viewed in isolation.

In this action, we are also proposing alternative RCRA standards for spent ignitable refrigerants being recycled for reuse. These proposed standards would not be part of the regulations under subsection (h)(1) of the AIM Act. Rather, this would involve regulatory changes to 40 CFR parts 261–271, and those changes are proposed under the authority of sections 2002, 3001, 3002, 3003, 3004, 3006, and 3010 of the Solid Waste Disposal Act of 1965, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). This statute is commonly referred to as ''RCRA.''

III. Background

A. What are HFCs?

HFCs are anthropogenic [12] fluorinated chemicals that have no known natural sources. HFCs are used in a variety of applications such as refrigeration and air conditioning, foam blowing agents, solvents, aerosols, and fire suppression. HFCs are potent greenhouse gases (GHGs) with 100-year GWPs (a measure of the relative climatic impact of a GHG) that can be hundreds to thousands of times more potent than CO_2.

HFC use and emissions [13] have been growing worldwide due to the global phaseout of ozone-depleting substances (ODS) under the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol) and the increasing use of refrigeration and air-conditioning equipment globally. HFC emissions had previously been projected to increase substantially over the next several decades. In 2016, in Kigali, Rwanda, countries agreed to adopt an amendment to the Montreal Protocol, known as the Kigali Amendment, which provides for a global phasedown of the production and consumption of HFCs. The United States ratified the Kigali Amendment on October 31, 2022. Global adherence to the Kigali Amendment would substantially reduce future emissions, leading to a peaking of HFC emissions before 2040.[14] [15]

Atmospheric observations of most currently measured HFCs confirm their abundances are increasing at accelerating rates. Total emissions of HFCs increased by 19 percent from 2016 to 2020 and the four most abundant HFCs in the atmosphere, in GWP-weighted terms, are HFC–134a, HFC–125, HFC–23, and HFC–143a.[16]

In 2020, HFCs excluding HFC–23 accounted for a radiative forcing [17] of 0.037 W/m^2. This is an increase of nearly a third in total HFC forcing relative to 2016. This radiative forcing was projected to increase by an order of magnitude to 0.25 W/m^2 by 2050.[18] Full implementation of the Kigali Amendment is expected to reduce the future radiative forcing due to HFCs (excluding HFC–23) to 0.13 W/m^2 in 2050, which is a reduction of about 50 percent compared with the radiative forcing projected in the business-as-usual scenario of uncontrolled HFCs.[19]

There are hundreds of possible HFC compounds. The 18 HFCs listed as regulated substances by the AIM Act are some of the most commonly used HFCs (neat and in blends) and have high impacts as measured by the quantity of each substance emitted multiplied by their respective GWPs. These 18 HFCs are all saturated, meaning they have only single bonds between their atoms and therefore have longer atmospheric lifetimes.

In the United States, HFCs are used primarily in refrigeration and air-conditioning equipment in homes, commercial buildings, and industrial operations (approximately 75 percent of total HFC use in 2018) and in air conditioning in vehicles and refrigerated transport (approximately 8 percent). Smaller amounts are used in foam products (approximately 11 percent), aerosols (approximately 4 percent), fire protection systems (approximately 1 percent), and solvents (approximately 1 percent).[20]

EPA estimated in its final rule, Allocation Framework Rule (86 FR 55116, October 5, 2021) as updated under the final rule, Allowance Allocation Methodology for 2024 and Later Years (''2024 Allocation Rule'') (88 FR 46836; July 20, 2023), that phasing down HFC production and consumption according to the schedule provided in the AIM Act will avoid cumulative consumption of 3,156 million metric tons of exchange value equivalent (MMTEVe) of HFCs in the United States for the years 2022 through 2036. That estimate included both consumption as defined in 40 CFR 84.3—*i.e.,* with respect to a regulated substance, bulk production plus bulk imports minus bulk exports—and, although not requiring AIM Act allowances, the amount in imported products containing a regulated substance, less the amount in exported products containing a regulated substance. Annual avoided consumption was estimated at 42 $MMTCO_2e$ in 2022 and 282 $MMTCO_2e$ in 2036. In order to calculate the climate benefits associated with consumption abatement, the consumption changes were expressed in terms of emissions reductions. EPA estimated that for the years 2022–2050, the HFC phasedown will avoid emissions of 4,560 $MMTCO_2e$ of HFCs in the United States. The annual avoided emissions are estimated at 22 $MMTCO_2e$ in the year 2022 and 171 $MMTCO_2e$ in 2036. More information

[12] While the overwhelming majority of HFC production is intentional, EPA is aware that HFC–23 can be a byproduct associated with the production of other chemicals, including but not limited to hydrochlorofluorocarbon (HCFC)-22.

[13] World Meteorological Organization (WMO), Scientific Assessment of Ozone Depletion: 2022, GAW Report No. 278, 509 pp., WMO, Geneva, Switzerland, 2022. Available at: *https://ozone.unep.org/system/files/documents/Scientific-Assessment-of-Ozone-Depletion-2022.pdf.*

[14] Ibid.

[15] A recent study estimated that global compliance with the Kigali Amendment is expected to lower 2050 annual emissions by 3.0–4.4 Million Metric Tons of Carbon Dioxide Equivalent ($MMTCO_2e$). Guus J.M. Velders et al. Projections of hydrofluorocarbon (HFC) emissions and the resulting global warming based on recent trends in observed abundances and current policies. Atmos. Chem. Phys., 22, 6087–6101, 2022. Available at: *https://doi.org/10.5194/acp-22-6087-2022.*

[16] WMO, 2022.

[17] Radiative forcing is expressed in units of watts per square meter (W/m^2) and is defined by the IPCC as ''a measure of the influence a factor has in altering the balance of incoming and outgoing energy in the Earth-atmosphere system and is an index of the importance of the factor as a potential climate change mechanism.'' IPCC, 2007: Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. *https://www.ipcc.ch/report/ar4/syr/.*

[18] Guus J.M. Velders, David W. Fahey, John S. Daniel, Stephen O. Andersen, Mack McFarland, Future atmospheric abundances and climate forcings from scenarios of global and regional hydrofluorocarbon (HFCs) emissions, Atmospheric Environment, doi:10.1016/j.atmosenv.2015.10.071, 2015.

[19] Ibid.

[20] Calculations based on EPA's Vintaging Model, which estimates the annual chemical emissions from industry sectors that historically used ODS, including refrigeration and air conditioning, foam blowing agents, solvents, aerosols, and fire suppression. The model uses information on the market size and growth for each end use, as well as a history and projections of the market transition from ODS to substitutes. The model tracks emissions of annual ''vintages'' of new equipment that enter into operation by incorporating information on estimates of the quantity of equipment or products sold, serviced, and retired or converted each year, and the quantity of the compound required to manufacture, charge, and/or maintain the equipment. Additional information on these estimates is available in U.S. EPA, April 2016. EPA Report EPA–430–R–16–002. Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2014. Available at: *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2014.*

regarding these estimates is provided in the Allocation Framework Rule RIA and the RIA addendum for the 2024 Allocation Rule, which can be found in the docket for this proposal.

B. How do HFCs affect public health and welfare?

Elevated concentrations of GHGs including HFCs are and have been warming the planet, leading to changes in the Earth's climate including changes in the frequency and intensity of heat waves, precipitation, and extreme weather events; rising seas; and retreating snow and ice. The changes taking place in the atmosphere as a result of the well-documented buildup of GHGs due to human activities are changing the climate at a pace and scale that threatens human health, society, and the natural environment. In this section, EPA is providing some scientific background on climate change to offer additional context for this rulemaking and to help the public understand the environmental impacts of GHGs such as HFCs.

Extensive additional information on climate change is available in the scientific assessments and the EPA documents that are briefly described in this section, as well as in the technical and scientific information supporting them.

One of those documents is EPA's 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under section 202(a) of the CAA (74 FR 66496, December 15, 2009).[21] In the 2009 Endangerment Finding, the Administrator found under CAA section 202(a) that elevated atmospheric concentrations of six key well-mixed GHGs—CO_2, methane (CH_4), nitrous oxide (N_2O), HFCs, perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)—''may reasonably be anticipated to endanger the public health and welfare of current and future generations'' (74 FR 66523, December 15, 2009), and the science and observed changes have confirmed and strengthened the understanding and concerns regarding the climate risks considered in the Finding. The 2009 Endangerment Finding, together with the extensive scientific and technical evidence in the supporting record, documented that climate change caused by human emissions of GHGs (including HFCs) threatens the public health of the population of the United States. It explained that by raising average temperatures, climate change increases the likelihood of heat waves, which are associated with increased deaths and illnesses (74 FR 66497, December 15, 2009). While climate change also likely reduces cold-related mortality, evidence indicates that the increases in heat mortality will be larger than the decreases in cold mortality in the United States (74 FR 66525, December 15, 2009). The 2009 Endangerment Finding further explained that, compared with a future without climate change, climate change is expected to increase tropospheric ozone pollution over broad areas of the United States, including in the largest metropolitan areas with the worst tropospheric ozone problems, and thereby increase the risk of adverse effects on public health (74 FR 66525, December 15, 2009). Climate change is also expected to cause more intense hurricanes and more frequent and intense storms of other types and heavy precipitation, with impacts on other areas of public health, such as the potential for increased deaths, injuries, infectious and waterborne diseases, and stress-related disorders (74 FR 66525, December 15, 2009). Climate change is also expected to cause more intense hurricanes and more frequent and intense storms of other types and heavy precipitation, with impacts on other areas of public health, such as the potential for increased deaths, injuries, infectious and waterborne diseases, and stress-related disorders (74 FR 66525, December 15, 2009). Children, the elderly, and the poor are among the most vulnerable to these climate-related health effects (74 FR 66498, December 15, 2009).

The 2009 Endangerment Finding also documented, together with the extensive scientific and technical evidence in the supporting record, that climate change touches nearly every aspect of public welfare [22] in the United States, including: changes in water supply and quality due to increased frequency of drought and extreme rainfall events; increased risk of storm surge and flooding in coastal areas and land loss due to inundation; increases in peak electricity demand and risks to electricity infrastructure; predominantly negative consequences for biodiversity and the provisioning of ecosystem goods and services; and the potential for significant agricultural disruptions and crop failures (though offset to some extent by carbon fertilization). These impacts are also global and may exacerbate problems outside the United States that raise humanitarian, trade, and national security issues for the United States (74 FR 66530, December 15, 2009).

In 2016, the Administrator similarly issued Endangerment and Cause or Contribute Findings for GHG emissions from aircraft under CAA section 231(a)(2)(A)(81 FR 54422, August 15, 2016).[23] In the 2016 Endangerment Finding, the Administrator found that the body of scientific evidence amassed in the record for the 2009 Endangerment Finding compellingly supported a similar endangerment finding under CAA section 231(a)(2)(A) and also found that the science assessments released between the 2009 and the 2016 Findings ''strengthen and further support the judgment that GHGs in the atmosphere may reasonably be anticipated to endanger the public health and welfare of current and future generations'' (81 FR 54424, August 15, 2016).

Since the 2016 Endangerment Finding, the climate has continued to change, with new records being set for several climate indicators such as global average surface temperatures, GHG concentrations, and sea level rise. Moreover, heavy precipitation events have increased in the Eastern U.S. while agricultural and ecological drought has increased in the Western U.S. along with more intense and larger wildfires.[24] These and other trends are examples of the risks discussed in the 2009 and 2016 Endangerment Findings that have already been experienced. Additionally, major scientific assessments continue to demonstrate advances in our understanding of the climate system and the impacts that GHGs have on public health and welfare both for current and future generations. According to the Intergovernmental Panel on Climate Change's (IPCC) Sixth Assessment Report, ''it is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.'' [25] These

[21] In describing these 2009 Findings in this proposal, EPA is neither reopening nor revisiting them.

[22] The CAA states in section 302(h) that ''[a]ll language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.'' 42 U.S.C. 7602(h).

[23] In describing these 2016 Findings in this proposal, EPA is neither reopening nor revisiting them.

[24] An additional resource for indicators can be found at *https://www.epa.gov/climate-indicators.*

[25] IPCC, 2021: Summary for Policymakers. In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Pe´an, S. Berger, N.

Continued

updated observations and projections document the rapid rate of current and future climate change both globally and in the United States.[26] [27] [28] [29].

C. What refrigerant management programs has EPA already established under the Clean Air Act?

EPA is developing regulations that are designed to establish a comprehensive HFC management program that maximizes the reclaiming and minimizes the release of HFCs while coordinating these efforts with other similar programs. EPA has an extensive history under CAA Title VI regulating the sectors in which HFCs and substitutes are typically used, including where they are used as refrigerants and for other purposes. For example, EPA has regulated stationary refrigeration applications under CAA section 608, MVACs under CAA section 609, and has evaluated alternative substances for refrigeration, air conditioning, and other uses under the Significant New Alternatives Policy (SNAP) program under CAA section 612.

1. National Recycling and Emission Reduction Program (CAA Section 608)

CAA section 608, titled ''National Recycling and Emission Reduction Program,'' has three main components. First, section 608(a) requires EPA to establish standards and requirements regarding the use and disposal of class I and class II substances.[30] The second component, section 608(b), requires that the regulations issued pursuant to subsection (a) contain requirements for the safe disposal of class I and class II substances. The third component, section 608(c), prohibits the knowing venting, release, or disposal of ODS refrigerants [31] and their substitutes [32] in the course of maintaining, servicing, repairing, or disposing of appliances or industrial process refrigeration (IPR). EPA refers to this third component as the ''venting prohibition.'' Section 608(c)(1) establishes the venting prohibition for ODS refrigerants effective July 1, 1992, and it includes an exemption from this prohibition for ''[d]e minimis releases associated with good faith attempts to recapture and recycle or safely dispose'' any such substance. Section 608(c)(2) extends 608(c)(1) to substitute refrigerants, effective November 15, 1995. Section 608(c)(2) also includes a provision that allows the Administrator to exempt a substitute refrigerant from the venting prohibition if he or she determines that such venting, release, or disposal of a substitute refrigerant ''does not pose a threat to the environment.''

EPA first issued regulations under CAA section 608 on May 14, 1993 (58 FR 28660, ''1993 Rule''), to establish the national refrigerant management program for ODS refrigerants recovered during the service, repair, or disposal of air conditioning and refrigeration appliances. Since then, EPA has revised these regulations, which are found at 40 CFR part 82, subpart F (''subpart F''), through subsequent rulemakings published between 1994 and 2020. Regulations issued under CAA section 608 include, among other things, the venting prohibition and sales restrictions for refrigerants (40 CFR 82.154); safe disposal of appliances (40 CFR 82.155); proper practices for the evacuation of refrigerant from appliances (40 CFR 82.156); required practices for appliance maintenance and leak repair (40 CFR 82.157); standards for recovery and/or recycling equipment (40 CFR 82.158); technician and reclaimer certification requirements (40 CFR 82.161 and 82.164, respectively); and reporting and recordkeeping requirements (40 CFR 82.166). Appendices A–E at 40 CFR part 82, subpart F provide, among other things, specifications for refrigerants, performance standards for refrigerant recovery, recycling, and/or reclaiming equipment, and standards for becoming a certifying program for technicians.

As it pertains to regulations under section 608 of the CAA, EPA is using the term ''non-exempt substitute'' in this document to refer to substitute refrigerants that have not been exempted from the venting prohibition under CAA section 608(c)(2) and § 82.154(a) in the relevant end-use. Similarly, the term ''exempt substitute'' refers to a substitute refrigerant that has been exempted from the venting prohibition under section 608(c)(2) and § 82.154(a) in the relevant end-use. A few exempt substitutes have been exempted from the venting prohibition in all applications. Notably, in 2016, EPA published a rule (81 FR 82272, November 18, 2016) updating existing refrigerant management requirements and extending the full set of the subpart F refrigerant management requirements, which prior to that rule applied only to ODS refrigerants,[33] to non-exempt substitute refrigerants, such as HFCs and hydrofluoroolefins (HFOs). Among the subpart F requirements extended to non-exempt substitute refrigerants in the 2016 CAA section 608 Rule were provisions that restrict the servicing of appliances and the sale of refrigerant to certified technicians, specify the proper evacuation levels before opening an appliance, require the use of certified refrigerant recovery and/or recycling equipment, require that refrigerant be recovered from appliances prior to disposal, require that appliances have a servicing aperture or process stub to facilitate refrigerant recovery, require that refrigerant reclaimers be certified to reclaim and sell used refrigerant, and establish standards for technician certification programs, recovery equipment, and established technical standards for the purity of reclaimed refrigerant. The 2016 CAA section 608 Rule also extended the appliance maintenance and leak repair provisions, currently codified at 40 CFR 82.157, to appliances that contain 50 or more pounds of non-exempt substitute refrigerant. The 2016 CAA section 608 Rule additionally made numerous revisions to improve the efficacy of the refrigerant management program as a whole, such as revisions of regulatory provisions for increased clarity and readability, and removal of provisions that had become obsolete.

EPA reviewed the 2016 CAA section 608 Rule, focusing in particular on whether the Agency had the statutory authority to extend the full set of

Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press: 4.

[26] USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 1515 pp. doi: 10.7930/NCA4.2018. Available at: *https://nca2018.globalchange.gov*.

[27] IPCC, 2021.

[28] National Academies of Sciences, Engineering, and Medicine, 2019. Climate Change and Ecosystems. Washington, DC: The National Academies Press. Available at: *https://doi.org/10.17226/25504*.

[29] NOAA National Centers for Environmental Information, Monthly Global Climate Report for Annual 2022, published online January 2023, retrieved on March 1, 2023 from *https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202213*.

[30] A class I or class II substance is an ozone-depleting substance (ODS) listed at 40 CFR part 82, subpart A, appendix A or appendix B, respectively. This document refers to class I and class II substances collectively as ozone-depleting substances, or ODS.

[31] The term ''ODS refrigerant'' as used in this document refers to any refrigerant or refrigerant blend in which one or more of the components is a class I or class II substance.

[32] The term ''substitute'' for the purposes of the regulations under section 608 of the CAA is defined at 40 CFR 82.152.

[33] The only 40 CFR part 82, subpart F requirements that applied to substitute refrigerants prior to the 2016 CAA section 608 Rule were the venting prohibition and certain exemptions from that prohibition, as set forth in § 82.154(a).

subpart F refrigerant management regulations to non-exempt substitute refrigerants, such as HFCs and HFOs. In 2018, EPA proposed to withdraw the extension of the provisions of 40 CFR 82.157 to appliances using only non-exempt substitute refrigerants.[34] (83 FR 49332, October 1, 2018). In 2020, EPA published a final rule (85 FR 14150, March 11, 2020) withdrawing only the extension of the leak repair requirements—including requirements for repairing leaks, conducting leak inspections, and keeping applicable records—for appliances containing only such substitute refrigerants. Other subpart F provisions that were extended to substitute refrigerants in the 2016 CAA section 608 Rule, as mentioned above, were left in place for appliances containing only ODS substitute refrigerants. There were no changes to any of the regulatory requirements for ODS in the 2020 CAA section 608 Rule.

Petitions for judicial review were filed on the 2016 CAA section 608 Rule and separately on the 2020 CAA section 608 Rule. Two industry coalitions, National Environmental Development Association's Clean Air Project (NEDA/CAP) and the Air Permitting Forum (APF), filed petitions for judicial review of the 2016 CAA section 608 Rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in 2017. APF also filed an administrative petition for reconsideration before EPA regarding the 2016 CAA section 608 Rule.[35] In 2020, the Natural Resources Defense Council (NRDC) and a group of state and municipal petitioners [36] filed petitions for judicial review of the 2020 CAA section 608 Rule in the D.C. Circuit. NEDA/CAP also filed an administrative petition before EPA regarding the 2020 CAA section 608 Rule, which is styled as a petition for reconsideration or in the alternative a petition for rulemaking.[37] These four petitions for review were all consolidated under Case No. 20–1150 (D.C. Cir.) in July of 2020, and in August of 2020 the court severed four issues raised in NEDA/CAP and APF's administrative petitions for reconsideration and assigned them to a different case (Case No. 20–1309, D.C. Cir.). Both cases are now being held in abeyance.

On January 20, 2021, President Biden issued an ''Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,'' which directed review of certain agency actions taken between January 20, 2017, and January 20, 2021. Exec. Order No. 13,990, 86 FR 7037 (Jan. 20, 2021). The 2020 CAA section 608 Rule was one of the actions subject to review under this Executive Order. In light of both EPA's review of the 2020 CAA section 608 Rule consistent with the Executive Order and the Agency's consideration of subsection (h) of the AIM Act, EPA has decided to initiate a rulemaking that, among other things, would involve evaluating the application of leak repair requirements to appliances using HFCs and substitute refrigerants under subsection (h). Because this proposed action is rooted in EPA's authority under the AIM Act, EPA is not reopening or otherwise addressing the question of its authority for such requirements under the CAA in this proposal.

2. Motor Vehicle Air Conditioning Servicing Program (CAA Section 609)

CAA section 609 directs EPA to issue regulations establishing standards and requirements for the servicing of MVACs. For purposes of the regulations implementing CAA section 609, ''motor vehicle air conditioners'' [38] is defined at 40 CFR 82.32(d) as mechanical vapor compression refrigeration equipment used to cool the driver's or passenger's compartment of any motor vehicle. This definition further states that it is not intended to encompass certain hermetically sealed refrigeration systems used on motor vehicles for refrigerated cargo and the air conditioning systems on passenger buses. For purposes of the section 609 regulations, motor vehicle is defined at 40 CFR 82.32(c) as any vehicle which is self-propelled and designed for transporting persons or property on a street or highway, including but not limited to passenger cars, light-duty vehicles, and heavy-duty (HD) vehicles. This definition further provides that it does not include a vehicle where final assembly of the vehicle has not been completed by the original equipment manufacturer (OEM).

Under CAA section 609 and regulations that implement it, no person repairing or servicing motor vehicles for consideration (*e.g.,* payment or bartering) may perform any service on an MVAC that involves the refrigerant [39] without properly using approved refrigerant recovery or recovery and recycling equipment, and no such person may perform such service for consideration unless such person has been properly trained and certified. Section 609 also contains restrictions on the sale or distribution, or offer for sale or distribution, of class I and class II substances suitable for use as a refrigerant in MVACs in containers of less than 20 pounds, except to a person performing service for consideration on MVAC systems.

Regulations issued under CAA section 609, codified at 40 CFR part 82, subpart B, include, among other things, prohibited and required practices for persons repairing and servicing MVACs for consideration (40 CFR 82.34); requirements for refrigerant handling equipment (40 CFR 82.36); approval processes for independent standards testing organizations (40 CFR 82.38); requirements for certifications that any person servicing or repairing MVACs for consideration must submit to EPA, and related recordkeeping requirements (40 CFR 82.42). Appendices A–F at 40 CFR part 82, subpart B, provide minimum operating requirements for equipment used for the recovery, recycling and/or recharging of refrigerant used in MVACs.

In 1992, EPA published a rule (57 FR 31242, July 14, 1992) under CAA section 609 establishing standards and requirements for servicing of MVACs and restricting the sale of small containers of ODS. The regulations, which appear in 40 CFR part 82, subpart B, require persons who repair or service MVACs for consideration to be certified in refrigerant recovery and recycling and to properly use approved equipment when performing service involving the refrigerant. Consistent with the definition in CAA section 609(b)(1), ''refrigerant'' is defined in

[34] Ozone-depleting refrigerants and appliances that contain or use any amount of ODS continue to be subject to all applicable subpart F requirements, including those in 40 CFR 82.157.

[35] APF Petition for Reconsideration, January 2017, available: *https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0453-0228.*

[36] The state and municipal petitioners are the State of New York, State of Connecticut, State of Illinois, State of Maine, State of Maryland, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Virginia, State of Washington, District of Columbia, and City of New York.

[37] NEDA/CAP Petitions for Reconsideration/Petition for Rulemaking, May 2020, available: *https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0629-0345.*

[38] A related definition for ''MVAC-like appliance'' is found at 40 CFR 82.152: MVAC-like appliance means a mechanical vapor compression, open-drive compressor appliance with a full charge of 20 pounds or less of refrigerant used to cool the driver's or passenger's compartment of off-road vehicles or equipment. This includes, but is not limited to, the air-conditioning equipment found on agricultural or construction vehicles. This definition is not intended to cover appliances using R–22 refrigerant.

[39] Section 609(b)(1) defines the term ''refrigerant,'' ''[a]s used in this section'', to mean ''any class I or class II substance used in a motor vehicle air conditioner. Effective 5 years after November 15, 1990, the term 'refrigerant' shall also include any substitute substance.'' EPA's implementing regulations include a parallel definition of this term at 40 CFR 82.32(f).

subpart B as any class I or class II substance used in MVACs, and to include any substitute substance effective November 15, 1995. The 1992 CAA section 609 Rule also defined approved refrigerant recycling equipment as equipment certified by the Administrator or an approved organization as meeting either one of the standards in 40 CFR 82.36. Such equipment extracts and recycles refrigerant or extracts but does not recycle refrigerant, allowing that refrigerant to be subsequently recycled on-site or to be sent off-site for reclamation.[40] EPA based the regulatory equipment standards in subpart B on those developed by SAE. They cover service procedures for dichlorodifluoromethane (CFC–12 or R–12) recover/recycle equipment (SAE J1989, issued in October 1989), test procedures to evaluate R–12 recover/recycle equipment (SAE J1990, issued in October 1989 and revised in 1991) and a purity standard for recycled R–12 refrigerant (SAE J1991, issued in October 1989). Only equipment certified to meet the standards set forth in appendix A at 40 CFR part 82, subpart B, or that meet the criteria for substantially identical equipment, was approved under CAA section 609 for use in the servicing of MVACs at that time.

EPA issued another rule under CAA section 609 in 1997 (62 FR 68026, December 30, 1997) in response to the increasing use of substitute refrigerants, particularly 1,1,1,2-tetrafluoroethane (HFC–134a or R–134a). The 1997 CAA section 609 Rule established standards and requirements for the servicing of MVACs that use any refrigerant other than R–12. The rule also stated that refrigerant (whether R–12 or a substitute) recovered from motor vehicles at motor vehicle disposal facilities may be re-used in the MVAC service sector only if it has been properly recovered and recycled by persons who are either employees, owners, or operators of the facilities, or technicians certified under CAA section 609, using approved equipment. This differs from the rules established under CAA section 608, in which no person may sell or distribute, or offer for sale or distribution, used refrigerant (including both ODS and non-exempt substitutes such as HFCs) unless it has first been reclaimed by a certified reclaimer (40 CFR 82.154(d)). The 1997 CAA section 609 Rule also established conditions under which owners and operators of motor vehicle disposal facilities may sell refrigerant recovered from such vehicles to technicians certified under CAA section 609.

3. Significant New Alternatives Policy Program (CAA Section 612)

EPA identifies and evaluates substitutes for ODS in certain industrial sectors, including RACHP; aerosols; and foams. To a very large extent, HFCs are used in the same sectors and subsectors as where ODS historically have been used. Under SNAP, EPA evaluates acceptability of substitutes for ODS based primarily on the potential human health and environmental risks, relative to other substances used for the same purpose. In so doing, EPA assesses atmospheric effects such as ozone depletion potential (ODP) and GWP, exposure assessments, toxicity data, flammability, and other environmental impacts. This assessment could take a wide range of forms, such as a theoretical evaluation of the properties of the substitute, a computer simulation of the substitute's performance in the sector or subsector, lab-scale (table-top) evaluations of the substitute, or equipment tests under various conditions.

IV. How is EPA proposing to regulate the management of HFCs and their substitutes?

As described in the following sections, EPA is proposing to establish a program for the management of HFCs under subsection (h) of the AIM Act that includes requirements regarding several topics, including leak repair requirements for certain refrigerant-containing appliances and use of ALD systems for certain equipment; use of reclaimed HFCs in certain sectors or subsectors for the initial charge or installation of equipment and for servicing and/or repair of existing equipment; the servicing, repair, disposal, or installation of fire suppression equipment that contains HFCs, as well as requirements related to technician training in the fire suppression sector; recovery of HFCs from cylinders; and container tracking for HFCs that could be used in the servicing, repair, and/or installation of equipment. EPA intends for the proposed provisions for these topics to be able to stand independently from one another and has designed them accordingly. For example, the proposed leak repair requirements for refrigerant-containing appliances are designed to operate independently from the proposed requirements for servicing, repair, disposal, or installation of fire suppression equipment.

A. What definitions is EPA proposing to implement under subsection (h)?

The Allocation Framework Rule (86 FR 55116, October 5, 2021) established regulatory definitions at 40 CFR part 84, subpart A (''subpart A'') to implement the framework for, and begin the regulatory phasedown of, HFCs under the AIM Act, and EPA has finalized certain revisions to the definitions section of subpart A at 40 CFR 84.3 (*see* 88 FR at 46836, July 20, 2023).[41] The proposed Technology Transitions Rule (87 FR 76738, December 15, 2022) would establish additional regulatory definitions in 40 CFR part 84, subpart B (''subpart B'') as part of its first proposed rulemaking related to implementing subsection (i) of the AIM Act, entitled ''Technology Transitions''. EPA anticipates that any final Technology Transitions rule under subsection (i) would be available in the docket for that action. To maintain consistency, except as otherwise explained in this proposal, EPA generally intends to use terms in this proposal, and in the new subpart C which is to be established by this rule, as they are defined in subpart A. Thus, for terms not defined in this subpart but that are defined in subpart A (40 CFR 84.3), the definitions in 40 CFR 84.3 would apply. Although EPA has not yet finalized the regulatory definitions that would apply under the Technology Transitions program, we also anticipate considering any regulatory definitions that may be finalized at subpart B as we are developing this rulemaking under subsection (h) of the AIM Act in an effort to promote consistency where appropriate. Accordingly, we anticipate that for terms that are not defined in subparts A or C, but that are defined in subpart B, the subpart B definitions would apply under the new subpart C.

EPA welcomes comment on all definitions proposed in this action and in particular, whether it should adopt different definitions for any of the terms defined in subpart A or proposed to be defined in subpart B for purposes of this rulemaking under subsection (h) of the AIM Act. While EPA is seeking

[40] Equipment that extracts and recycles refrigerant is referred to as recover/recycle equipment. Equipment that extracts but does not recycle refrigerant is referred to as equipment that recovers but does not recycle refrigerant, or as recover-only equipment.

[41] The proposed revisions in 40 CFR 84.3 are described in EPA's proposed Allowance Allocation Methodology for 2024 and Later Years rule, which was published on October 21, 2022 (87 FR 66372). This rulemaking focuses on the second phase of the HFC phasedown and, among other things, proposes to establish the allocation methodology for the ''general pool'' of HFC production and consumption allowances for 2024 through 2028. Available at: *https://www.epa.gov/climate-hfcs-reduction/proposed-rule-allowance-allocation-methodology-2024-and-later-years.*

comment on the definitions as proposed for the new subpart C, in this rulemaking, the Agency is not reopening, taking comment, or proposing to modify the definitions as finalized in subpart A or those proposed under subpart B. The Agency also welcomes comment on the terms that are newly defined for this proposed rule under subsection (h) as well as if there are any additional definitions that are needed to ensure a common understanding of terminology.

1. Which definitions is EPA proposing to adopt that parallel definitions in 40 CFR 82.152?

EPA is proposing to adopt definitions for the following terms that are similar to the definitions for the same terms used in 40 CFR 82.152, which includes definitions implementing section 608 of the CAA, with only limited changes as are needed to conform with the AIM Act or this proposed action. EPA is proposing to use this approach for these previously defined terms because they are used in the same or substantially similar manner as in 40 CFR part 82, subpart F. Specifically, 40 CFR 82.152 includes definitions implementing section 608 in CAA Title VI, which is relevant to HFC management. As noted in section III.A. of this proposal, HFCs were intentionally developed to replace class I and class II ODS and are used in the same applications. The approach EPA is proposing to implement subsection (h) of the AIM Act is informed by the Agency's experience with CAA Title VI. For example, EPA's current regulations under section 608 of the CAA require certain refrigerant management practices by reclaimers, those who buy or sell refrigerant, technicians, owners and operators of refrigerant-containing appliances, and others. Because many in the regulated community are subject to both the AIM Act and CAA section 608, maintaining the same or similar definitions, where consistent with AIM Act requirements, would provide consistency to those that have been using and are familiar with these terms from CAA section 608 regulations. Because EPA's authority under the AIM Act extends beyond the sectors covered by the regulations at 40 CFR part 82, subpart F, where it is necessary for clarity, EPA is specifying where these definitions specifically apply to the terms as they refer to refrigerant-containing appliances.

Comfort cooling means the refrigerant-containing appliances used for air conditioning to provide cooling in order to control heat and/or humidity in occupied facilities including but not limited to residential, office, and commercial buildings. Comfort cooling appliances include but are not limited to chillers, commercial split systems, and packaged roof-top units.

Commercial refrigeration means the refrigerant-containing appliances used in the retail food and cold storage warehouse subsectors. Retail food appliances include the refrigeration equipment found in supermarkets, convenience stores, restaurants and other food service establishments. Cold storage includes the refrigeration equipment used to store meat, produce, dairy products, and other perishable goods.

Component, as it relates to a refrigerant-containing appliance, means a part of the refrigerant circuit within an appliance including, but not limited to, compressors, condensers, evaporators, receivers, and all of its connections and subassemblies.

Custom-built means that the industrial process refrigeration equipment or any of its components cannot be purchased and/or installed without being uniquely designed, fabricated and/or assembled to satisfy a specific set of industrial process conditions.

Disposal, as it relates to a refrigerant-containing appliance, means the process leading to and including:

(1) The discharge, deposit, dumping or placing of any discarded refrigerant-containing appliance into or on any land or water;

(2) The disassembly of any refrigerant-containing appliance for discharge, deposit, dumping or placing of its discarded component parts into or on any land or water;

(3) The vandalism of any refrigerant-containing appliance such that the refrigerant is released into the environment or would be released into the environment if it had not been recovered prior to the destructive activity;

(4) The disassembly of any refrigerant-containing appliance for reuse of its component parts; or

(5) The recycling of any refrigerant-containing appliance for scrap.

As with all the proposed definitions, this proposed definition of ''disposal,'' as it relates to a refrigerant-containing appliance, is limited to how the term is would be used in 40 CFR part 84 subpart C.

Follow-up verification test, as it relates to a refrigerant-containing appliance, means those tests that involve checking the repairs to an appliance after a successful initial verification test and after the appliance has returned to normal operating characteristics and conditions to verify that the repairs were successful. Potential methods for follow-up verification tests include, but are not limited to, the use of soap bubbles as appropriate, electronic or ultrasonic leak detectors, pressure or vacuum tests, fluorescent dye and black light, infrared or near infrared tests, and handheld gas detection devices.

Full charge, as it relates to a refrigerant-containing appliance, means the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one or a combination of the following four methods:

(1) Use of the equipment manufacturer's determination of the full charge;

(2) Use of appropriate calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations;

(3) Use of actual measurements of the amount of refrigerant added to or evacuated from the appliance, including for seasonal variances; and/or

(4) Use of an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge.

Industrial process refrigeration means complex customized refrigerant-containing appliances that are directly linked to the processes used in, for example, the chemical, pharmaceutical, petrochemical, and manufacturing industries. This sector also includes industrial ice machines, appliances used directly in the generation of electricity, and ice rinks. Where one appliance is used for both industrial process refrigeration and other applications, it will be considered industrial process refrigeration equipment if 50 percent or more of its operating capacity is used for industrial process refrigeration.

Initial verification test, as it relates to a refrigerant-containing appliance, means those leak tests that are conducted after the repair is finished to verify that a leak or leaks have been repaired before refrigerant is added back to the appliance.

Leak rate, as it relates to a refrigerant-containing appliance, means the rate at which an appliance is losing refrigerant, measured between refrigerant charges. The leak rate is expressed in terms of the percentage of the appliance's full charge that would be lost over a 12-month period if the current rate of loss were to continue over that period. The rate must be calculated using one of the following methods. The same method

must be used for all appliances subject to the leak repair requirements located at an operating facility.

(1) Annualizing Method.

(i) *Step 1.* Take the number of pounds of refrigerant added to the appliance to return it to a full charge, whether in one addition or if multiple additions related to same leak, and divide it by the number of pounds of refrigerant the appliance normally contains at full charge;

(ii) *Step 2.* Take the shorter of the number of days that have passed since the last day refrigerant was added or 365 days and divide that number by 365 days;

(iii) *Step 3.* Take the number calculated in Step 1 and divide it by the number calculated in Step 2; and

(iv) *Step 4.* Multiply the number calculated in Step 3 by 100 to calculate a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added}}{\text{pounds of refrigerant in full charge}} \times \frac{365\ \textit{days/year}}{\textit{shorter of:}\ \#\ \text{days since refrigerant last added or 365 days}} \times 100\%$$

(2) Rolling Average Method.

(i) *Step 1.* Take the sum of the pounds of refrigerant added to the appliance over the previous 365-day period (or over the period that has passed since the last successful follow-up verification test showing all identified leaks in the appliance were repaired, if that period is less than one year);

(ii) *Step 2.* Divide the result of Step 1 by the pounds of refrigerant the appliance normally contains at full charge; and

(iii) *Step 3.* Multiply the result of Step 2 by 100 to obtain a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added over past 365 days (or since the last successful follow-up verification test showing all identified leaks in the appliance were repaired, if that period is less than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

As discussed in section IV.C.4. of this proposal, EPA is clarifying that owner/operators that wish to preemptively repair leaks and then run the leak rate calculation once refrigerant has been added to the repaired appliance for the follow-up verification test may do so, assuming all applicable time windows are adhered to. Additionally, owner/operators may use the amount of refrigerant lost in lieu of the amount of refrigerant added to run the leak rate calculation prior to adding refrigerant if they have a valid method of determining the amount of refrigerant lost (*e.g.,* evacuating the appliance and comparing the amount of refrigerant evacuated to the full charge).

Mothball, as it relates to a refrigerant-containing appliance, means to evacuate refrigerant from an appliance, or the affected isolated section or component of an appliance, to at least atmospheric pressure, and to temporarily shut down that appliance.

MVAC-like appliance means a mechanical vapor compression, open-drive compressor refrigerant-containing appliance with a full charge of 20 pounds or less of refrigerant used to cool the driver's or passenger's compartment of off-road vehicles or equipment. This includes, but is not limited to, the air-conditioning equipment found on agricultural or construction vehicles. This definition is intended to have the same meaning as defined in 40 CFR 82.152.

This proposed definition deviates slightly from the definition of ''MVAC-like appliance'' at 40 CFR 82.152 to conform to the AIM Act grant of authority. As noted, this definition is intended to have the same meaning as defined 40 CFR 82.152.

Normal operating characteristics and conditions, as it relates to a refrigerant-containing appliance, means appliance operating temperatures, pressures, fluid flows, speeds, and other characteristics, including full charge of the appliance, that would be expected for a given process load and ambient condition during normal operation. Normal operating characteristics and conditions are marked by the absence of atypical conditions affecting the operation of the appliance.

Refrigerant circuit, as it relates to a refrigerant-containing appliance, means the parts of an appliance that are normally connected to each other (or are separated only by internal valves) and are designed to contain refrigerant.

Retire, as it relates to a refrigerant-containing appliance, means the removal of the refrigerant and the disassembly or impairment of the refrigerant circuit such that the appliance as a whole is rendered unusable by any person in the future.

Seasonal variance, as it relates to a refrigerant-containing appliance, means the removal of refrigerant from an appliance due to a change in ambient conditions caused by a change in season, followed by the subsequent addition of an amount that is less than or equal to the amount of refrigerant removed in the prior change in season, where both the removal and addition of refrigerant occurs within one consecutive 12-month period.

Technician, as it relates to any person who works with refrigerant-containing appliances, means any person who in the course of servicing, repair, or installation of a refrigerant-containing appliance (except MVACs) could be reasonably expected to violate the integrity of the refrigerant circuit and therefore release refrigerants into the environment. Technician also means any person who, in the course of disposal of a refrigerant-containing appliance (except small appliances as defined in 40 CFR 82.152, MVACs, and MVAC-like appliances), could be reasonably expected to violate the integrity of the refrigerant circuit and therefore release refrigerants from the appliances into the environment. Activities reasonably expected to violate

the integrity of the refrigerant circuit include but are not limited to: Attaching or detaching hoses and gauges to and from the appliance; adding or removing refrigerant; adding or removing components; and cutting the refrigerant line. Activities such as painting the appliance, rewiring an external electrical circuit, replacing insulation on a length of pipe, or tightening nuts and bolts are not reasonably expected to violate the integrity of the refrigerant circuit. Activities conducted on refrigerant-containing appliances that have been properly evacuated pursuant to § 82.156 are not reasonably expected to release refrigerants unless the activity includes adding refrigerant to the appliance. Technicians could include but are not limited to installers, contractor employees, in-house service personnel, and owners and/or operators of refrigerant-containing appliances. This proposed definition deviates slightly from the definition of ''technician'' at 40 CFR 82.152 to conform to the AIM Act grant of authority. EPA is also proposing a definition of ''certified technician'' to make it clear that persons certified per 40 CFR 82.161 are considered ''certified technicians'' for the purposes of these regulations. In section VIII. of this preamble, EPA is taking advanced comment on considerations for a future rulemaking on technician training.

2. Which definitions is EPA proposing to adopt that parallel definitions in 40 CFR 82.32?

EPA is proposing to adopt definitions for the following defined terms that are similar to the definitions used in 40 CFR 82.32 with limited changes as are needed to conform with the AIM Act or this proposal. EPA is proposing this approach for these defined terms because they are used in the same or substantially similar manner as in 40 CFR part 82, subpart B—Servicing of Motor Vehicle Air Conditioners under the CAA. Section 609 in Title VI of the CAA is relevant to refrigerant management, as it directs EPA to establish standards and requirements regarding the servicing of MVACs. For example, under CAA section 609 and regulations that implement it, no person repairing or servicing motor vehicles for consideration (*e.g.,* payment or bartering) may perform any service on an MVAC that involves the refrigerant without properly using approved refrigerant recovery or recovery and recycling equipment, and no such person may perform such service for consideration unless such person has been properly trained and certified. Because many within the regulated community are subject to both the AIM Act and CAA section 609, maintaining the same definitions, where consistent with AIM Act requirements, would provide consistency to those that have been using and are familiar with these terms from section 609. EPA welcomes comment on whether any of these terms should be further updated or modified for purposes of this rulemaking under subsection (h) of the AIM Act.

Motor vehicle as used in this subpart means any vehicle which is self-propelled and designed for transporting persons or property on a street or highway, including but not limited to passenger cars, light-duty vehicles, and heavy-duty vehicles. This definition does not include a vehicle where final assembly of the vehicle has not been completed by the original equipment manufacturer.

Motor vehicle air conditioners (MVAC) means mechanical vapor compression refrigerant-containing appliances used to cool the driver's or passenger's compartment of any motor vehicle. This definition is intended to have the same meaning as defined in 40 CFR 82.32.

3. What other definitions is EPA proposing to adopt?

EPA is also proposing to establish definitions for new terms that are applicable only under 40 CFR part 84, subpart C, and do not have a counterpart in the definitions under 40 CFR part 84, subpart A and that we do not anticipate will have a counterpart in any definitions that may be finalized in subpart B. The definitions that EPA is proposing to include in 40 CFR 84.102 for application to 40 CFR part 84, subpart C are as follows:

Certified technician means a technician that has been certified per the provisions at 40 CFR 82.161.

Equipment means any device that contains, uses, detects or is otherwise connected or associated with a regulated substance or substitute for a regulated substance, including any refrigerant-containing appliance, component, or system.

Fire suppression equipment means any device that is connected to or associated with a regulated substance or substitute for a regulated substance, including blends and mixtures, consisting in part or whole of a regulated substance or a substitute for a regulated substance, and that is used for fire suppression purposes. This term includes any such equipment, component, or system. This term does not include mission-critical military end uses and systems used in deployable and expeditionary situations. This term also does not include space vehicles as defined in 40 CFR 84.3.

EPA is proposing to explicitly state that the definition of ''fire suppression equipment'' for purposes of subsection (h) does not include mission-critical military end uses and systems used in deployable and expeditionary applications, as well as space vehicles. This proposed exclusion is based on EPA's understanding that there are situations in which the unique design and use of mission-critical military end uses and systems used in deployable and expeditionary situations and space vehicles make it impossible to recover fire suppression agent during the service, repair, disposal, or installation of the equipment.

Fire suppression technician means any person who in the course of servicing, repair, disposal, or installation of fire suppression equipment could be reasonably expected to violate the integrity of the fire suppression equipment and therefore release fire suppressants into the environment.

Installation means the process of setting up equipment for use, which may include steps such as completing the refrigerant circuit, including charging equipment with a regulated substance or substitute for a regulated substance, or connecting cylinders containing a regulated substance or a substitute for a regulated substance to a total flooding fire suppression system, such that the equipment can function and is ready for use for its intended purpose.

This definition of ''installation'' for purposes of subsection (h) is different from how the term is used in the definitions in the proposed Technology Transitions Rule (87 FR 76738, December 15, 2022). Specifically, the definition for ''manufacture'' in that proposed rule covers the installation of certain appliances in certain subsectors (*e.g.,* commercial refrigeration and IPR). In discussing the definition for ''manufacture'' in that proposed rule, EPA described that for these types of appliances, complex installation processes may be required, and the appliance is typically manufactured and field-charged with refrigerant on-site. Further, appliances such as these that are field charged or have the refrigerant circuit completed on-site are considered manufactured at the point when installation of all the components and other parts are completed, and the appliance is fully charged with refrigerant and able to operate. For purposes of the proposed Technology Transitions Rule (87 FR 76738, December 15, 2022), the installation

date of such equipment is relevant to the proposed GWP limit-based restriction and compliance date for the applicable subsector(s).

The types of installations covered under the proposed definition of ''manufacture'' in the proposed Technology Transitions Rule (87 FR 76738, December 15, 2022) would be included in the proposed definition of ''installation'' in this proposal under subsection (h), and other types of installation would also be included in the definition included in this proposal. EPA is proposing a broad definition of ''installation'' under subsection (h) in order to ensure that the Agency's implementation of subsection (h)(1) encompasses the practices, processes or activities that are relevant to the installation of equipment that would be regulated under this proposal.

Leak inspection, as it relates to a refrigerant-containing appliance, means the examination of an appliance to detect and determine the location of refrigerant leaks. Potential methods include, but are not limited to, ultrasonic tests, gas-imaging cameras, bubble tests as appropriate, or the use of a leak detection device operated and maintained according to manufacturer guidelines. Methods that determine whether the appliance is leaking refrigerant but not the location of a leak, such as standing pressure/vacuum decay tests, sight glass checks, viewing receiver levels, pressure checks, and charging charts, must be used in conjunction with methods that can determine the location of a leak.

This definition generally aligns with the corresponding definition at 40 CFR 82.152, except EPA is proposing to add the ''detect and'' language. In EPA's view, including ''detect and'' clarifies that a leak inspection is not just to determine the precise location of a known leak, but also to detect additional leaks that may be contributing to a leak rate exceedance.

Owner or operator means any person who owns, leases, operates, or controls any equipment, or who controls or supervises any practice, process, or activity that is subject to any requirement pursuant to this subpart.

Recover means the process by which a regulated substance, or where applicable, a substitute for a regulated substance, is removed, in any condition, from equipment; and stored in an external container, with or without testing or processing the regulated substance or substitute for a regulated substance.

In the regulations implementing under subsection (h), EPA is proposing to define the term ''recover'' as it is defined in subsection (b)(10) of the AIM Act for HFCs and to extend the regulatory definition to substitutes for HFCs. The term ''recover'' is defined in the AIM Act at subsection (b)(10) as ''the process by which a regulated substance'' is ''removed, in any condition, from equipment'' and ''stored in an external container, with or without testing or processing the regulated substance.'' EPA is proposing to include that the term recover also apply to substitutes for regulated substances in these regulations to support implementation of subsection (h)(1), which authorizes certain regulations involving substitutes for regulated substitutes. Substitutes for regulated substances are used in the same applications and often the same equipment as the regulated substances that they are being used in place of. Thus, recovering the substitute for a regulated substance would also occur, as appropriate, during the servicing, repair, or disposal of equipment and could be addressed by regulations under subsection (h)(1). Thus, including substitutes for regulated substances in the regulatory definition of ''recover'' provides clarity and supports application of these regulations to both regulated substances and their substitutes.

Recycling, when referring to fire suppression or fire suppressants, means the testing and/or reprocessing of regulated substances used in the fire suppression sector to certain purity standards.

Refrigerant, for purposes of this subpart, means any substance, including blends and mixtures, consisting in part or whole of a regulated substance or a substitute for a regulated substance that is used for heat transfer purposes, including those that provide a cooling effect.

Refrigerant-containing appliance means any device that contains and uses a regulated substance or substitute for a regulated substance as a refrigerant including any air conditioner, motor vehicle air conditioner, refrigerator, chiller, or freezer. For a system with multiple circuits, each independent circuit is considered a separate appliance.

As the terms ''appliance'' and ''refrigerant-containing appliance'' are not defined terms under the AIM Act, the regulatory definition will provide clarity as to what types of equipment would be subject to certain proposed requirements. EPA intends this term to be a subset of the broader category of ''equipment'' subject to subsection (h) of the AIM Act. EPA notes that this proposed definition differs from the definition of ''appliance'' under section 608 of the CAA. Sections 601 and 608 of the CAA specified that an appliance ''is used for household or commercial purposes,'' and that phrase also appears in the definition of ''appliance'' in 40 CFR 82.152. The AIM Act has no analogous provision. Accordingly, EPA is not proposing to include that phrase in defining ''refrigerant-containing appliance'' for purposes of implementing subsection (h). In keeping with the application of Title VI of the CAA (*e.g.,* under sections 608 and 612), EPA is defining a ''refrigerant-containing appliance'' to consist of an independent circuit. The independent circuit provides the desired cooling or heating effect, typically consisting of a compressor, condenser, evaporator, and metering device in an enclosed refrigerant loop. EPA notes that a given piece of equipment could contain multiple independent circuits and thus be considered as multiple, separate ''refrigerant-containing appliances.'' For instance, some food retail cases have been made with multiple independent circuits, each one containing the maximum 150-gram charge limit of propane, thus allowing a single case to address a higher refrigeration load. Also, some household refrigerator-freezers have been produced with two independent circuits, one handling the refrigerator and another the freezer.

Refrigerant-containing equipment means equipment as defined in this subpart that contains, uses, or is otherwise connected or associated with a regulated substance or substitute for a regulated substance that is used as a refrigerant. This definition includes refrigerant-containing components, refrigerant-containing appliances, and MVAC-like appliances. This term does not include mission-critical military end uses and systems used in deployable and expeditionary situations. This term also does not include space vehicles as defined in 40 CFR 84.3.

EPA is proposing to explicitly state that the definition of ''refrigerant-containing equipment'' under subsection (h) does not include mission-critical military end uses and systems used in deployable and expeditionary applications, as well as space vehicles. This proposed exclusion is based on EPA's understanding that there are situations in which the unique design and use of mission-critical military end uses and systems used in deployable and expeditionary situations and space vehicles make it impossible to recover refrigerant during the service, repair, disposal, or installation of the equipment. Likewise, requiring adherence to the leak repair and other

proposed provisions for refrigerant-containing equipment in this proposal in an active military zone of engagement, including systems used in deployable and expeditionary situations, could lessen the military effectiveness of the equipment. Likewise, requiring leak repair and other provisions in this proposal for such equipment in space vehicles could lessen their effectiveness.

Repackager means an entity who transfers regulated substances, either alone or in a blend, from one container to another container prior to sale or distribution or offer for sale or distribution. An entity that services system cylinders for use in fire suppression equipment and returns the same regulated substances to the same system cylinder it was recovered from after the system cylinder is serviced is not a repackager.

Repair, for purposes of this subpart and as it relates to a particular leak in a refrigerant-containing appliance, means making adjustments or other alterations to that refrigerant-containing appliance that have the effect of stopping leakage of refrigerant from that particular leak.

Reprocess means using procedures, such as filtering, drying, distillation and other chemical procedures to remove impurities from a regulated substance or a substitute for a regulated substance.

Retrofit, as it relates to a refrigerant-containing appliance, means to convert an appliance from one refrigerant to another refrigerant. Retrofitting includes the conversion of the appliance to achieve system compatibility with the new refrigerant and may include, but is not limited to, changes in lubricants, gaskets, filters, driers, valves, o-rings or appliance components. Retrofits required under this subpart shall be done to a refrigerant with a lower global warming potential. EPA is proposing this definition as similar to the parallel definition in 40 CFR 82.152, with an additional provision requiring that retrofits performed for compliance with this rulemaking must involve switching to a lower GWP refrigerant. EPA is proposing to include this provision as part of this definition for the purposes of this action so that if an owner or operator chooses to retrofit a refrigerant-containing appliance in lieu of repairing a leak, the retrofit must use a refrigerant that is a lower GWP in the original equipment. One implication of including this provision would be that if there are cases in which switching to a lower GWP refrigerant is not an option (*e.g.,* for reasons such as safety considerations or a refrigerant with a lower GWP is not suitable for use in a particular refrigerant-containing appliance), a retrofit would not be available as a compliance option for the particular refrigerant-containing appliance. Additional detail on the requirements of performing a retrofit and developing a retrofit plan can be found in section IV.C.3.f. of this preamble.

Stationary refrigerant-containing equipment means refrigerant-containing equipment, as defined in this subpart, that is not a motor vehicle air conditioner or MVAC-like appliance, as defined in this subpart.

Substitute for a regulated substance means a substance that can be used in equipment in the same or similar applications as a regulated substance, to serve the same or a similar purpose, including but not limited to a substance used as a refrigerant in a refrigerant-containing appliance or as a fire suppressant in fire suppression equipment, provided that the substance is not a regulated substance or an ozone-depleting substance.

EPA is proposing for the purposes of this action to define a substitute for a regulated substance to make clear that substitutes in this rulemaking would not include regulated substances or ozone-depleting substances. Examples of a substitute for a regulated substance include but are not limited to HFOs, hydrocarbons (*e.g.,* propane, isobutane), ammonia (NH_4), and CO_2. A substitute for a regulated substance may be used neat or in a blend. Subsection (h) includes authority for EPA to develop regulations involving regulated substances and substitutes for regulated substances. Specifically, subsection (h)(1) expressly provides that EPA is to promulgate certain regulations involving a regulated substance, a substitute for a regulated substance, the reclaiming of a regulated substance as a refrigerant, or the reclaiming of a substitute for a regulated substance as a refrigerant. EPA acknowledges that this definition of ''substitute for a regulated substance'' differs from the definition of the similar term, ''substitute'' [42] in the proposed Technology Transitions Rule (87 FR 76738, December 15, 2022). EPA is proposing this definition for purposes of implementing subsection (h), because specifying that substitutes for a regulated substance are only those substances that do not contain HFCs will draw a distinction that is helpful for certain provisions in this proposal, as EPA is proposing to control certain practices, processes, or activities as they relate to regulated substances differently from compared to how they relate to substitutes for regulated substances. As EPA has noted in the Executive Summary at section I.A., the terms ''HFC'' and ''regulated substance'' are used interchangeably in this preamble. Similarly, throughout this preamble, EPA notes that the term ''substitute for an HFC'' may be used interchangeably with ''substitute for a regulated substance'' in this preamble.

Virgin regulated substance means any regulated substance that has not had any bona fide use in equipment except for those regulated substances contained in the heel or the residue of a container that has bona fide use in the servicing, repair, or installation of equipment.

EPA is proposing to add this definition of ''virgin regulated substance'' to make it clear that introduction of a regulated substance to equipment, such as a refrigerant-containing appliance or fire suppression equipment, solely to convert the regulated substance to ''used'' regulated substance in order to circumvent the intended requirements of this proposal is not permissible. This scenario, where regulated substance is charged to equipment, such as a refrigerant-containing appliance or fire suppression equipment, and recovered without any bona fide use, was brought to EPA's attention by stakeholders including during public stakeholder meetings as the agency developed this proposal.[43] A regulated substance that has had no bona fide use in equipment would be considered a virgin regulated substance unless it was from the heel or residue of a container that did have a bona fide use in the servicing, repair, or installation of equipment.

B. Which sectors and subsectors is EPA considering addressing under subsection (h)?

Subsection (h) of the AIM Act provides EPA authority to promulgate regulations to control, where appropriate, any practice, process, or activity related to the servicing, repair, disposal, or installation of equipment that involves HFCs or their substitutes, or the reclaiming of HFCs or their substitutes used as refrigerants. EPA

[42] The proposed definition for *substitute* in the proposed Technology Transitions rule is: ''any substance, product, or alternative manufacturing process, whether existing or new, that is used, or intended for use, in a sector or subsector with a lower global warming potential than the regulated substance, whether neat or used in a blend, to which a use restriction would apply.'' (See 87 FR 76738, 76754, December 15, 2022). EPA further notes that it has not made final decisions for the Technology Transitions rule.

[43] EPA held stakeholder meetings for public input on November 9, 2022 and March 16, 2023 as well as solicited feedback through a webinar for the EPA GreenChill Partnership program on April 12, 2023.

interprets this provision to include authority to regulate, as appropriate, practices, processes, or activities related to any sector, subsector, or application where a regulated substance or a substitute for a regulated substance is used in equipment. Regulated substances and their substitutes are typically used in the RACHP sector as a refrigerant in a vapor compression cycle to cool and/or dehumidify a substance or space, like a refrigerator cabinet, room, office building, or warehouse. Regulated substances and/or their substitutes may also be used in other sectors, subsectors, or applications, such as aerosols, fire suppression, solvent cleaning, foam blowing, and others. However, as noted in section II.B. of this proposal, subsection (h)(4) expressly provides that any rulemaking under subsection (h) shall not apply to a regulated substance or a substitute for a regulated substance that is contained in a foam. Thus, EPA is not proposing any requirements for regulated substances or their substitutes when they are contained in foams in this proposal. Accordingly, EPA interprets its authority under subsection (h) to include promulgating regulations that control the types of practices, processes, or activities identified in subsection (h)(1) in any of those sectors, subsectors, or applications, with the limitation that we do not interpret our regulatory authority under subsection (h) to extend to HFCs or substitutes for HFCs when they are contained in foams.

EPA is proposing requirements for equipment in certain sectors or subsectors as described in sections IV.C.–F. of this preamble. While EPA interprets subsection (h) to provide authority that could be applied to practices, processes, or activities related to equipment across a broad range of sectors, subsectors, or applications that involve regulated substances and/or their substitutes, at this time EPA is focusing on certain sectors and subsectors in the requirements proposed in the rulemaking. In future rulemakings, EPA may consider establishing requirements for equipment in other sectors, subsectors, or applications that involve regulated substances and/or their substitutes. The relevant sections of this preamble describe the requirements that EPA is proposing for equipment in certain sectors and subsectors and how EPA understands these sectors and subsectors as relevant for these proposed requirements.

Where EPA is proposing requirements for certain sectors or subsectors, we intend to be consistent with how those sectors or subsectors are understood under other provisions of the AIM Act and/or CAA Title VI that address the same sector or subsector, such as subsection (i) of the AIM Act, through the Technology Transitions program. EPA issued a proposed Technology Transition rulemaking on December 15, 2022 (87 FR 76738) which provides additional detail on many of the same sectors and subsectors for which we are proposing certain requirements under subsection (h). Although EPA has not yet made final decisions regarding those sectors or subsectors under subsection (i) of the AIM Act, we also anticipate considering how those sectors or subsectors are addressed in the final Technology Transitions rulemaking in developing this rulemaking under subsection (h) of the AIM Act.

EPA is proposing certain provisions, as described later in this preamble, for certain equipment in applicable subsectors within the RACHP sector in this action. Such subsectors within the RACHP sector include: residential and light commercial air conditioning and heat pumps; cold storage warehouses; IPR; stand-alone retail food refrigeration; supermarket systems; refrigerated transport; and automatic commercial ice makers. EPA is also proposing certain provisions for equipment in the fire suppression sector, as described later in this preamble. Not all provisions proposed in this rulemaking would apply to each of the sectors and subsectors identified here. For example, EPA is proposing certain requirements for the use of reclaimed HFCs in residential and light commercial AC and heat pumps. However, EPA is proposing to exempt residential and light commercial AC and heat pump equipment in the universe of refrigerant-containing appliances subject to proposed leak repair requirements. Additional detail can be found in section IV.C.2. of this preamble.

EPA is requesting comment on all aspects of this proposed rule. Where EPA is proposing requirements for equipment in certain sectors and subsectors, EPA is providing additional detail noting specific areas for which we are seeking comment.

C. How is EPA proposing to address leak repair?

1. Background

As noted above, subsection (h) of the AIM Act includes provisions focused on the management of regulated substances. Specifically, subsection (h)(1) directs EPA, for ''purposes of maximizing reclaiming and minimizing the release of a regulated substance from equipment and ensuring the safety of technicians and consumers,'' to ''promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment (including requiring, where appropriate, that any such servicing, repair, disposal, or installation be performed by a trained technician meeting minimum standards, as determined by the Administrator) that involves'': ''a regulated substance''; ''a substitute for a regulated substance''; ''the reclaiming of a regulated substance used as a refrigerant''; or ''the reclaiming of a substitute for a regulated substance used as a refrigerant.''

Among other things, EPA interprets its regulatory authority under subsection (h)(1) to include authority to establish requirements related to the detection, prevention, and repair of leaks for equipment containing HFCs or substitutes for HFCs (whether the equipment uses the HFC or substitute for an HFC neat or in a blend with other substances). EPA understands the statutory phrase ''regulations to control . . . any practice, process, or activity'' as including authority for rules governing both the manner in which a practice, process, or activity occurs (*e.g.,* standards that must be met, timing of the process or activity, etc.), as well as rules requiring that a practice, process, or activity be undertaken. Regulations establishing requirements for leak prevention, detection, and repair would control practices, processes, and activities regarding the servicing, repair, disposal, or installation of equipment. For example, detecting and fixing leaks in equipment would be considered an activity regarding the servicing or repair of equipment. Similarly, leak prevention and/or inspection and repair practices, processes, or activities would be conducted regarding the servicing and/or repair of equipment.

The requirements proposed in this rulemaking also relate to the statutory purposes identified in subsection (h)(1). Requirements related to the detection, inspection, repair, and prevention of leaks for equipment containing HFCs (whether used neat or in a blend) or their substitutes would serve the statutory purpose of minimizing the release of regulated substances from equipment. For example, leak detection, inspection, and repair requirements help minimize such releases because the sooner a leak is found and repaired, the less HFC will be released. Further, leak prevention requirements would minimize HFC releases by avoiding potential leaks in the first place. Additionally, regulations establishing

requirements for leak prevention, detection, and repair would also further the statutory purpose of maximizing the reclamation of regulated substances by reducing the amount of HFC released from equipment and thus increasing the amount of HFC that is available to be recovered and reclaimed. Any regulated substance used in equipment that is released through leaks and escapes to the atmosphere reduces the amount of HFC remaining in the equipment that could otherwise be recovered and reclaimed for further use.

Further, as the phasedown of the production and consumption of HFCs as required by the AIM Act progresses, reclaimed HFCs will play a key role in the amount of available HFCs for equipment that will continue to use HFCs (*e.g.,* for servicing). Reclaimed HFCs will also be important in avoiding potential economic disruption that could be associated with the scarcity of virgin HFCs as well as avoid stranding existing equipment that will need to be serviced using HFCs. Generally, overall refrigerant management in appliances helps to maintain the health of the appliances. This can be crucial for refrigerant-containing appliances in the RACHP subsectors that are relevant to handling food products, such as supermarket systems, refrigerated transport, and other food retail subsectors where the intended function is to ensure food products are maintained at appropriate temperatures to avoid spoilage and food waste. In 2021, 344,000 tons of food were lost in the United States due to equipment issues in the retail and food service subsectors.[44] Successful repair of leaks and avoiding leaks are a few ways to help ensure that these appliances are operating efficiently and as intended and can help to avoid unnecessary food waste.

In considering requirements related to leak prevention, detection, and repair under subsection (h) of the AIM Act, EPA further notes that subsection (h)(3) expressly provides that EPA may coordinate regulations promulgated to carry out subsection (h) with any other regulations promulgated by EPA that involve the same or a similar practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment, or reclaiming. Accordingly, the Agency considered various potential approaches to coordinating the proposed regulations under subsection (h) related to leak prevention, detection, and repair with regulations previously promulgated under CAA section 608, given they relate to the same or similar practices, processes, or activities for refrigerant-containing appliances containing ODS. In particular, during the development of this NPRM, EPA considered the requirements at 40 CFR 82.157.

As noted in the background section of this preamble at section III.C.1., all provisions in 40 CFR part 82, subpart F except leak repair currently apply to appliances containing ODS substitutes including regulated HFCs used neatly or in blends. EPA is not proposing any requirements duplicative of those in this action. However, EPA is proposing to establish leak repair requirements for refrigerant-containing appliances using HFCs and/or substitutes for HFCs.

As described in the definitions section of this proposal at section IV.A.3., EPA is proposing to define ''equipment'' as including appliances. In the context of subsection (h), EPA considers that appliances would be a subset within the broader category of equipment. EPA has also proposed to define ''refrigerant-containing appliance'' in section IV.A.3. In this action, the Agency generally refers to the proposed leak repair requirements as applying to refrigerant-containing appliances. In the context of the proposed leak repair requirements, appliances are considered types of equipment that are used in subsectors within the RACHP sector. EPA is proposing leak repair provisions for certain refrigerant-containing appliances with a refrigerant that contains HFCs or certain substitutes for HFCs (whether the equipment uses the HFC or certain substitutes for an HFC neat or in a blend with other substances) under subsection (h) of the AIM Act. If finalized, these regulations would be codified at 40 CFR part 84.106.

2. Scope of the Proposed Leak Repair Requirements

EPA is proposing leak repair requirements for certain refrigerant-containing appliances containing HFC (whether used neat or in a blend) or certain HFC substitute refrigerants under subsection (h) of the AIM Act. These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as these provisions would control practices, processes, or activities regarding servicing or repair of appliances, which are a type of equipment, and would involve a regulated substance or a substitute for a regulated substance. The requirements proposed are similar to leak repair provisions for appliances containing an ODS refrigerant found at 40 CFR 82.157,[45] but are not identical. In particular, EPA is proposing to apply the leak repair requirements under subsection (h) of the AIM Act to appliances containing HFCs or certain substitutes for HFCs with lower charge sizes. Where EPA is proposing to require the same or similar practice, process or activity for applicable appliances containing HFC or substitutes for HFCs as is required under 40 CFR 82.157 for appliances containing an ODS refrigerant, EPA is proposing to adopt regulatory text under 40 CFR part 84, where appropriate, that is consistent with the parallel provision in 40 CFR 82.157. Where the proposed requirements are different, the regulatory text will differ.

a. Appliances containing which refrigerants would be subject to the proposed leak repair requirements?

EPA is proposing to include HFCs (including blends that contain HFCs) and certain substitutes for HFCs under the provisions related to leak repair under subsection (h) of the AIM Act. As noted previously, HFCs are potent GHGs with GWPs that can be hundreds to thousands of times more potent than CO_2. As noted in the background section of this preamble (section III.A), global HFC use and emissions have been increasing since the ODS phaseout and their increasing use in RACHP equipment.[46] Provisions related to leak repair for equipment that use HFCs and their substitutes are critical to mitigating emissions of HFCs and meeting the purpose stated in subsection (h)(1) of the AIM Act to minimize releases of regulated substances from equipment. As mentioned, the AIM Act includes a list of 18 HFCs as regulated substances and provides authority for the Administrator to add additional HFCs if certain criteria are met, including that the GWP of the substance is above 53.[47] Certain substitutes for HFCs have GWPs that are below that of the lowest GWP of a substance that EPA could list as a regulated substance under subsection (c)(3)(A)(i)(II) of the AIM Act (*i.e.,* a GWP of greater than 53). EPA is proposing to apply the leak repair requirements to refrigerant-containing appliances containing an HFC

[44] ReFED, Insights Engine Food Waste Monitor, May 2023, available at: *https://insights-engine.refed.org/food-waste-monitor?view=overview&year=2021.*

[45] In this proposed rulemaking, EPA is not reopening the leak repair requirements at 40 CFR 82.157 or proposing any changes to them.

[46] WMO, 2022.

[47] Subsection (c)(3)(A) provides the criteria by which the Administrator may designate a substance not included in the list of regulated substances in subsection (c)(1); these criteria include that the substance must be a chemical substance that is a saturated hydrofluorocarbon and have an exchange value (*i.e.,* GWP) greater than 53.

refrigerant or a substitute for HFC refrigerants that have a GWP above 53 (whether the HFC or substitute for an HFC is used neat or in a blend). EPA is proposing this cutoff for the leak repair provisions; however, other provisions in this proposal would apply to any substitute for an HFC without any GWP threshold, unless otherwise specified.

In subsection (h) of the AIM Act, Congress directed EPA to control, *where appropriate,* any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment involving HFCs or their substitutes. EPA is proposing that for the leak repair provisions under subsection (h), it is appropriate at this time to only address substitutes for HFCs (whether used neat or in a blend) with GWPs that are greater than the cutoff Congress provided for listing new regulated substances (*i.e.,* a GWP of 53). The agency notes that currently the vast majority of HFC refrigerants and refrigerant blends containing HFCs in equipment have much higher GWPs, often 20 to 50, or even more than 75 times as high as this cutoff. EPA acknowledges that over time the refrigerant market is likely to shift, and that this proposal is based on the current and near-term anticipated market for equipment that contains HFCs and substitutes for HFCs. Thus, we view it as appropriate to focus the proposed leak repair requirements on HFCs and substitutes for HFCs with GWPs above 53 in this rulemaking, whether the HFC or substitute is used neat or in a refrigerant blend. We further note that EPA may in a future rulemaking consider establishing leak repair requirements for substitutes for HFCs and blends containing substitutes for HFCs with a GWP at or below 53. For example, if EPA becomes aware of concerns related to this limitation as the refrigerant market shifts to lower GWP substitutes for HFCs, EPA could consider revisiting this requirement.

To determine whether an appliance containing a substitute for a regulated substance is required to comply with the proposed leak repair provisions, EPA is proposing to adopt the similar process for determining the GWP of regulated substances and/or their substitutes as described in the proposed Technology Transitions Rule (87 FR 76738, 76750, December 15, 2022). The GWP of a regulated substance would use the GWP as related to the exchange value listed in subsection (c) of the AIM Act and codified as appendix A to 40 CFR part 84.[48] For the GWP of substitutes for regulated substances, EPA is proposing to use IPCC's Fourth Assessment Report (AR4) 100-year GWPs wherever possible given they are numerically the same as the exchange values in the AIM Act and because EPA considers such an approach to be less complicated. For hydrocarbons listed in Table 2–15 of AR4, EPA is proposing to use the net GWP value. For substances for which no GWP is provided in AR4, EPA is proposing to use the 100-year GWP listed in World Meteorological Organization (WMO) 2022.[49] For any substance not listed in either of these sources, EPA is proposing to use the GWP of the substance in Table A–1 to 40 CFR part 98, as it exists on a specified date, such as the date any final rule based on this proposal is published in the **Federal Register**, if such substance is specifically listed in that table. EPA is aware of two potential substitutes for regulated substances that might be addressed by the proposed requirements that are not listed in these three sources, trans-dichloroethylene (HCO-1130(E)) and HCFO-1224yd(Z) and is proposing to set these GWPs to be five[50] and one,[51] respectively, for the purposes of this proposal. For any other substance not listed in the above three source documents, EPA is proposing that the default GWPs as shown in Table A–1 to 40 CFR part 98, as it exists on a specified date, such as the date any final rule based on this proposal is published in the **Federal Register**, shall be used. In the event that the hierarchy outlined in this section does not provide a GWP (*i.e.,* the substance in question is not listed in the three documents, is not one of the two for which EPA is proposing GWPs, is not listed in Table A–1 to 40 CFR part 98 and does not fit within any of the default GWPs provided in Table A–1 to 40 CFR part 98), EPA is proposing to use a GWP of zero. In any case where a GWP value is preceded with a less than (<), very less than (<<), greater than (>), approximately (~), or similar symbol in the source document, which is used to determine the GWP, EPA is proposing that the value shown shall be used.

Applying the proposed provisions related to leak repair under subsection (h) to HFC substitutes with a GWP greater than 53, but not those with a GWP at or below 53, would result in certain lower GWP refrigerants (*e.g.,* single component HFO refrigerants) that are covered by the venting prohibition at 40 CFR 82.154(a)(1) to be excluded from coverage under the proposed subsection (h) leak repair provisions, as they have a GWP lower than 53. The proposed leak repair requirements would still apply where any substitute for an HFC is a component in a refrigerant blend that contains an HFC or another substitute for an HFC with a GWP above 53. This would be true even if one or more of the components of the refrigerant blend is a substitute for an HFC that is exempted from the venting prohibition under 40 CFR 82.154(a)(1). In describing the practical effects of our proposed approach, we are not reopening, taking comment on, or proposing to modify any regulatory provisions in 40 CFR part 82 in this NPRM.

In the case that a refrigerant-containing appliance uses a refrigerant blend that contains an ODS and an HFC or a substitute for an HFC with a GWP above 53, EPA is proposing that the owner or operator of such appliance be required to simultaneously meet the leak repair provisions promulgated under CAA section 608 at 40 CFR 82.157 and the proposed provisions in this action, to the extent that they are applicable. EPA notes that many of the provisions in this proposed action are similar to those in 40 CFR 82.157, which should help alleviate any concerns about duplicative requirements. However, the provisions proposed in this NPRM (as described in the following section) would apply to refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53. The requirements at 40 CFR 82.157 apply to appliances containing an ODS with a charge size at or above 50 pounds. If such appliances use a refrigerant that also contains an HFC or an HFC substitute that has a GWP above 53, they would be required to meet the leak repair requirements proposed in this NPRM, to ensure that the requirements applicable to the HFCs and HFC substitutes are also met. An appliance with a charge size of 15 pounds or greater containing a refrigerant blend that was made up of ODS and an HFC or a substitute for an HFC with a GWP above 53 would also be required to meet the proposed provisions in this action, as a way of ensuring that the requirements that apply to the HFCs or certain substitutes for HFCs contained in the equipment

[48] EPA noted in section III.A. of this preamble that the exchange values for the regulated HFCs listed in subsection (c) of the AIM Act are numerically identical to the 100-year GWPs of each substance, as given in the Errata to Table 2.14 of the IPCC's Fourth Assessment Report (AR4) and Annexes A, C, and F of the Montreal Protocol. Available at: *https://www.ipcc.ch/site/assets/uploads/2018/05/ar4-wg1-errata.pdf.*

[49] WMO, 2022.

[50] 81 FR 32244 (May 23, 2016).

[51] 84 FR 64766 (November 25, 2019).

are met. However, because these appliances would not meet the charge size threshold under 40 CFR 82.157, those requirements would not apply even though they contain ODS refrigerants.

EPA intends for the leak repair requirements in this proposal to be sufficiently consistent with the requirements at 40 CFR 82.157 such that both sets of requirements could be met for refrigerant-containing appliances that use a refrigerant blend containing an ODS and an HFC or a substitute for an HFC with a GWP above 53 and that have full charge of 50 or more pounds of refrigerant. EPA requests comment on whether there is an impediment to a refrigerant containing-appliance simultaneously complying with both sets of requirements.

Leak repair provisions for appliances containing HFCs and certain substitutes for HFCs as refrigerants as proposed in this document should minimize emissions. EPA describes emission reductions in the draft TSD titled *Analysis of the Economic Impact and Benefits of the Proposed Rule* and in in section VI. of this proposal.

EPA is requesting comment on all aspects of this proposal. In particular, EPA is seeking comment on the use of a GWP cutoff to apply the proposed leak repair requirements to equipment containing an HFC or a substitute for an HFC as a refrigerant, used neat or in blends. EPA also seeks comment on using a GWP above 53 as the cutoff, including, for example, comments on whether EPA should consider a lower GWP cutoff.

b. Appliances with what charge size would be subject to the proposed leak repair requirements?

EPA is proposing to apply the leak repair requirements under subsection (h) of the AIM Act to refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53, with specific exemptions. This is a lower threshold than the threshold for the leak repair requirements established under CAA section 608, as the leak repair provisions at 40 CFR 82.157 apply to appliances containing 50 or more pounds of ODS refrigerant, a threshold that was established in 1993. EPA is aware of technological achievements that, in many cases, have resulted in smaller charge sizes for cooling loads. For example, microchannel heat exchangers are one such technology used to reduce refrigerant charge size in equipment. Equipment using different refrigerants may also have a lower charge size; for example, in air conditioning equipment, the refrigerant charge size for HFC–32 is approximately 10–20 percent less than that of R–410A.[52] As another example, EPA also understands that in certain cases, remodels or expansions of supermarket systems can increase capacity while not increasing the refrigerant charge size (*i.e.,* effectively using a lower refrigerant charge for a greater cooling capacity). Such a scenario could be achieved by remodeling with display cases that operate at a higher evaporator temperature to maintain product temperatures without changing the intended purpose of the refrigeration system.[53]

EPA is proposing a lower threshold because applying the requirements to more equipment is expected to reduce HFC releases from equipment and because avoided releases of HFCs from leaks would increase the amount of HFCs that would be available for recovery and reclamation. The AIM Act provides a schedule for a phasedown of HFCs, as opposed to the phaseout directed for ODS under the CAA. Therefore, there may be the continued introduction of HFC-containing equipment indefinitely which is a notable difference from the CAA. As described more fully in section II.B. of this proposal, subsection (h)(1) of the AIM Act tasks the Agency with promulgating certain regulations, where appropriate, for certain purposes, including minimizing the release of regulated substances from equipment and maximizing the reclamation of regulated substances. EPA interprets the phrase ''where appropriate'' in subsection (h)(1) to provide it discretion to reasonably determine how the regulations under subsection (h)(1) will apply, including by making determinations about the charge size threshold of equipment that would be subject to the leak repair requirements. Consistent with its statutory authority, EPA is proposing to use a lower threshold than the 50-pound threshold for ODS-containing appliances under 40 CFR 82.157 for the leak repair requirements to further serve these purposes.

By proposing that the applicable charge size for appliances with a refrigerant that contains an HFC or a substitute for an HFC with a GWP greater than 53 to be 15 pounds or more of refrigerant, with certain exemptions, the universe of affected appliances covered by the leak repair requirements under subsection (h) would be expanded as compared to the universe of appliances containing ODS refrigerants and subject to the leak repair requirements provisions at 40 CFR 82.157. For example, an applicable charge size of 15 pounds or more of a refrigerant that contains an HFC or substitute refrigerant with a GWP above 53 is expected to cover certain appliances in the following subsectors which are typically below the 50-pound threshold under 40 CFR 82.157 and thus not subject to those provisions:

- Train air conditioning;
- Passenger buses (*e.g.,* school, coach, transit, and trolley buses);[54]
- Refrigerated transport—rail;
- Large retail food remote condensing units (*e.g.,* cold rooms in supermarkets); and
- Large commercial unitary air conditioning (*e.g.,* a system for a mid-sized office building).

EPA is proposing a 15-pound or more refrigerant charge size for appliances subject to the subsection (h) leak repair requirements based in part on consideration of an analysis of equipment in applications where HFCs or their substitutes are currently being used as a refrigerant and where they are expected to be used in the coming years. EPA conducted an analysis using the Vintaging Model to estimate stocks of refrigerants used in equipment of varying charge sizes. The Vintaging Model tracks the transition from ODS to substitutes including HFCs by modeling the total pieces of equipment and average charge sizes—which could vary over time based on vintage and the ODS or substitute used—from five sectors to over 60 subsectors. Doing so allows us to bin the pieces of equipment and total refrigerant in equipment by charge size. A current snapshot of the model's estimates of the installed stock of refrigerants that are HFCs and their substitutes (excluding ODS refrigerants) in 2025 shows that approximately 39 percent of refrigerants (on a weighted CO_2e basis) are used in appliances with a charge size above 50 pounds. An additional 22 percent of installed stock are within appliances containing between 15 and 50 pounds of refrigerant. In evaluating potential sources where leak repair could be efficacious at reducing releases of refrigerant from equipment and changes

[52] Refrigeration, Air Conditioning, and Heat Pumps Technical Options Committee 2018 Assessment Report, Technical and Economic Assessment Panel, UNEP, February 2019. Available at: *https://ozone.unep.org/sites/default/files/2019-04/RTOC-assessment-report-2018_0.pdf.*

[53] See 80 FR 42903, July 20, 2015.

[54] ''Bus'' is defined at 40 CFR 1037.801 and means ''a heavy-duty vehicle designed to carry more than 15 passengers. Buses may include coach buses, school buses, and urban transit buses.''

in the RACHP market and aftermarket over the past few decades, EPA finds it appropriate to propose a threshold of 15 pounds as the applicable charge size of appliances that would need to comply with leak repair requirements. As a general matter, EPA is proposing 15 pounds as the appropriate charge size threshold because at less than 15 pounds these appliances are significantly more likely to be hermetically sealed and thus less prone to leak, and because appliances with less than 15 pounds are also more likely to be replaced rather than repaired.

EPA assessed other refrigerant charge sizes for appliances to cover in the proposed leak provisions. EPA is considering higher alternative thresholds for charge sizes such as 30 pounds and 50 pounds, as well as lower alternative thresholds, such as 5 pounds. For information on the estimated costs and emissions reductions of the various charge size thresholds, please refer to Appendix F of the draft TSD titled *Analysis of the Economic Impact and Benefits of the Proposed Rule* in the docket for this action. As a general matter, EPA considered the statutory purposes in subsection (h)(1) to maximize the reclaiming and minimize the releases of regulated substances from equipment when setting the threshold for appliances covered for the leak repair requirements. These purposes guided EPA's considerations in exploring different charge sizes; however, subsection (h)(1) states for EPA to consider promulgating regulations ''as appropriate'' to meet these purposes. EPA notes that refrigerant-containing appliances with small charge sizes (below 15 pounds) may be hermetically sealed and less prone to leaks. Further, in many cases, these smaller appliances (*e.g.,* residential appliances like window air conditioning units) are likely to be disposed of and replaced rather than repaired when they are found to be malfunctioning. On the other hand, EPA described earlier in this section the rationale for proposing the lower charge size threshold of 15 pounds as compared to a higher charge size (*e.g.,* 30 or 50 pounds). For example, EPA notes that with technological advances in some refrigerant-containing appliances, similar cooling capacity can be achieved with smaller relative charge sizes. We are proposing a charge size threshold of 15 pounds of refrigerant for covered appliances in this action.

EPA is proposing to exempt from the leak repair requirements under subsection (h) any refrigerant-containing appliance, including those with a charge-size at or above 15 pounds, used for the residential and light commercial air conditioning and heat pumps subsector.[55] The vast majority of appliances in the residential and light air conditioning subsector typically have a charge size of less than 15 pounds; however, EPA is proposing exemptions in the case that an appliance is used within this subsector with a charge size of 15 pounds or more. These appliances are used in residences (but this subsector does not include larger centrally-cooled apartment/condominium buildings—where a chiller is likely used), and small retail and office buildings. Since the majority of appliances in this subsector have a refrigerant charge below the proposed 15-pound cutoff for leak repair requirements, enforcement of those that are above a charge size of 15 pounds may be challenging or burdensome. It may not be immediately obvious if a particular refrigerant-containing appliance has a charge size of 15 pounds or greater without examining it more closely. Further, the universe of affected appliances could grow unevenly if appliances in this subsector were included, which could cause compliance by owners and operators or servicing technicians to become cumbersome. EPA's proposal to exempt appliances in this subsector from the leak repair requirements would be administratively more efficient and less burdensome for those that would be required to comply.

The Agency is proposing to require leak repair provisions for new and existing passenger buses,[56] including school, coach, transit, and trolley buses with charge-sizes at or above 15 pounds. The HD category [57] incorporates all motor vehicles with a gross vehicle weight rating of 8,500 pounds or greater. Air conditioning systems used to cool passenger compartments in these buses mainly use HFC–134a or R–407C,[58] and are typically manufactured as a separate unit that is pre-charged with refrigerant and installed onto the vehicle in a separate enclosure (*e.g.,* roof mounted). The refrigerant charge for these systems is also much larger than those for other MVAC systems, typically ranging from 15 to 30 pounds. On the other hand, MVAC systems used to cool passenger compartments in light-duty, medium-duty, HD on-road and nonroad (off-road) vehicles are typically charged during vehicle manufacture and the main components are connected by flexible refrigerant lines. MVAC systems in these vehicles typically have charge sizes ranging from one to eight pounds depending on the manufacturer and cab size.[59] [60] EPA requests comments on the proposed extension of the leak repair provisions to passenger buses. The Agency is particularly interested in information, such as any technical challenges, maintenance concerns, or other issues EPA should consider regarding the repair of buses.

EPA is proposing to stagger the proposed compliance dates. Appliances containing 50 pounds or more of a refrigerant containing an HFC or a substitute for an HFC with a GWP above 53 would be required to comply with the provisions on the effective date for the final rule. Because these proposed requirements are similar to those that have been in place for ODS-containing appliances at or above a full charge size of 50 pounds for some time, EPA is proposing to conclude that this is sufficient time for regulated entities to come into compliance. Further, prior to the rescission in 2020 (85 FR 14150, March 11, 2020), the final rulemaking under CAA section 608 in 2016 (81 FR 82272, November 18, 2016) applied leak repair provisions for HFC-containing appliances with a charge size of 50 pounds or greater. The 2016 CAA

[55] The residential and light commercial air conditioning subsector includes equipment for cooling air in individual rooms, single-family homes, and small commercial buildings, including both self-contained and split systems. Self-contained systems include some rooftop AC units (*e.g.,* those ducted to supply conditioned air to multiple spaces) and many types of room ACs, including packaged terminal air conditioners (PTACs), some rooftop AC units, window AC units, portable room AC units, and wall-mounted self-contained ACs, designed for use in a single room. Split systems include ducted and non-ducted mini-splits (which might also be designed for use in a single room), multi-splits and variable refrigerant flow (VRF) systems, and ducted unitary splits. For additional information on the types of equipment, see EPA's website at *https://www.epa.gov/snap/substitutes-residential-and-light-commercial-air-conditioning-and-heat-pumps.* EPA is not proposing to codify a regulatory definition for residential and light commercial air conditioning and heat pumps subsector consistent with the foregoing description, but EPA requests comment on whether such a regulatory definition would be beneficial in resolving any perceived ambiguities.

[56] ''Bus'' is defined at 40 CFR 1037.801 and means ''a heavy-duty vehicle designed to carry more than 15 passengers. Buses may include coach buses, school buses, and urban transit buses.''

[57] Defined at 40 CFR 86.1803–01.

[58] Chemours, Freon ™ Refrigerant for Bus and Rail Air Conditioning; available at: *https://www.freon.com/en/industries/stationary-ac-heat-pumps/public-transport-ac.*

[59] ICF, 2016. Technical Support Document for Acceptability Listing of HFO–1234yf for Motor Vehicle Air Conditioning in Limited Heavy-Duty Applications. Available at: *https://www.regulations.gov/document/EPA-HQ-OAR-2015-0663-0007.*

[60] EPA, 2021. Basic Information about the Emission Standards Reference Guide for On-road and Nonroad Vehicles and Engines. Available at *https://www.epa.gov/emission-standards-reference-guide/basic-information-about-emission-standards-reference-guide-road.*

section 608 Rule became effective on January 1, 2017, and the relevant leak repair requirements for HFCs and other ODS substitutes (now rescinded) applied as of January 1, 2019 (81 FR 82272, 82356, November 18, 2016). The 2020 CAA section 608 Rule took effect on April 10, 2020 (85 FR 14150, March 11, 2020). Thus, for over three years industry was aware of these requirements and affected entities should have been complying for more than one year before the requirements in the 2016 CAA section 608 Rule were rescinded. While entities that were no longer subject to the leak repair requirements after rescission may have chosen to no longer comply with those requirements after the rescission took effect, those entities that were subject to the regulatory requirements per the 2016 CAA section 608 Rule prior to rescission would, at a minimum, be familiar with these requirements.

For appliances with a full charge that is less than 50 pounds of refrigerant, the Agency did not previously require leak repair and thus we are proposing additional time. EPA is proposing one year after the publication date of the final rule for appliances with a charge size between 15 to 50 pounds of a refrigerant containing an HFC or a substitute for an HFC with a GWP above 53 to allow the affected regulated community time to familiarize themselves with the requirements and make preparations to comply with them. For example, it is expected that owners and operators of affected appliances with between 15 and 50 pounds of a refrigerant containing an HFC or a substitute for an HFC with a GWP above 53 may need time to learn about the updated requirements; determine full charges of their appliances; and update systems, standard operating procedures, and training materials to best implement the requirements. Appliances with a full charge of between 15 and 50 pounds of a refrigerant containing an HFC or a substitute for an HFC with a GWP above 53 that are not exempted would be expected to comply as of one year after the date of publication for the final rule in the **Federal Register**. EPA understands that some appliance owners or operators with equipment with a charge size between 15 and 50 pounds of a refrigerant containing an HFC or a substitute for an HFC may have already been repairing leaks. Refrigerant-containing appliance owners or operators may choose to repair leaks when not required, for example as a way to avoid costs associated with continually adding refrigerant to systems or to avoid any disruption in normal operations. However, given there was no leak repair requirement for this equipment, EPA is unaware whether this is true in all or even the majority of cases. Further, where unrequired leak repair may have been occurring, it is not clear whether the repairs were sufficient to ensure equipment was leaking below the applicable leak rates (as established under 40 CFR 82.157) or whether the repairs were verified and records of the repair event were kept. Accordingly, these owners and operators may also need time to understand the proposed requirements and develop practices and processes for compliance.

EPA is seeking comment on all aspects of this proposal. In particular, the Agency is seeking comment on the proposed charge size cutoff of 15 pounds of refrigerant for equipment that contain HFCs or certain substitutes for HFCs. As noted previously, EPA is also considering using different charge sizes as a threshold for the proposed leak repair requirements for applicable refrigerant-containing appliances, including those that are lower (*e.g.,* 5 pounds) or higher (*e.g.,* 30 pounds). While EPA is proposing 15 pounds as the charge size cutoff for the leak repair provisions, EPA continues to consider the option of using a different charge size cutoff, such as 5 pounds, 30 pounds, or 50 pounds, and seeks comment on these considerations. Further, EPA also seeks comment on its proposal to exempt refrigerant-containing appliances in the residential and light commercial air conditioning and heat pumps subsector from the leak repair requirements. Specifically, EPA is seeking whether the scope of this exemption is appropriate and if EPA should consider exempting refrigerant-containing appliances in other subsectors from the proposed leak repair requirements. While EPA is proposing that refrigerant-containing appliances with a full charge between 15 and 50 pounds subject to the leak repair requirements under 40 CFR part 84 would have a compliance date of one year after the date of publication for the final rule in the **Federal Register**, the Agency is considering alternative compliance dates including January 1, 2025, or 18 months from the date of publication of the final rule. EPA is seeking comment on the proposed compliance dates for the proposed leak repair requirements, and in particular, allowing additional time for appliances with a refrigerant charge size of between 15 and 50 pounds. In particular, EPA seeks information about activities (besides rule familiarization and applicability determinations) that owners or operators of refrigerant-containing appliances with a refrigerant charge size of between 15 and 50 pounds perceive that they would need to engage in prior to the effective date of the rule, the length of time the commenter estimates the activity would take, and any available information that would substantiate that estimate. For example, EPA seeks comment on whether they would need to modify or initiate a contractual relationship with a servicing technician firm, the length of time that would take, and information to substantiate that estimate if available.

3. What leak repair provisions is EPA proposing?

EPA is proposing leak repair requirements under subsection (h) to achieve the purposes of minimizing releases and maximizing the reclamation of regulated substances by controlling practices, processes, and activities related to the servicing, repair, or disposal of equipment that contains regulated substances and/or their substitutes (whether the regulated substance or the substitute is used neat or in blends). These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as these provisions would control practices, processes, or activities regarding servicing or repair of appliances, which are a type of equipment, and would involve a regulated substance or a substitute for a regulated substance.

As described in section IV.C.2.a. and b., these leak repair requirements would apply to refrigerant-containing appliances with a charge size of 15 pounds or more where the refrigerant contains an HFC or a substitute for an HFC with a GWP greater than 53. As noted in section II.B., subsection (h)(3) provides that EPA may coordinate regulations under this authority with other regulations promulgated by the Agency that involve: ''the same or a similar practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment; or . . . reclaiming.''

EPA reviewed the regulations promulgated under CAA section 608 addressing the same or similar practice, processes or activities as addressed in this proposal to consider the extent appropriate to coordinate requirements in those regulations with those proposed in this action. Specifically, EPA reviewed the leak repair requirements at 40 CFR 82.157, which do not apply to appliances containing HFCs or their substitutes. The leak repair provisions under CAA section

608 contain requirements for practices, processes, and activities related to identifying and repairing leaks in appliances that contain ODS. These practices, processes, and activities are applicable to appliances containing HFCs as, in many cases, the same types of appliances (*e.g.,* chillers, rooftop air conditioning units, supermarket systems, etc.) are used since HFCs are a substitute for ODS. EPA is not proposing new requirements in this action where the provisions in 40 CFR part 82, subpart F already apply to appliances containing HFCs and certain substitutes. EPA notes that there are existing recordkeeping requirements 40 CFR 82.156(a)(3) for technicians evacuating refrigerant from appliances with a full charge of more than 5 and less than 50 pounds of refrigerant for purposes of disposal of that appliance. EPA is not reopening any of the provisions in 40 CFR part 82 in this action, and thus, the Agency is not proposing any changes to the referenced recordkeeping requirements. Further, the Agency does not view these recordkeeping requirements as being in conflict with the proposed leak repair requirements nor does the Agency view them as redundant. EPA notes that the bulk of the appliances covered by the recordkeeping requirements at 40 CFR 82.156(a)(3) are residential air conditioning appliances, which would be exempt from the proposed leak repair provisions in this proposed action. These records are used to assess technicians' compliance with the disposal requirements for 5 to 50 pound appliances under 40 CFR part 82 subpart F and are not related to the owner/operator's compliance with the leak repair requirements.

As described in greater detail in the following sections, the proposed leak repair provisions would require action if an appliance has been found to be leaking above the applicable leak rate threshold. The proposed leak repair provisions would generally not necessitate any specific action for appliances that are not leaking above the applicable leak-rate threshold, although the leak rate calculations and certain recordkeeping requirements would apply to appliances that are not leaking above the threshold. While EPA is proposing to adopt the same applicable leak rates for the leak repair requirements under subsection (h) as applies under 40 CFR 82.157, as described in section IV.C.3.b. of this preamble, EPA is proposing requirements for identifying and potentially repairing leaks sooner (see section IV.C.4. of this preamble for proposed requirements for ALD systems).

a. Leak Rate Calculations

EPA is proposing to adopt requirements for leak rate calculations as part of the proposed leak repair requirements under subsection (h). Under these proposed requirements, refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant that contains an HFC or a substitute for and HFC with a GWP above 53 would require a leak rate calculation, if the appliance is found to be leaking. Accordingly, under subsection (h), EPA is proposing to require that the leak rate of covered appliances be calculated every time refrigerant is added to an appliance, unless the addition is made immediately following a retrofit, installation of a new appliance, or qualifies as a seasonal variance, as described in this and subsequent sections.

In this action, EPA is not proposing to require the repair of all leaks, but rather to require repair of leaks such that the appliance is below the applicable leak rate threshold. Thus, calculation of the leak rate is necessary to determine where further action (*i.e.,* repair) is required, since owners or operators may not be able to determine compliance without calculating the leak rate each time refrigerant is added to the appliance. For example, if an appliance owner adds refrigerant to the appliance but does not calculate the leak rate, the owner would have no means of determining if the appliance's leak rate was below the applicable leak rate threshold. Hence, the owner would not know if further action was warranted. The leak rate calculation is an important step for owners and operators to determine if a leak must be repaired and to the applicable leak rate threshold to which it would need to be repaired (as discussed in section IV.C.3.b). EPA considers that the leak rate calculation provisions under 40 CFR 82.157(b) are appropriate for the refrigerant-containing appliances proposed in this action and is proposing to establish analogous requirements for equipment covered under the subsection (h) leak repair provisions.

EPA is proposing two methods for calculating the leak rate for an applicable appliance under subsection (h) in this action: the annualizing method and the rolling average method. These leak rate calculation methods are described in section IV.A.1. This approach of providing two different methods for calculating the leak rate, as well as the specific leak rate calculation methods proposed, are the same as those described and provided in 40 CFR part 82, subpart F. EPA is proposing that these two methods could be used similarly to how they can be used under subpart F. Based on EPA's experience under subpart F, there are advantages in the flexibility provided by having two different methods. The strength of the annualizing method is that it is future oriented and allows the owner or operator to ''close out'' each leak event so long as the requirements are followed and does not lump past leak events with the current leak event. It considers the amount of time since the last refrigerant addition and then scales that up to provide a leak rate that projects the amount of refrigerant lost over a whole year if the leak is not fixed. As a result, this formula will yield a higher leak rate for smaller leaks if the amount of time since the last repair was shorter. This approach can contribute to minimizing the releases of HFCs or their substitutes by requiring more thorough leak inspections and verified repairs sooner. The rolling average method also has its strengths. It accounts for all refrigerant additions over the past 365 days or since the last successful follow-up verification test showing that all identified leaks were successfully repaired (if less than 365 days). If an owner or operator verifies all identified leaks are repaired, this method would also allow an owner or operator to ''close out'' a leak event. If there is no follow-up verification test showing that all identified leaks were successfully repaired within the last year, the leak rate would be based completely on actual leaks in the past year. This retrospective approach measures actual performance and if leaks are identified and fixed quickly, an appliance may never reach the applicable leak rate, thus limiting and minimizing the releases of HFCs or their substitutes from leaks.

In the 2016 CAA section 608 Rule (81 FR 82272, November 18, 2016), EPA finalized that the same leak rate calculation must be used for all appliances at the same facility for appliances subject to the CAA leak repair provisions. EPA is proposing to similarly require that the same method of leak rate calculation be used for all refrigerant-containing appliances at the same facility for appliances subject to the proposed leak repair provisions in this action. This aspect of the proposal helps ensure that the requirements are followed consistently at a facility. As noted above, having the option to choose between one of two methodologies to calculate the leak rate

provides flexibility to the owners and operators of affected refrigerant-containing appliances. However, once a method is chosen, it is necessary for the owner or operator to continue using the same methodologies so leak rates are consistently calculated for the appliances. The two methods use two different paradigms to determine leak rate—one is forward-looking/predictive, while the other is looking back/retrospective. If an owner or operator were to switch between methods, they would not get an accurate calculation (because the time frame being evaluated would be different in each method).

In either methodology of calculating the leak rate, EPA is proposing that when calculating the leak rate, any purged refrigerant that is destroyed would not be counted towards the leak rate. To qualify for this exemption, the purged refrigerant would be required to be destroyed at a verifiable destruction efficiency of 98 percent or greater.

EPA is seeking comment on all aspects of its proposal related to leak rate calculations under subsection (h). EPA is particularly requesting comment on if there are any alternative leak rate calculations that could be conducted to identify whether a system is leaking above the applicable trigger leak rate. EPA is also requesting comment on calculating the amount of refrigerant lost, without having to add refrigerant, as a means of calculating the leak rate. For example, an owner or operator could evacuate all of the refrigerant from an appliance, weigh it, and compare it to the full charge of the appliance. Alternatively, EPA is aware that certain types of ALD systems can infer the amount of refrigerant that has leaked from an appliance based on operating characteristics (more detail in section IV.C.4. of this preamble) and EPA is seeking comment on the feasibility and technical accuracy of using the amount of refrigerant that such a system identifies as having been lost from the appliance in the leak rate calculation, as a means of identifying the leak rate.

b. Requirement To Repair Leaks, Timing and Applicable Leak Rates

EPA is proposing to establish a number of requirements related to the repair of leaks under subsection (h) related to determining when a leak needs to be repaired, the extent of the repair required, and the timing of such repairs. EPA is proposing to establish timing requirements for the repair of leaks in refrigerant-containing appliances with a charge size of 15 pounds or more with a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53. Under this proposal, owners or operators would be required to identify and repair leaks within 30 days (or 120 days if an industrial process shutdown is required) of when refrigerant is added to an appliance that has exceeded the applicable leak rate. These proposed timing requirements are consistent with those requirements found at 40 CFR 82.157(d) to repair leaks for ODS-containing equipment. Repairing leaks in a timely manner helps serve the purposes identified in subsection (h)(1). For example, timely repair is critical to reducing the emissions of refrigerants from leaking appliances, and thus to minimizing releases of HFCs from equipment. In addition, by repairing leaks in a timely manner, additional HFC refrigerant will be subsequently available for reclamation, which supports maximizing reclaiming of HFCs. Also, equipment that is in good repair, is better able to operate in an efficient manner.

In some unforeseen circumstances, repair of leaks may require additional time beyond that of the proposed timeframe. EPA is proposing that extensions may be available for owners or operators to repair leaks if certain conditions are met, which would further serve the purposes identified in subsection (h)(1) of ensuring the safety of technicians and/or minimizing the release of regulated substances. Among these conditions, EPA is proposing that one or more must be met to qualify for additional time. Extensions for the leak repair would be available if the appliance is located in an area subject to radiological contamination or shutting down the appliance will directly lead to radiological contamination. EPA is proposing that in this case, additional time would be permitted to the extent necessary to complete the repairs in a safe working environment. An extension would also be available to owners or operators if the requirements of any other Federal, state, local, or Tribal regulations would make a repair within 30 days (or 120 days if an industrial process shutdown is required) impossible. Additional time would be permitted to the extent needed to comply with the applicable regulations. EPA is also proposing there would be extensions available if components must be replaced as a part of the repair and they are not available within the leak repair timeframe of 30 days (or 120 days if an industrial process shutdown is required). In this case, additional time would be permitted of up to 30 days after receiving the needed component, and the total extension could not exceed 180 days (or 270 days if an industrial process shutdown is required) from the date of the appliance exceeded the applicable leak rate. In all cases of potential extensions to the leak repair timeframe, an owner or operator would still be required to repair leaks that the technician has identified as significantly contributing to the exceedance of the applicable leak rate and that do not require additional time and verify those repairs within the initial 30 days (or 120 days if an industrial process shutdown is required). Owners or operators would also be required to document all repair efforts and provide a reason for the inability to repair the leak within the initial 30-day (or 120-day if an industrial process shutdown is required) time period. All extension requests must be submitted electronically in a format specified by EPA and include pertinent information as described in the proposed regulatory text at § 84.106.

EPA is proposing that a leak is presumed to be repaired if there is no further addition of refrigerant to the equipment for 12 months after the repair or if there are no leaks identified by either the required periodic leak inspection(s) or an ALD system, where applicable. Further information on the proposed requirements for ALD systems are described in section IV.C.4. While EPA is proposing to require ALD systems for certain equipment, there may be some cases where an owner or operator chooses to use ALD systems for equipment where it is not required. Whether use of the ALD system is due to requirements as proposed in section IV.C.4. or used as a compliance option in lieu of leak inspections (see section IV.C.3.d.) for a specific appliance, if the ALD system detects a leak in the 12-month period after a successful leak repair, the leak repair would be presumed to have subsequently failed unless the owner or operator can document that the ALD system leak detection was due to a new leak unrelated to the previously repaired leak. Such documentation would include but not be limited to the records required to be kept under proposed 40 CFR 84.108(i). Additional information on leak inspections is described in section IV.C.3.d. If an appliance is mothballed, EPA is proposing that the timeframe for repair, inspections, and verification tests would be temporarily suspended and resume when additional refrigerant is added to the appliance (or component of an appliance is the leaking component was isolated).

As noted earlier, under the CAA section 608 implementing regulations at 40 CFR 82.157, specific leak rates are

used to determine whether a repair is needed for an appliance and also the degree to which the leak must be repaired, as leaks must be repaired if the appliance exceeds the applicable leak rate (which varies depending on the type of appliance) and must be repaired such that the leak rate is brought below the applicable leak rate. *See* 40 CFR 82.157(c) and (d). For the leak repair requirements under subsection (h), EPA is proposing to use a similar approach for determining when leaks must be repaired and the degree to which they must be repaired. EPA is also proposing to apply the same applicable leak rates for certain types of refrigerant-containing appliances covered in this proposal that contain HFCs or their substitutes as would apply to the same types of appliances under 40 CFR 82.157(c) if it contained an ODS refrigerant. Thus, EPA is proposing that the applicable leak rates for refrigerant-containing appliances with a charge size of 15 pounds or more with a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53 would be as follows:

- 20 percent leak rate for commercial refrigeration equipment;
- 30 percent leak rate for IPR equipment; and
- 10 percent leak rate for comfort cooling appliances or other refrigerant-containing appliances not covered as commercial or industrial refrigeration equipment.

EPA is proposing that these applicable leak rates per the type of appliance are appropriate for the proposed leak repair provisions in this action under subsection (h) of the AIM Act. The applicable leak rates were established to limit and minimize the releases of ODS refrigerant and were updated to be more stringent in the 2016 CAA section 608 Rule (81 FR 82272, November 18, 2016). EPA is proposing to adopt applicable leak rates that mirror those that are currently in effect for ODS-containing appliances under the 2016 CAA section 608 Rule. These rates were in effect for appliances containing 50 or more lbs of HFCs for a period of time, and, after reviewing the information and analysis that supported application of these leak rates to that HFC equipment, EPA has determined it is appropriate to propose them in this action. These applicable leak rates are relevant for minimizing releases of HFCs from refrigerant-containing appliances that contain HFCs. This proposal draws on EPA's experience implementing similar requirements under section 608, where these thresholds have provided a practical and effective method for determining when leaks must be repaired. EPA notes in support of the 2016 CAA section 608 Rule, EPA reviewed data from the lowest-emitting equipment to gauge technological feasibility and then reviewed other datasets.[61] The Agency considered whether a lower percent leak rate for some, or all of the categories of appliances would be more appropriate to propose in this rulemaking for those that use refrigerants that contain HFCs and/or substitutes for HFCs. EPA notes that, as a general matter, equipment in good repair is typically able to operate more efficiently. EPA reviewed the docket for the 2016 CAA section 608 Rule, which lowered the applicable leak rates for each of the appliance categories.[62] [63] In that action, EPA evaluated leak rate data of appliances in each of the applicable categories to determine the appropriate applicable leak rates. EPA also reviewed information from stakeholders shared during public meetings held in the development of this proposal.[64] EPA is proposing to use the same applicable leak rates for each category of appliances as found under 40 CFR 82.157. While EPA is not proposing changes to the applicable leak rates for categories of refrigerant-containing appliances as they involve HFCs and covered substitutes for HFCs, the Agency notes that we could revisit the applicable leak rates as appropriate to support the overall purposes of subsection (h) of the AIM Act.

This proposal includes refrigerant-containing appliances with charge sizes that are below the 50-pound charge size threshold for ODS-containing appliances under 40 CFR 82.157. As discussed in section IV.C.2., EPA is proposing to apply leak repair requirements to appliances using an HFC and/or a substitute for HFCs as a refrigerant (neat or in blends) based on a charge size threshold of 15 pounds or greater, with certain exceptions as discussed in section IV.C.2.a. above. EPA is proposing to use the same leak rate across categories of equipment for all covered appliances. In other words, a 20 percent leak trigger rate would apply for commercial refrigeration equipment with a full charge size of 15 pounds or more, and a 10 percent trigger leak rate would apply for comfort cooling appliances with a full charge size of 15 pounds or more.

Refrigerant-containing appliances with 15–50 pounds of refrigerant in the applicable subsectors are proposed to be covered by the appropriate listed categories and with the applicable trigger leak rates. For refrigerant-containing appliances in certain subsectors and applications that have not been previously covered under 40 CFR 82.157, as noted in section IV.C.2.b., EPA is proposing determinations for the applicable leak rates. For refrigerated transport—rail, EPA is proposing that this application would be considered under the comfort cooling and other appliances category and have an applicable leak rate of 10 percent.

EPA is seeking comment on all aspects of this proposal and in particular on the proposed applicable leak rates for appliances in the subsectors and applications noted in section IV.C.2.b. of this proposal. EPA is also seeking comment on its proposal to include an explicit presumption that a leak is presumed to be repaired if one of the listed conditions is met, such as there being no further addition of refrigerant to the equipment for 12 months after the repair. While a similar, though not identical, presumption is included in similar regulations under section 608 of the CAA, EPA is also proposing to include a definition of ''repair'' to the regulatory provisions under subsection (h), which is not a defined term in the regulations under CAA section 608. EPA is particularly interested in comments on whether the presumption is necessary or helpful, if the proposed definition of ''repair'' is finalized.

c. Verification Testing

EPA is proposing requirements for initial and follow-up verification for refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53 as a part of the proposed leak repair provisions under subsection (h). Verification testing involves important practices, processes, and activities regarding the repair and servicing of equipment. The tests are performed shortly after an appliance has been

[61] For more details on this analysis see 81 FR 82272, 82317; Technical Support Document: Analysis of the Economic Impact and Benefits of Final Revisions to the National Recycling and Emission Reduction Program, September 2, 2016, available at *https://www.regulations.gov/document/EPA-HQ-OAR-2015-0453-0225.*

[62] Docket No. EPA–HQ–OAR–2015–0453.

[63] For further information, please see the discussion in the 2016 CAA section 608 rule at 81 FR 82272, 82317 and the technical support document, Analysis of the Economic Impact and Benefits of Final Revisions to the National Recycling and Emission Reduction Program, available in the docket for the 2016 CAA section 608 rulemaking (EPA–HQ–OAR–2015–0453).

[64] EPA held stakeholder meetings for public input on November 9, 2022 and March 16, 2023 as well as solicited feedback through a webinar for the EPA GreenChill Partnership program on April 12, 2023.

repaired to confirm that the leak has been successfully repaired. Without the verification tests, it may take additional time for the owner or operator to realize that the repair has been unsuccessful and during that time refrigerant could continue to leak from the appliance. EPA is proposing that the verification tests must be performed for all leak repairs to ensure that the leak repair is done correctly the first time, which would help minimize any releases of HFCs from the appliance, and also help maximize HFCs available for eventual reclamation by limiting such releases.

Thus, as part of the proposed requirements for leak repair verification tests under subsection (h), an owner or operator would be required to conduct initial and follow-up verification tests within specified timeframes on each leak that is repaired. The initial verification test would be required to be performed within 30 days (or 120 days if an industrial process shutdown is required) of an appliance exceeding the applicable leak rate and must demonstrate that leaks are repaired, where a repair attempt was made. The initial verification test is to verify that the leak has been repaired prior to adding refrigerant back into the appliance and the follow-up verification test confirms that the repair held after refrigerant has been added and the appliance has been brought back to normal operating characteristics. The follow-up verification test would be required to be conducted within 10 days of a successful initial verification test or 10 days after the appliance has returned to normal operating conditions (if the appliance or isolated component of the appliance was evacuated to perform repairs). EPA is proposing that the follow-up verification test is necessary to confirm that the leak repair has held after the refrigerant-containing appliance has been recharged, pressurized, and returned to normal operating conditions. Thus, these provisions are proposed in this action to ensure leaks are properly repaired and to ensure emissions are minimized. EPA also notes that this process of performing an initial verification test and a follow-up verification test has been a part of the similar leak repair provisions for affected ODS-containing equipment under CAA section 608. For additional discussion on the terminology, timing, and purposes associated with the verification tests in detail in the context of the requirements under CAA section 608, please refer to the 2016 CAA section 608 Rule (81 FR 82272, 82324, November 18, 2016).

EPA is also considering that in some cases, a follow-up verification test is impossible; for example, when it would be unsafe to be present when the system is at normal operating characteristics and conditions. Under subsection (h), EPA is proposing language to address such situations. This approach helps serve the purpose identified in subsection (h)(1) of ensuring technician and consumer safety. EPA is proposing that where it is unsafe to be present or otherwise impossible to conduct a follow-up verification test when it would be unsafe to be present when the system is at normal operating characteristics and conditions the follow-up verification test must, where practicable, be conducted prior to the system returning to normal operating characteristics and conditions. In such situations, the owner or operator has the burden of showing that it was unsafe to be present when the system is at normal operating characteristics and conditions. EPA requests comment on whether there should be a recordkeeping requirement associated with establishing that it is unsafe to be present or otherwise impossible to conduct a follow-up verification test on the system has been returned to normal operating conditions.

EPA understands these initial and follow-up verification tests after an attempted repair of a leak as involving important practices, processes, and activities regarding the repair of equipment within the proposed leak repair provisions. These proposed requirements are designed to help ensure that leaks are repaired successfully and that the repair holds, so that repair has the intended effect of limiting emissions of HFCs or substitutes for HFCs from the appliance. EPA is proposing that if the initial or follow-up verification test indicates that a leak repair had not been successful, the owner or operator may conduct as many additional repairs and initial or follow-up verification tests as needed to achieve a successful leak repair within the applicable time period and to verify the repairs.

EPA is requesting comment on all aspects of this rulemaking. In particular, EPA is requesting comment on the applicable leak rates for each category for refrigerant-containing appliances. EPA is also requesting comment on the timing by which the initial and follow-up verification tests must be performed as a part of the proposed leak repair provisions.

d. Leak Inspections

EPA is proposing requirements for leak inspections as a part of the proposed leak repair requirements under subsection (h). These leak inspection requirements would apply to refrigerant-containing appliances that have been found to be leaking at a rate that exceeds the applicable leak rate per the appliance type. In particular, the proposed leak inspection requirements involve processes, practices, and activities regarding the repair of refrigerant-containing appliances that are designed to ensure the long-term effectiveness of a successful leak repair. Thus, the proposed requirements would help minimize any releases of HFCs from equipment over time and also help maximize HFCs available for eventual reclamation by limiting such releases.

EPA is proposing that leak inspections would be required for refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP greater than 53 that are found to be leaking above the applicable leak rate and have had one or more leaks repaired. Leak inspection frequency would be dependent on the type of appliance and the size of the appliance (by refrigerant charge size). As described in greater detail later in this section, an ALD system that is being used to monitor an appliance or portions of an appliance may be used as a compliance option in lieu of quarterly or annual leak inspections, whether the ALD system is required to be used under requirements in this proposal or the ALD system is used voluntarily on an appliance where it would not be required under this proposal. Where an ALD system is not being used on an appliance or on portions of an appliance, all leak inspection requirements proposed would be required for the appliance or the portions of the appliance that are not being monitored by an ALD system. If an ALD system is being used to comply with the leak inspection requirements for an appliance or portions of an appliance (per proposed regulatory requirement or voluntarily), certain regulatory requirements must be met as proposed (see section IV.C.4.).

For commercial refrigeration and IPR appliances that have a charge size of 500 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP greater than 53, EPA is proposing that leak inspections be performed every three months after the equipment is found to be leaking above the applicable leak rate until the owner or operator can demonstrate that the equipment has not exceeded the applicable leak rate for four consecutive quarters. For commercial refrigeration and IPR appliances that have a charge size between 15 and 500 pounds of a

refrigerant that contains an HFC or a substitute for an HFC with a GWP greater than 53, EPA is proposing that leak inspections be performed once per calendar year after the equipment is found to be leaking above the applicable leak rate until the owner or operator can demonstrate that the equipment has not exceeded the applicable leak rate for one year (*i.e.,* 12 months). For comfort cooling and other appliances that have a charge size of 15 pounds or above of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53, EPA is proposing that leak inspections be performed once per calendar year after the equipment is found to be leaking above the applicable leak rate until the owner or operator can demonstrate that the equipment has not exceeded the applicable leak rate for one year (*i.e.,* 12 months). In each case, to demonstrate that the equipment has not exceeded the applicable leak rate, a leak rate calculation is done during a leak inspection as described in section IV.C.3.a. of this proposal. EPA is proposing that it is appropriate to require more frequent leak inspections for larger commercial refrigeration and IPR appliances (*i.e.,* charge sizes at or above 500 pounds), as the larger charge size means that potential emissions from the appliance are greater if a leak is not properly repaired.

In this action, EPA is also separately proposing requirements for the use of ALD systems for commercial refrigeration and IPR appliances that have a charge size of 1,500 pounds or more of refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53 (see section IV.C.4. of this proposal). Where ALD systems would be required to monitor leaks in appliances, EPA is proposing that leak inspections for the appliances would be required after exceeding the applicable leak rate and undergoing a repair only for the portions of the appliance that are not being monitored by the ALD system (*e.g.,* if part of the appliance is not in an enclosed space). This proposal is based on an understanding that where the ALD system is monitoring the appliance, it serves the function of monitoring for leaks. Thus, a requirement for performing periodic leak inspections on those portions of the appliance would be unneeded. EPA considers the leak inspections that are proposed for codification at 40 CFR 84.106(g) and the requirements related to ALD systems that are proposed for codification at 40 CFR 84.108 to be separate. That is to say, EPA would be proposing these leak inspections irrespective of any mandatory ALD system requirement and vice versa. However, recognizing that some equipment could be subject to both requirements, if both proposals are finalized, to help coordinate the requirements, EPA is proposing a limited exception to the quarterly and annual leak inspection requirements if ALD systems are being used and meet certain requirements. This proposed limited exception is intended to allow the use of the ALD system in those circumstances to serve as a compliance option for the leak inspection requirement.

For further information and requirements related to ALD systems proposed in this action, refer to section IV.C.4. Likewise, EPA is proposing that if an owner or operator is voluntarily using an ALD system to monitor leaks in a refrigerant-containing appliance that would not be subject to the proposed requirement to use an ALD system (*e.g.,* the equipment has a charge size below 1,500 pounds), any periodic leak inspections would only need to be performed after the applicable leak rate is exceeded for the portions of the appliance where the ALD system is not monitoring for leaks. Again, where the ALD system is monitoring the appliance, it would serve the function of monitoring for leaks in the equipment, and periodic inspections on those portions of the equipment would be unneeded. EPA is also proposing that, where an appliance exceeds the applicable leak rate, an owner or operator may choose to use an ALD system, where not required under proposed requirements in section IV.C.4. (*i.e.,* for certain appliances with a charge size below 1,500 pounds), as a compliance option in lieu of the proposed requirements for periodic leak inspections. However, leak inspections would need to be performed for the portions of the appliance where the ALD system is not monitoring for leaks. Where an owner/operator wishes to use an ALD system in lieu of proposed regulatorily required leak inspections, the ALD system needs to meet the requirements established elsewhere in this proposal (including annual ALD system audit and calibration requirements). The owner or operator would be required to follow certain reporting and recordkeeping requirements to show the ALD system is meeting the intended functionality and monitoring leaks effectively (as described in section IV.C.4.b.).

EPA is requesting comment on all aspects of this proposal. In particular, EPA is seeking comment on the proposed requirements for leak inspection. EPA welcomes comment on the frequency of leak inspections required based on the charge size of the equipment as well as the use of ALD system (whether required as part of this proposal or not) to satisfy the requirements for leak inspections.

e. Chronically Leaking Appliances

As part of the proposed leak repair provisions under subsection (h), EPA is proposing to include specific requirements for refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53 that EPA would consider as chronically leaking. The proposed requirements are designed to gather information and support efforts to address such chronic leaks, which would have the effect of further minimizing emissions from equipment.

As discussed in section IV.C.2. above, under this proposal, covered appliances include refrigerant-containing appliances with charge sizes of 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53. EPA is proposing that an appliance would be considered a chronically leaking appliance if the appliance leaks 125 percent or more of its full charge within a calendar year. The proposed requirements for chronically leaking appliances are similar, but not identical to, analogous requirements under 82.157(j). For such chronically leaking appliances, owners and operators are required to submit reports describing the efforts taken to identify leaks and repair the appliance. Under subsection (h), EPA is proposing to establish a reporting requirement for covered appliances that are considered chronically leaking.

To better serve the purposes of minimizing releases of regulated substances and allow EPA to more easily verify the information being reported, EPA is proposing to standardize the reporting format for chronically leaking appliances. EPA is proposing that the reports must be submitted no later than March 1 following the calendar year of the ≥125 percent leak. EPA is proposing that these reports cover basic identification information (*i.e.,* owner name, facility name, facility address where appliance is located, and appliance ID or description), appliance type (comfort cooling, IPR, or commercial refrigeration), refrigerant type, full charge of appliance (pounds), annual percent refrigerant loss, dates of refrigerant addition, amounts of refrigerant added, date of last successful

follow-up verification test, explanation of cause of refrigerant losses, repair actions taken, and whether a retrofit or retirement plan been developed for the appliance, and, if so, the anticipated date of retrofit or retirement. EPA proposes that these reports be submitted electronically in a format specified by EPA. EPA anticipates that the information in these reports would either be contained in the records EPA is proposing that owner or operators would be required to maintain, or they are the type of information that would be on hand during the ordinary course of business. Because of the amount of refrigerant emitted, chronically leaking appliances warrant special attention. These reporting requirements for chronically leaking equipment are designed to help ensure that owner or operators are complying with the leak repair provisions and that they have taken appropriate steps to identify the leaks and correct the root cause of those leaks. These reports would allow EPA to evaluate compliance with the regulatory requirements and to identify entities that may benefit from compliance assistance and other outreach efforts. These reports would also allow EPA to assess common root causes for appliances that chronically leak, which would facilitate consideration of approaches to mitigate these leaks and minimize the releases of HFCs from such equipment. EPA discusses whether this information is entitled to confidential treatment in section V.A.1. of this document.

EPA is proposing to set the reporting threshold for appliances that leak 125 percent of the full charge within a calendar year, as the Agency intends to avoid capturing refrigerant-containing appliances affected by unavoidable losses of full charge. In order to be subject to the requirement, appliances would have to lose their full charge and then a significant quantity more within a single calendar year. EPA requests comment on the 125 percent threshold and whether, given the focus of minimizing releases of regulated substances, that threshold should be lowered. For example, EPA is considering lowering the threshold to 110 percent to avoid capturing refrigerant-containing appliances affected by unavoidable losses of full charge, but a lower amount leaked beyond a full charge would be required to trigger the provisions for chronically leaking appliances.

f. Retrofit and Retirement Plans

EPA is proposing to include requirements for retrofit and retirement plans in the proposed leak repair provisions under subsection (h) for applicable refrigerant-containing appliances that contain HFCs or certain substitutes for HFCs as a refrigerant. These requirements reduce emissions by capping the amount of time an appliance can remain in operation when it is known to be leaking above the leak rate threshold. Owners or operators may choose to retrofit or retire a leaking appliance rather than repair a leak, or, in some situations, may be required to retrofit or retire the appliance if successful leak repair cannot be achieved and verified. The proposed requirements would also further serve the purposes of minimizing releases and maximizing the reclaiming of HFCs, as proper retrofit or retirement of a leaking appliance would ensure that any further HFC emissions from such equipment are mitigated. Additionally, in the process of retrofitting or retiring an appliance, the refrigerant that was remaining in the leaking appliance would typically be recovered and could then subsequently be reclaimed.

EPA is proposing requirements for developing retrofit and retirement plans for refrigerant-containing appliances where leaks cannot be repaired, or an owner or operator chooses to retrofit to a lower GWP refrigerant (where available) or retire an appliance rather than repair a leak. The proposed requirements would apply to refrigerant-containing appliances with 15 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53. The provisions proposed in this action would provide the details on the timing for creating a retrofit or retirement plan for covered refrigerant-containing appliances, and what must be contained in a retrofit or retirement plan. EPA is proposing that a retrofit or retirement plan be created within 30 days of certain scenarios. The Agency understands this timing is sufficient for an owner or operator to either attempt to repair the leak with all necessary requirements as described in section IV.C.3.b. or make a business decision to directly begin the retrofit or retirement process. It is necessary to cap this timing requirement to minimize emissions from leaks in the case where an owner or operator fails to take any action after finding that their applicable refrigerant-containing appliance is leaking above the applicable leak threshold. After 30 days, the owner or operator must begin developing a retrofit or retirement plan. The following scenarios describe when a retrofit or retirement plan must be developed:

- An appliance is leaking above the applicable leak rate and the owner or operator intends to retrofit or retire the appliance rather than repair the leak;
- An appliance is leaking above the applicable leak rate and the owner or operator fails to take action to identify or repair the leak; or
- An appliance is continuing to leak above the applicable leak rate after an attempted leak repair and verification testing.

Developing the retrofit or retirement plan is a key process in ensuring that each step of the plan is successfully performed such that releases of HFCs are minimized and the reclaiming of the HFCs can be maximized. EPA is proposing that the retrofit or retirement plan include information regarding the location of the appliance, characteristics of the appliance, a procedure for how the appliance will be converted to accommodate a different refrigerant (if the appliance is being retrofitted), plans for the disposition of any recovered refrigerant and the appliance (if the appliance is being retired), and a schedule for the completion of the appliance retrofit or retirement. Characteristics of the appliance that would be retrofitted or retired include the type and full charge of the refrigerant used in the appliance, and for retrofitted, the type and full charge of the refrigerant to which the appliance will be retrofitted. In describing how the appliance would be retrofitted, the owner or operator must include an itemized procedure for converting the appliance to a different refrigerant, including changes required for compatibility. This would also include any changes for compatibility that relate to safety considerations to ensure the safety of technicians and consumers when converting an appliance to a different refrigerant, which would further serve one of the purposes identified in subsection (h)(1). EPA is also proposing that the retrofit or retirement plan must include information on how any recovered refrigerant is being dispositioned. In the case of retiring an appliance, the retirement plan would need to include how the appliance is being dispositioned. EPA is proposing that the retrofit or retirement plan include a schedule for completion of the retrofit or retirement and, unless additional time is granted, that the schedule would not exceed one year of the plan's date (not to exceed 12 months from when the plan was finalized).

EPA is proposing that an owner or operator may request relief from the provisions of a retrofit or retirement plan if they are able to establish that an

appliance is no longer leaking above the applicable leak rate within 180 days of creating the plan, and the owner or operator agrees to repair all identified leaks within one year of the plan's date. The owner or operator would be required to submit specified information to EPA, including information regarding leaks in the appliance, descriptions of the work completed/to be completed, and more, as found in the proposed regulatory text.

For IPR equipment, EPA is proposing that extensions could be requested in cases where requirements or other applicable Federal, state, local, or Tribal regulations would make it impossible to complete the retrofit or retirement within one year. In this case, owners or operators could be permitted additional time to the extent needed to comply with the applicable regulations. EPA is also proposing that extensions could be requested for IPR equipment if the equipment is custom-built and the supplier of the appliance or one of its components has quoted a delivery time of more than 30 weeks. In such cases, the appliance or component must be installed within 120 days of receipt. If additional time is needed, the owner or operator would need to submit a request for the additional time to EPA. Further, EPA is proposing that extensions could be requested to complete a retrofit or retirement if the IPR equipment is located in an area subject to radiological contamination or shutting down the appliance will directly lead to radiological contamination. EPA is proposing that in this case, additional time would be permitted to the extent necessary to complete the retrofit in a safe working environment. EPA is not proposing extensions specifically applicable to Federally owned equipment (see, *e.g.,* the provisions at 40 CFR 82.157(i)(3)) because EPA believes these circumstances can be addressed under the other proposed extension provisions, but EPA requests comment on this.

EPA is requesting comment on all aspects of this proposal, and, in particular, the proposed provisions for retrofit and retirement plans for applicable refrigerant-containing appliances. EPA is requesting comment on the timing for developing retrofit or retirement plans and the timing for executing these plans. EPA is also requesting comment on if the Agency should require that refrigerant be recovered as a part of the retrofit or retirement plan, or if that is already sufficiently covered by requirements under 40 CFR part 82, subpart F. Further, EPA is seeking comment on requiring that if an owner or operator is developing a retrofit plan, they must include that a lower GWP refrigerant will be used in the retrofitted appliance. EPA notes that it is not assuming early retirement of appliances as a result of the proposed rule provisions. EPA is seeking comment on any potential impacts of the proposed leak repair provisions on the retirement of affected refrigerant-containing appliances.

g. Recordkeeping and Reporting

EPA is proposing to include recordkeeping and reporting requirements to support compliance with the proposed leak repair provisions under subsection (h) for applicable refrigerant-containing appliances that contain HFCs or certain substitutes for HFCs as a refrigerant. For example, the requirements would control recordkeeping and reporting practices, process, or activities for servicing and repair that involves HFCs or a substitute for an HFC. As noted in section II.B. of this document, EPA's authority to require recordkeeping and reporting under the AIM Act is also supported by section 114 of the CAA, which applies to the AIM Act and rules promulgated under it as provided in subsection (k)(1)(C) of the AIM Act.

As discussed in section IV.C.2. above, this proposal covers refrigerant-containing appliances with charge sizes of 15 pounds or higher of a refrigerant that contains an HFC or a substitute for an HFC that has a GWP above 53. The recordkeeping and requirements related to the leak repair requirements under subsection (h) would be applicable to the full range of appliances that are subject to the proposed leak repair provisions, including those containing at least 15 pounds of refrigerant with limited exemptions, as described in section IV.C.2.b. for certain appliances. The proposed recordkeeping and reporting requirements provide critical information about whether required actions were taken and are part of the suite of compliance tools included in this proposal. Compliance with the overall leak repair requirements is intended to minimize the release of HFC and substitute refrigerants and the Agency considers these recordkeeping and reporting requirements necessary to readily assess compliance. Records that would demonstrate noncompliance or are incomplete may be used for enforcement purposes. The proposed requirements are informed in part by EPA's consideration of its experience implementing similar regulations under CAA section 608 at 40 CFR 82.157 and the recordkeeping and reporting requirements that have been used to assure compliance with those provisions.

EPA is proposing recordkeeping requirements for refrigerant-containing appliances with a charge size of 15 pounds or more of a refrigerant containing an HFC or a substitute for an HFC with a GWP above 53 under subsection (h) that are similar to those at 40 CFR 82.157(l). Where EPA is proposing requirements for recordkeeping, we are proposing that record be maintained for three years in either paper or electronic format. An owner or operator may contract out the record generation responsibilities but retains ultimate liability for compliance and must be able to access these records electronically or in hard copy from the facility where the appliance is located. All recordkeeping requirements can be found in § 84.106(l) of the proposed regulatory text. These records would be the primary means for the facility to demonstrate compliance with the leak repair requirements, and EPA would review them when evaluating compliance. EPA could access these records in various ways, including, but not limited to, via on-site review of the records or requesting them via an information request. In general, EPA is proposing the following recordkeeping requirements for owners and operators under subsection (h):

- Maintain records documenting the full charge of appliances;
- Maintain records, such as invoices or other documentation showing when refrigerant is added or removed from an appliance, when a leak inspection is performed, when a verification test is conducted, and when service or maintenance is performed;
- Maintain retrofit and/or retirement plans;
- Maintain retrofit and/or extension requests submitted to EPA;
- If a system is mothballed to suspend a deadline, maintain records documenting when the system was mothballed and when it was brought back on-line (*i.e.,* when refrigerant was added back into the appliance or isolated component of the appliance);
- Maintain records of purged and destroyed refrigerant if excluding such refrigerant from the leak rate;
- Maintain records to demonstrate a seasonal variance; and
- Maintain copies of any reports submitted to EPA under the proposed reporting requirements in this action.

EPA is proposing reporting requirements for refrigerant-containing appliances that with a charge size of 15 pounds or more of a refrigerant containing an HFC or a substitute for an HFC with a GWP above 53 under

subsection (h) that are similar to those at 40 CFR 82.157(m). The proposed reporting requirements include notifications to EPA that include specified information when:

- The owner or operator is seeking an extension to complete repairs;
- The owner or operator is seeking an extension to complete a retrofit or retirement plan;
- The owner or operator is seeking relief from the obligation to retrofit or retire an appliance;
- When an appliance leaks 125 percent or more of the full charge in a calendar year;
- The owner or operator is excluding purged refrigerants that are destroyed from annual leak rate calculations for the first time.

Additional detail on these proposed recordkeeping and requirements is available in the proposed regulatory text. Proposed recordkeeping and reporting requirements in this action for ALD systems are described in section IV.C.4.b.

EPA is requesting comment on all aspects of this proposal, and, in particular, the recordkeeping and reporting requirements associated with the leak repair provisions in this proposal. EPA is requesting comment on the information required in the recordkeeping and reporting provisions and if there is any additional information that would be relevant for the proposed leak repair requirements in this action.

4. Automatic Leak Detection Systems

ALD systems on refrigerant-containing appliances are refrigerant leak detection technologies calibrated to continuously monitor a refrigerant-based system(s) for evidence of leaks and alert an operator upon detection of a leak. Repairing leaks sooner further minimizes emissions. Where ALD systems are used, it can result in early and effective detection of leaks, so that the leaks can be repaired and emissions of regulated substances or their substitutes can quickly be mitigated. As part of the proposed regulatory requirements to implement subsection (h)(1), EPA is proposing to require that ALD systems be used for certain new and existing refrigerant-containing appliances to detect leaks, which would trigger subsequent requirements. These provisions would control practices, processes, or activities regarding servicing, repair or installation of such appliances, which are a type of equipment, and would involve a regulated substance or a substitute for a regulated substance. When an ALD system detects a leak in a refrigerant-containing appliance covered by this proposal, an owner or operator of the appliance would be required to either perform practices, processes, and/or activities to determine whether servicing or repair of the appliance is necessary (*i.e.,* calculating a leak rate and assessing it compared to the applicable leak rate for the type of appliance) or, alternatively, preemptively repair the leak (*i.e.,* before adding refrigerant and calculating the leak rate). EPA is proposing to explicitly permit preemptive repair of the leak as a compliance option to avoid the need to add refrigerant to an appliance with a known leak (which would otherwise generally be necessary to calculate the leak rate and determine if the applicable leak rate is exceeded). If the preemptive repair is being used as a compliance option, it must occur within 30 days (or 120 days where an industrial process shutdown would be necessary) of the alert. These proposed requirements are expected to facilitate prompt repair of leaks, which would further help minimize releases of regulated substances from equipment.

In the case of preemptive repair, this compliance option provides the opportunity to repair an appliance that is known to be leaking prior to the addition of refrigerant. When refrigerant is added to the appliance that underwent preemptive repair, a leak rate calculation would still be required. If the leak rate calculation (performed after the addition of refrigerant for the follow-up verification test) conducted after the preemptive repair reveals that the appliance had leaked above the applicable leak threshold, the proposed suite of leak repair requirements would still apply. The preemptive repair actions can be considered in determining whether the suite of leak repair requirements triggered by the exceedance of the applicable leak threshold have been satisfied, but the owner or operator of the appliance would still need to ensure that the leaks had been repaired according to the proposed definition of repair and that the other requirements proposed in 40 CFR 84.106 (*e.g.,* initial and follow-up verification tests, leak inspections (where applicable) and related recordkeeping) had been met.

EPA understands that for reasons other than this proposal, ALD systems already are in use to a certain extent. For example, some owners and operators may already use ALD systems to serve as an early warning system for detecting and repairing leaks. Some owners and operators may choose to install ALD systems from an economic perspective as early detection and repair of leaks can avoid costs of replacing the released refrigerant and operating equipment at suboptimal levels and/or the loss of perishable products due to failure to maintain required cooling. Further, there are provisions under 40 CFR 82.157 where an owner or operator of a covered appliance with ODS refrigerants may choose to use an ALD system in place of performing regular leak inspections as a part of the leak repair provisions under CAA section 608 at 40 CFR 82.157. Nothing in this proposal changes the requirements related to ALD systems under CAA section 608 for equipment containing only ODS refrigerants. In other words, an owner or operator of an appliance that uses ODS-containing refrigerants will continue to be required to meet any and all requirements under 40 CFR 82.157 for that appliance, including if they choose to use an ALD system to comply with requirements under 40 CFR 82.157.

Additionally, there are safety standards that apply when using certain HFCs (whether neat or in a blend) and/or substitutes for HFCs that have been classified as lower flammability. Lower flammability refrigerants in this context are those that are classified by ASHRAE as A2L refrigerants.[65] UL Standard 60335–2–40 currently requires the use of leak detectors for electrical heat pumps, air conditioners and dehumidifiers containing A2L refrigerants.[66] [67] Under that standard, leak detectors that detect pressure loss are required in cases that the prescribed A2L charge limit is exceeded (which is typically around four pounds for permanently installed applications). That standard also prescribes that refrigerant leak detectors be installed at the factory for applicable appliances

[65] ASHRAE Standard 34–2022 assigns a safety group classification for each refrigerant which consists of two alphanumeric characters (*e.g.,* A2 or B1). The capital letter indicates the toxicity class (''A'' for lower toxicity) and the numeral denotes the flammability. ASHRAE recognizes three classifications and one subclass for refrigerant flammability. The three main flammability classifications are Class 1, for refrigerants that do not propagate a flame when tested as per the ASHRAE 34 standard, ''Designation and Safety Classification of Refrigerants;'' Class 2, for refrigerants of lower flammability; and Class 3, for highly flammable refrigerants, such as the hydrocarbon refrigerants. ASHRAE recently updated the safety classification matrix to include a new flammability subclass 2L, for flammability Class 2 refrigerants that burn very slowly.

[66] UL. 2019. ''Understanding UL 60335–2–40 Refrigerant Detector Requirements.'' *https://www.ul.com/news/understanding-ul-60335-2-40-refrigerant-detector-requirements.*

[67] UL 60335–2–40, 2019. Household And Similar Electrical Appliances—Safety—Part 2–40: Particular Requirements for Electrical Heat Pumps, Air-Conditioners and Dehumidifiers. Third Edition. November 1, 2019.

and have factory established set points for detection to avoid potential buildup of concentrations of flammable refrigerants.

a. Proposed Automatic Leak Detection Requirements

EPA is proposing to require the use of ALD systems for certain RACHP equipment. Specifically, EPA is proposing to require ALD systems for IPR and commercial refrigeration appliances containing 1,500 pounds or more of a refrigerant that contains an HFC or a substitute for an HFC with a GWP above 53 for both new and existing equipment. EPA is not proposing to require ALD systems for comfort cooling appliances. As previously noted, EPA considers the leak inspections that are proposed for codification at 40 CFR 84.106(g) and the requirements related to ALD systems that are proposed for codification at 40 CFR 84.108 to be separate. However, as previously discussed, in certain circumstances the proposed leak inspection requirements would recognize use of the ALD systems that meets certain requirements under the proposed 40 CFR 84.108 as a compliance option that may be used in lieu of quarterly or annual leak inspections.

Beginning on January 1, 2025, for new refrigerant-containing appliances, EPA is proposing that an ALD system be installed as part of the overall appliance installation, either during the installation of the new appliance or within 30 days from when the new appliance is installed. EPA understands that depending on the type of ALD system, it may be more practicable to install an ALD system during the appliance installation. In other cases, additional time may be needed to secure a contractor or technician to install the ALD system, or there may be unforeseen delays in acquiring an ALD system. For existing refrigerant-containing appliances, EPA is proposing that an ALD system must be installed within one year of the effective date of the final rule.

EPA is proposing that refrigerant-containing appliances in the commercial refrigeration and IPR subsectors with a charge size of 1,500 pounds or more with a refrigerant that contains an HFC or a substitute for an HFC that has a GWP above 53 (whether the HFC or substitute is used neat or in a blend) would be required to use ALD systems. The refrigerants that would be covered are the same as for other leak repair provisions proposed in this action, but the proposed full charge size cutoff for using ALD systems (1,500 pounds) is greater than that of the other leak repair provisions in this proposal (15 pounds). EPA understands that using ALD systems for refrigerant-containing appliances that have lower refrigerant charge sizes (*i.e.,* below 1,500 pounds) may be an option an owner or operator could take so they are alerted to leaks sooner. This could also be an option an owner or operator takes for specific refrigerants. However, discussed later in this section, EPA is not proposing to require use of ALD systems for refrigerant-containing appliances with less than 1,500 pounds. Similarly, EPA also understands that owners and operators with larger charge size appliances may be more likely to have in place refrigerant management plans, routine equipment inspections, or other formal or even informal mechanisms aimed at reducing refrigerant losses.

EPA considered a number of potential options for the threshold for requiring ALD systems. The Agency considered thresholds as low as 15 or 50 pounds to match the proposed leak repair requirements or as analogous with the longstanding CAA section 608 leak repair threshold for ODS-containing appliances, respectively. The Agency also considered as high as 2,000 pounds, which is consistent with the current state requirement in California.[68] Throughout this proposal, EPA uses charge sizes to differentiate requirements; for example, EPA proposed 500 pounds as a cutoff for the frequency of inspections for certain appliances and the Agency also considered this as a potential cutoff for proposing to require ALD systems. Further, another potential cutoff considered was 200 pounds, which was used as a point of inflection for proposing certain GWP-limit based restrictions under the Technology Transitions program.[69]

EPA is also aware of other cutoffs used for requirements for using ALD systems in certain states and internationally. Across states, the Agency is aware that California[70] has a similar provision with a cutoff of 2,000 pounds that has been in place for over ten years and Washington[71] is considering a cutoff of 1,500 pounds in a recent proposal for requiring ALD systems on refrigeration equipment. Internationally, the EU[72] uses a CO_2e-based threshold, requiring that leakage detection systems be installed for stationary equipment (including refrigeration, air conditioning, heat pumps, and fire protection equipment and electrical switch gear and organic Rankine cycles) that contain 500 or more metric tons of CO_2e. For example, if a stationary refrigeration appliance is charged with R–404A (which has a GWP of 3,920), then the minimum charge size required to use a leakage detection system would be approximately 281 pounds under the EU's approach. EPA notes that it is considering using either a pounds-based approach or a CO_2e-based approach to establishing the threshold for these requirements. While there are certain advantages to CO_2e approaches, such as providing an advantage for lower GWP refrigerants, the Agency also understands that for compliance purposes, limits based on pounds also has advantages. Refrigerant decisions are based on actual amounts of refrigerant added and the leak rate calculations are also based on pounds. Therefore, EPA is proposing to set the requirement based on pounds but is soliciting comments on a CO_2e approach too.

As a consideration in setting the proposed threshold, EPA took into account to what extent ALD systems may already be in use and the types of equipment to which they are marketed. For example, many larger refrigeration appliances (*e.g.,* a charge size of 1,500 to 2,000 pounds or more) may already use ALD systems per certain state requirements or to reduce negative economic impacts associated with replacing leaking refrigerant. These larger refrigeration appliances have potential to leak greater amounts of refrigerant, such that owners and operators using an ALD system to quickly detect leaks would further support the statutory purposes in

[68] California Code of Regulations, Regulation for the Management of High Global Warming Potential Refrigerants for Stationary Sources. Available: *https://ww2.arb.ca.gov/sites/default/files/2020-07/finalfro_0.pdf.*

[69] In the proposed Technology Transitions rule (87 FR 76738, December 15, 2022), the inflection point of 200 pounds for a charge size of equipment in certain subsectors is used to propose different GWP-limit based restrictions. This point was considered based on safety standards ANSI/ASHRAE Standard 15–2019 and UL 60335–2–89, which set a charge limit set a charge limit for using lower flammability refrigerant for certain applications that vary by refrigerant but does not exceed 200 pounds.

[70] California Code of Regulations, Regulation for the Management of high Global Warming Potential Refrigerants for Stationary Sources. Available: *https://ww2.arb.ca.gov/sites/default/files/2020-07/finalfro_0.pdf.*

[71] Washington, Department of Ecology, Hydrofluorocarbons (HFCs) and Other Fluorinated Greenhouse Gases, Draft (January 27, 2023). Available: *https://ecology.wa.gov/DOE/files/9b/9b91965d-4986-4c42-aa50-fd54cb97a2a4.pdf.*

[72] Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006, May 2014, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0517.*

subsection (h) of minimizing releases of HFCs from equipment and maximize the amount of HFC that is available for reclaiming. EPA also considered the availability of ALD systems for refrigeration appliances in the United States. In the draft TSD titled *American Innovation and Manufacturing Act of 2020—Subsection (h): Automatic Leak Detection System* in the docket for this proposal, EPA assessed the market presence and number of manufacturers of ALD systems that sell to the U.S. market. EPA notes that most manufacturers make direct ALD systems, while indirect ALD systems are newer technologies on the market.[73] Since ALD systems have generally only been required for larger refrigeration appliances per certain state requirements, or are likely used in larger charge size refrigeration appliances to avoid potential economic burden associated with replacing refrigerant that has leaked, EPA anticipates that the current market presence of ALD system manufacturing may be generally aligned to demand for ALD systems for larger refrigeration appliances. The proposed threshold accounts for the potential for an increased demand of ALD systems, where manufacturers of such systems may not be prepared for an increased demand if EPA were to propose a lower charge size, opening the requirement for ALD systems to a larger inventory of refrigeration appliances. Taking into account existing and pending state requirements, and a likely degree of voluntary adoption of ALD systems, EPA estimates that the proposed requirement will impact approximately 50,000 appliances over the year 2025 and 6,500 per year in subsequent years. EPA has identified 10 manufacturers of ALD systems for the U.S. market. There are eight manufacturers making direct ALD systems and three manufacturers making indirect ALD systems (one manufacturer was identified to make both types of ALD systems). The majority of installed systems are likely direct ALD systems. EPA estimates that one of the largest manufacturers of direct ALD in the US makes between 6,500–7,000 direct ALD systems per year. For additional information and details on the estimated emissions reductions and costs related to ALD systems, see the draft TSD titled *Analysis of the Economic Impact and Benefits of the Proposed Rule* available in the docket for this action. EPA also notes that later in this section, we are seeking comments specifically on the proposed threshold for ALD system requirements as well as comment on the current manufacturing landscape of ALD systems.

EPA considered and is not proposing requiring ALD systems for all refrigerant-containing appliances above a certain charge size. Instead, after considering the opportunities to reduce leaks and thus minimize emissions, EPA decided to limit this proposed requirement to commercial refrigeration and IPR appliances. EPA is not proposing requirements for using ALD systems for appliances used solely for comfort cooling. The Agency understands that refrigerant-containing appliances used for comfort cooling typically do not leak to the same degree as appliances in the commercial refrigeration and IPR subsectors. Medium (charge size of 200–2,000 pounds of refrigerant) and large (charge size 2,000 pounds or greater of refrigerant) comfort cooling appliances average annual leak rates of around 10 percent, while medium and large commercial refrigeration and IPR appliances have average leak rates that are around two to three times greater.[74] This is consistent with EPA's proposed requirements for leak inspections, such that appliances used for comfort cooling would not have more frequent required inspections as a part of the leak repair provisions (see section IV.C.3.d.). EPA previously noted in the 2016 CAA 608 Rule (81 FR 82272, November 16, 2016) that larger commercial refrigeration and IPR appliances tend to have larger annual average leak rates than comfort cooling appliances. Further, larger commercial refrigeration and IPR appliances would have a greater amount of refrigerant lost compared to comfort cooling appliances even if the leaks rate were the same since these larger appliances typically have significantly larger refrigerant charge sizes. Thus, the primary benefit of early leak detection from an ALD system would not be as useful for appliances solely used for comfort cooling. However, if an appliance has a dual function (*e.g.,* IPR and comfort cooling), an ALD system would be required. For example, if the refrigerant coming off the evaporator in an industrial process were cool enough, it could be directed towards co-located offices or break rooms to provide air conditioning, before being routed back to the compressor(s). Such a system would provide both IPR and comfort cooling, and for purposes of this rule, an ALD system would be required.

ALD systems detect leaks either by a direct system that automatically detects the presence of refrigerant leaked into the air (*e.g.,* an alert is triggered at a specified concentration, typically in parts per million (ppm)) from a refrigeration system, or by an indirect system that automatically analyzes operating conditions (*e.g.,* temperature or pressure) within a refrigeration system as indicators of whether a refrigerant leak has occurred. Both types of ALD systems can help to ensure early detection of leaks and help to identify the location and severity of a leak. Thus, EPA is not proposing to prescribe whether direct or indirect ALD systems must be used, but rather is proposing that either type of system, or a combination of direct and indirect systems, would be required, and is proposing requirements that are specific to each type of ALD system. For both indirect and direct systems, EPA is proposing that the ALD system be installed on covered refrigerant-containing appliances where the components (*e.g.,* compressor, evaporator, condenser) of the refrigerant circuit are located within an enclosed building or structure (or the whole refrigerant circuit if it is entirely enclosed within a building or structure). Further, EPA is proposing where ALD systems are required for covered appliances that the systems be calibrated or audited annually as described in section IV.C.4.b.

Direct refrigerant leak detection systems are fixed hardware that directly monitor the concentration of refrigerants in the air. For direct ALD systems, it is essential that gas sensors are located at all leak-prone components of a refrigeration system; otherwise, some leaks may go undetected. The benefits of direct ALD systems include being able to pinpoint the location and severity of a leak. Direct ALD systems are commissioned to send an ''alarm'' to maintenance and/or operations staff if the programmed leak level threshold is exceeded. EPA is proposing that if an owner or operator chooses to use a direct ALD system to comply with the proposed provisions to detect refrigerant leaks in equipment, the programmed leak level threshold to alert the operator would be when a concentration of 100 ppm of vapor of the specified refrigerant is detected. EPA is also proposing that the leak detection sensors must be capable of accurately detecting a concentration level of 10 ppm of the vapor of the specified refrigerant. The leak level threshold and minimum level of detection are critical to catch leaks in

[73] EPA describes each type (*i.e.,* direct and indirect) of ALD system later in this section and in detail in the draft TSD titled *American Innovation and Manufacturing Act of 2020—Subsection (h): Automatic Leak Detection System.*

[74] Average annual leak rates by appliance type and charge size are provided in the RIA Addendum.

equipment. If the leak level threshold is set too high, the ALD system will only provide an alarm in the case of catastrophic leaks. The technical feasibility of the 100 ppm threshold is well established. This has been the threshold used by the California Air Resources Board (CARB) and is also the standard in provisions at 40 CFR 82.157(g)(4)(i) for ALD systems that are used in lieu of quarterly or annual leak inspections, as part of the leak repair requirements under CAA section 608.

EPA is proposing that if a direct ALD system detects a leak based on the 100 ppm threshold, the owner or operator would be required to either perform a leak rate calculation to determine if the leak rate threshold has been exceeded, or alternatively they may preemptively repair the leak before adding refrigerant and calculating the leak rate. In order to calculate the leak rate, refer to section IV.C.3.a. of this action. EPA is proposing that a leak rate calculation must be performed within 30 days (or 120 days where an industrial process shutdown would be necessary) of the alarm where a direct ALD system is used for required equipment. If the leak rate calculated is above the applicable leak rate, as discussed in section IV.C.3. of this preamble, all of the leak repair requirements proposed in this action (including the repair requirements, inspections, verification tests and recordkeeping and reporting) would then apply. Alternatively, if the owner or operator chooses to preemptively repair the detected leak, a leak rate calculation would be performed after the preemptive repair; however, the leak rate calculation would still be required to be performed within 30 days (or 120 days where an industrial process shutdown would be necessary) of the alarm where a direct ALD system is used for required equipment, and accordingly the preemptive repair would also need to occur in that time frame. If the leak rate calculation (performed after the addition of refrigerant pursuant to the follow-up verification test) conducted after the preemptive repair reveals that the appliance had leaked above the applicable leak threshold, the proposed suite of leak repair requirements would apply. The preemptive repair actions can be considered in determining whether the suite of leak repair requirements triggered by the exceedance of the applicable leak threshold have been satisfied, but the owner or operator of the appliance would still need to ensure that the leaks had been repaired according to the proposed definition of repair and that the other requirements proposed in 40 CFR 84.106 (*e.g.,* initial and follow-up verification tests, leak inspections (where applicable), and related recordkeeping) had been met. By allowing a leak detected by an ALD system to be preemptively repaired before the addition of refrigerant and calculation of the leak rate, EPA anticipates that this would avoid requiring owners and operators to add refrigerant to a system with a known leak, thereby saving the cost of refrigerant that might subsequently leak prior to the repair, as well as prevent unnecessary emissions of refrigerant. Additionally, preemptive repair of leaks allows owners and operators to have a ''head start'' on repairing leaks if it is later found that the applicable leak rate threshold has been exceeded when the leak rate calculation is performed.

Indirect ALD systems rely on data analytics to detect leaks rather than the direct detection of refrigerant gas. Indirect ALD systems monitor the operation of a refrigerant-based system to infer whether a leak is present. This method is typically conducted using existing sensors and hardware that are already located on site, and it relies on algorithms to evaluate existing conditions, such as liquid levels, temperatures, and ambient conditions to indicate if a leak is occurring. EPA understands that indirect systems can be calibrated to provide an alarm when a specified predicted refrigerant leak rate has occurred. EPA is proposing that if an owner or operator chooses to use an indirect ALD system to comply with the proposed provisions to detect leaks in equipment, that the system be calibrated to provide an alarm when the system has provided measurements that indicate that 50 pounds of refrigerant or 10 percent of the full charge of refrigerant, whichever is less, has leaked. At that point, as for direct ALD systems, EPA is proposing that the owner or operator would be required to perform a leak rate calculation, or alternatively they may preemptively repair the leak before adding refrigerant and calculating the leak rate. EPA is proposing that a leak rate calculation be performed within 30 days (or 120 days where an industrial process shutdown would be necessary) of the alarm where an indirect ALD system is used for required equipment. If the calculated leak rate is above the applicable leak trigger rate (as discussed in section IV.C.3. of this preamble), all of the leak repair requirements proposed in this action (including the repair requirements, inspections, verification tests and recordkeeping and reporting) would then apply.

If the owner or operator chooses to preemptively repair the detected leak, a leak rate calculation would be performed after the repair, for example when refrigerant is added to perform the follow-up verification test. The same requirements as described above for where an owner or operator chooses to do preemptive leak repair when using direct ALD system apply in the scenario where preemptive leak repair is performed when using an indirect ALD system. The leak rate calculation would still be required to be performed within 30 days (or 120 days where an industrial process shutdown would be necessary) of the alarm where an indirect ALD system is used for required equipment, and accordingly the preemptive repair would also need to occur in that time frame. If the leak rate calculation (performed after the addition of refrigerant pursuant to the follow-up verification test) conducted after the preemptive repair reveals that the appliance had leaked above the applicable leak threshold, the proposed suite of leak repair requirements would apply. The preemptive repair actions can be considered in determining whether the suite of leak repair requirements triggered by the exceedance of the applicable leak threshold have been satisfied, but the owner or operator of the appliance would still need to ensure that the leaks had been repaired according to the proposed definition of repair and that the other requirements proposed in 40 CFR 84.106 (*e.g.,* initial and follow-up verification tests, leak inspections (where applicable), and related recordkeeping) had been met.

EPA notes that a 10 percent loss in full charge does not directly correspond to the leak *rate* threshold of 20 percent for commercial refrigeration and 30 percent for IPR. The 10 percent of total *charge* lost when an indirect ALD system alarms may equate less than or greater than an annualized leak *rate* of 20 or 30 percent depending on the timeframe over which the leak occurred. See section IV.C.3.a. for more information on calculating the annualized leak rate. In any event, this difference is reasonable because the primary purpose of the ALD system is to allow the owner or operator to obtain knowledge of the leak earlier (*e.g.,* before operations are impacted) and to facilitate earlier repair, whether through preemptive repair before the leak rate threshold is exceeded or through required repairs after the leak rate threshold is exceeded.

The technical feasibility of the ''50 pounds of refrigerant or 10 percent of the full charge, whichever is less'' standard is well established. This has been the threshold used by both CARB and is also the standard in provisions at 40 CFR 82.157(g)(4)(ii) for ALD systems that are used in lieu of quarterly or annual leak inspections, as part of the leak repair requirements under CAA section 608.

EPA is requesting comment on all aspects of this proposal, and, in particular, aspects of the proposed requirements for installing and using ALD systems on refrigerant-containing appliances, as well as the proposed compliance dates. EPA is requesting comment on the types of appliances (*e.g.,* only refrigeration equipment) and the charge size cutoff for appliances (*i.e.,* 1,500 pounds) that would be required to use ALD systems. For example, should EPA consider including comfort cooling appliances in the equipment required to use ALD systems or should a lower or higher charge size cutoff be used, or should a different approach be used for determining applicability for this requirement (such as a CO_2e based approach)? EPA continues to consider options for the charge size cutoff for applying ALD system provisions, particularly, those discussed in this preamble (*e.g.,* 200, 500 pounds, 1,000 pounds, 2,000 pounds) and requests comment on these and other potential cutoffs for requiring ALD systems on refrigerant-containing appliances.

EPA is also requesting comment on the proposed alarm trigger thresholds and detection levels for both direct and indirect ALD systems. For direct ALD systems, EPA is requesting comment if it would be appropriate to lower the required alert trigger threshold to 50 ppm or to lower the concentration detection level to 5 ppm. For indirect ALD systems, EPA is seeking comment on requiring that an indirect ALD system alert at a lower measurement to detect leaks sooner (*e.g.,* 5 percent of the full charge). For either type of ALD system, EPA requests comment on whether these lower levels are technically feasible, whether they would lead to increase in false positives, and whether existing ALD systems used on refrigerant-containing appliances should be grandfathered if EPA were to lower these levels.

As noted above in this section, EPA is aware of ten manufacturers currently making ALD systems and selling them in the U.S. market. Many of these companies have been supplying those that are required by state regulations, those that chose to use ALD systems as an option under CAA section 608, and those that choose on a voluntary basis to use ALD systems. By requiring ALD systems nationally for certain types of RACHP equipment, EPA understands demand will increase in short time. Therefore, EPA requests comment and data or other supporting information on whether supply and availability of ALD systems will be available to meet the proposed compliance dates for new and existing appliances. EPA anticipates that ALD systems for new appliances would be able to comply with the January 1, 2025 date, and thus the options described are focused only on existing equipment. However, EPA requests comments on whether additional time would be needed for ALD system installations in new appliances as well. EPA considered but did not propose as its lead option to require ALD systems for existing appliances when there is a triggering event (*e.g.,* a leak rate threshold exceedance). In this option, existing appliances would not be required to install ALD systems within one year of the effective date of the final rule, but they would be required to obtain and install ALD systems within one year of a leak rate threshold exceedance (measured from the date of the refrigerant addition that triggered the leak rate calculation that revealed the exceedance). Another option EPA considered but did not propose as its lead option would be to phase in the requirement for ALD systems for existing refrigerant-containing appliances over a longer time frame, such as over the course of three years. EPA requests comment on the requirements for ALD systems including these options the Agency considered. Additional information is available in the draft TSD named *American Innovation and Manufacturing Act of 2020—Subsection (h): Automatic Leak Detection System* available in the docket for the proposed rulemaking.

b. Recordkeeping and Reporting

EPA is proposing specific reporting and recordkeeping requirements for ALD systems that would be required under this action under subsection (h). Where ALD systems are required, EPA is proposing that owners or operators maintain records regarding the annual calibration or audit of the system. EPA is also proposing to require that records be maintained each time an ALD system triggers an alert, whether that be based on the applicable ppm threshold for a direct ALD system or the indicated loss of refrigerant measured in an indirect ALD system. When an ALD system alerts of a leak, EPA is proposing that the owner or operator maintain a record of the date the ALD systems alerted to a leak and the location of the leak. The recordkeeping requirements related to when a leak rate calculation is conducted are described in section IV.C.3.g of this document. As noted in section II.B. of this document, EPA's authority to require recordkeeping and reporting under the AIM Act is also supported by section 114 of the CAA, which applies to the AIM Act and rules promulgated under it as provided in subsection (k)(1)(C) of the AIM Act.

EPA is proposing recordkeeping requirements in the case where an owner or operator chooses to use an ALD system, where not required, as a compliance option in lieu of periodic inspections for an appliance that has exceeded an applicable leak rate. EPA is proposing that owners or operators maintain records regarding the installation of the ALD system and records of the annual calibration or audit of the system. EPA is also proposing to require that records be maintained each time the ALD system triggers an alert, whether that be based on the applicable ppm threshold for a direct ALD system or the indicated loss of refrigerant measured in an indirect ALD system. EPA is proposing that the owner or operator maintain a record of the date the ALD systems alerted to a leak and the location of the leak.

EPA is proposing that these records related to ALD systems, where required, be maintained for 3 years. Where ALD systems are being voluntarily used (*i.e.,* appliances with a full charge below 1,500 pounds or using a substitute for HFCs with a GWP of 53 or below), there are no recordkeeping requirements under this proposal. However, if an appliance using an ALD system is found to be leaking above the applicable leak rate and the owner or operator chooses to use the ALD system in lieu of periodic inspections, they would be required to follow all requirements associated with this compliance option, including annual audits or calibration and all necessary recordkeeping requirements. The proposed recordkeeping requirements in this action do not change any recordkeeping requirements where an owner or operator chooses to use an ALD system per 40 CFR 82.157(g)(4) for appliances containing ODS refrigerants.

EPA requests comment on whether the Agency should require reporting of ALD system alerts to the agency. Specifically, EPA requests comment on whether owner or operators of refrigerant-containing appliances that have a full charge of 1,500 pounds should be required to file a report with

the agency within 120 days of an ALD system alert that describes the incident and follow-up leak rate calculation and/or repairs. Alternatively, EPA requests comment on an annual reporting requirement that would catalogue all ALD system alerts that occurred in a one-year period and the follow-up actions associated with those alerts. EPA is not proposing either of these reporting requirements as its lead option because the Agency believes the proposed requirements for chronically leaking appliance reports may be sufficient to accomplish the policy objectives of verifying that appropriate repairs are undertaken when a refrigerant-containing appliance has a significant history of leaks.

D. How is EPA proposing to establish requirements for the use of recovered and reclaimed HFCs?

1. Background

As described more fully in section II.B. in this proposal, subsection (h) of the AIM Act directs EPA to promulgate regulations for certain purposes identified in the statutory text, which include maximizing the reclamation of regulated substances. More specifically, subsection (h)(1) gives EPA authority to promulgate regulations to control, where appropriate, any practice, process, or activity related to the servicing, repair, disposal, or installation of equipment that involves HFCs or their substitutes, or the reclaiming of HFCs or their substitutes used as a refrigerant. With respect to reclamation, EPA interprets subsection (h) as including authority for EPA to establish regulations to control such practices, processes, or activities that are intended to increase reclamation of HFCs, as well as substitutes for HFCs that are used as refrigerants. Such regulations could include those that are designed to increase market demand for reclaimed HFCs with a goal of increasing the amount of HFCs that are reclaimed, which would further serve the purpose of maximizing the reclamation of regulated substances. Consistent with this interpretation, EPA is proposing requirements for the use of reclaimed HFCs in the installation, servicing, or repair of certain equipment. In this rulemaking, EPA is not considering establishing requirements for the use of reclaimed HFC substitutes. Substitutes for HFCs, for the purposes of this proposal, range from fluorinated chemistry (*e.g.,* HFOs), non-fluorinated chemistry (*e.g.,* hydrocarbons), and not-in-kind substitutes. In this proposed rulemaking, EPA determined it would be prudent to limit the proposed requirements to HFCs, given the consumption and production phasedown will create scarcity for virgin HFCs and such demand can partly be addressed by increased use of reclaimed HFCs where possible.

Reclamation of refrigerants has played an important role in smoothing the phase out of ODS refrigerants. The continued availability of ODS refrigerants helped ensure that equipment could continue to be used even after the phaseout date for production and consumption of various class I and class II ODS. Even today, more than 25 years after the class I phaseout, reclaimed class I ODS remain available for servicing appliances. Reclamation of HFCs already plays a nascent role in the refrigerant market and is expected to be of increasing importance as HFC production and consumption are phased down. By bolstering the current supply of HFCs with recovered and reclaimed refrigerants from existing systems, reclamation can support a smooth transition to substitutes for HFCs, minimize disruption of the current capital stock of equipment by allowing its continued use with existing refrigerant supplies, avoid supply shortages of virgin refrigerants, and can insulate the industry against price spikes that could affect the servicing of existing systems using HFCs.

EPA published a Notice of Data Availability (NODA) on October 17, 2022 (87 FR 62843) to alert stakeholders of information regarding the U.S. HFC reclamation market, available through a draft report, *Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices.*[75] EPA solicited stakeholder feedback and held a public stakeholder meeting shortly after the NODA was published on November 9, 2022.[76] EPA received comments[77] from various entities in response to the published NODA and from the stakeholder meeting held, including comments from reclaimers, industry organizations, environmental non-government organizations (ENGOs), OEMs, and a private citizen. Commenters provided input on a variety of topics. They noted the importance of tackling certain barriers to increased reclamation and availability of reclaimed HFCs on the market. Such barriers included increasing recovery of refrigerants, handling mixed refrigerants returned to reclaimers, and reclaiming certain patented blends. Commenters also provided input on consideration for a clear standard of what constitutes reclaimed HFCs, as well as improved tracking of HFCs in the supply chain. Further, some commenters noted opportunities for requiring the use of reclaimed materials in certain uses (*e.g.,* first charge of certain equipment). EPA held an additional public stakeholder meeting on March 16, 2023 and a webinar through EPA's GreenChill Partnership Program on April 12, 2023 and heard many similar comments.[78] [79] Interested parties may view the draft report, the materials for the public meetings, and the comments the Agency received in response to the NODA in the docket for this action. Further, EPA is providing an updated version of the draft report, titled *Updated Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices,* in the docket of this action that incorporates feedback heard in the stakeholder meetings and as provided in comments to the NODA.

2. Proposed Reclamation Standard

Subsection (b)(9) of the AIM Act provides a statutory definition for ''reclaim, reclamation.'' This definition refers to the reprocessing of a recovered regulated substance to meet at least the purity described in standard AHRI 700–2016 (or an appropriate successor standard adopted by the Administrator), and that the purity of the reclaimed regulated substances must be verified using, at a minimum, the analytical method described in that standard. EPA promulgated a definition for ''reclaim'' in the Allocation Framework Rule (86 FR 55116, October 5, 2021) that is consistent with the definition provided by the AIM Act. As noted in section IV.A. of this proposal, the Agency intends to maintain consistency, except as otherwise explained in this proposal,

[75] Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices, October 2022. Available: *https://www.epa.gov/system/files/documents/2022-10/Draft_HFC-Reclamation-Report_10-13-22%20sxf%20v3.pdf.*

[76] Stakeholder meeting for input on an upcoming regulatory action under subsection (h) of the AIM Act, November 2022. Available: *https://www.epa.gov/system/files/documents/2022-11/AIM%20Act%20Stakeholder%20Meeting_HFC%20Management_11-9-2022.pdf.*

[77] Comments submitted to response of NODA published on October 17, 2022 (87 FR 62843) are available in the docket for this proposed rulemaking at *https://www.regulations.gov.*

[78] Stakeholder meeting on HFC reclamation under the AIM Act, March 2023. Available: *https://www.epa.gov/system/files/documents/2023-04/HFC%20Management_Reclaimer%20Stakeholder%20Mtg_Final%203-15-23.pdf.*

[79] Webinar—Subsection (h) Under the American Innovation and Manufacturing Act, April 2023. Available: *https://www.epa.gov/greenchill/webinar-subsection-h-under-american-innovation-and-manufacturing-act.*

and use terms in this proposal, and in the new subpart C, which is proposed to be established in this rulemaking, as they are defined in subpart A.

Subsection (h)(2)(B) of the AIM Act provides that any regulated substance used as a refrigerant that is recovered shall be reclaimed before being sold or transferred to a new owner, except where the recovered regulated substance is sold or transferred to a new owner solely for the purposes of being reclaimed or destroyed. EPA is proposing regulations to implement the statutory requirement in subsection (h)(2)(B) for stationary refrigerant-containing equipment. This would be particularly relevant to the refrigerant-containing appliances for which EPA is proposing requirements to use reclaimed HFCs in sections IV.D.3. and IV.D.4. of this proposal. More specifically, EPA is proposing to prohibit the sale, distribution, or transfer to a new owner, or the offer for sale, distribution, or transfer to a new owner, any regulated substance used as a refrigerant in stationary refrigerant-containing equipment consisting in whole or in part of recovered regulated substances. This prohibition would not apply where the recovered regulated substances are reclaimed by an EPA-certified reclaimer (as described in 40 CFR 82.164) and has been reclaimed to the required purity standard, or if the recovered regulated substance is being sold, distributed, or transferred to a new owner, or offered for sale, distribution, or transfer to a new owner solely for the purposes of being reclaimed or destroyed. These proposed provisions are intended to support the implementation of this statutory provision for stationary refrigerant-containing equipment in the context of other requirements proposed in this rulemaking, including by outlining more specific requirements for the reclamation that would need to occur before sale or any of the other listed activities for such regulated substances, as well as incorporating the statutory exception for situations where such recovered regulated substances are sold or transferred solely for the purposes of being reclaimed or destroyed. EPA further discusses its anticipated approach for recovered regulated substances used as refrigerants in MVAC equipment in section IV.H. of this preamble.

To support consistent implementation of the proposed requirements for the use of reclaimed HFCs in the installation, servicing, or repair of certain equipment, EPA is proposing a standard for the amount of virgin HFC refrigerant that can be included in any HFC or HFC blend reclaimed refrigerant. These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as these provisions would control practices, processes, or activities regarding the installation, servicing or repair of equipment and would involve a regulated substance or the reclaiming of a regulated substance used as a refrigerant.

Typically, CAA section 608 certified reclaimers meet the required purity standards for reclaimed refrigerants by using separation technology (*e.g.,* fractional distillation), combining high purity [80] refrigerant with recovered refrigerant until the purity standard is met, or using a combination of these approaches. In some cases, sophisticated fractional distillation technology is required to purify recovered refrigerants. Combining high purity (*e.g.,* virgin) refrigerants with recovered refrigerants is an approach that some CAA section 608 certified reclaimers may use to meet the required purity standard. In that approach, virgin or otherwise high purity (*e.g.,* other reclaimed refrigerants) refrigerant is added to the recovered refrigerant, which may or may not have gone through some degree of reprocessing, until the final product meets the purity specifications to be considered reclaimed. A combination of separation technology and using virgin HFCs may be used, in which the separation technology reprocesses the refrigerant nearly to the required purity standard and high purity refrigerant is used to rebalance the refrigerant and/or fully achieve the standard.

As the HFC phasedown progresses, the overall quantity of virgin HFCs available, including to facilitate reclamation through blending or rebalancing, will decrease. In addition, the Agency considers that limiting the extent to which the purity standard for reclamation is achieved through combining with virgin refrigerant (besides what the Agency understands to be the necessary rebalancing, particularly of certain blends) will support the purposes of its proposed regulations for use of reclaimed refrigerant, including maximizing reclamation, as well as bolstering the available supply of HFCs in the market. Therefore, EPA is proposing to establish a limit on the amount, by weight of virgin HFC refrigerants, that can be contained in reclaimed HFC refrigerant. The proposed amount is no more than 15 percent virgin HFC refrigerants, by weight. As EPA understands, reclaimed HFCs may be reprocessed in a batch, from which containers, such as cylinders, may be filled and sold or distributed. In this case, EPA is not proposing to require that each individual container or cylinder be rationed out to meet the allowable limit of virgin HFCs. Rather, EPA would expect that at the batch level, the reclaimed HFCs do not exceed 15 percent, by weight, virgin HFCs. In order to support compliance with and enforcement of these proposed requirements, EPA is proposing labeling and recordkeeping requirements as well as proposing to prohibit the sale, identification, or reporting of refrigerant as being reclaimed if the HFC component of the resulting refrigerant contains more than 15 percent, by weight, of virgin HFC. Similarly, to ensure that this standard is supporting the reclamation of substances that have had bona fide use in equipment, EPA would not consider a refrigerant to be reclaimed if it contains a recovered regulated substance that has not had bona fide use in equipment, unless that recovered refrigerant was from the heel or residue of a container that had a bona fide use in the servicing, repair, or installation of refrigerant-containing equipment.

As the Agency developed this aspect of the proposal under the AIM Act subsection (h), EPA considered a number of sources of information about the approach to the use of virgin refrigerant in reclaimed refrigerant, including but not limited to the NODA (87 FR 62843, October 17, 2022) on the state of reclamation and comments received, relevant state regulations, comments made during stakeholder meetings, and a 2022 report by a group of ENGOs (Environmental Investigations Agency, the Natural Resources Defense Council, and the Institute for Governance & Sustainable Development).[81] Limiting the amount of virgin refrigerant was not included in the CAA section 608 regulations. However, consistent with sources of information noted above and in recognizing the context of the overall structure of the AIM Act phasedown, EPA assessed the current landscape of requirements for defining the composition of reclaimed HFCs as it

[80] In some cases, virgin refrigerant may be combined with less pure recovered refrigerant to achieve the required applicable purity standard; however, other higher purity refrigerants, such as previously reclaimed refrigerants could also be used to achieve the same result.

[81] Environmental Investigations Agency, the Natural Resources Defense Council, and the Institute for Governance & Sustainable Development, The 90 Million Ton Opportunity: Lifecycle Refrigerant Management (LMR), available at: *https://www.nrdc.org/sites/default/files/lrm-90-billion-ton-opportunity-report-20221020.pdf.*

relates to the amounts of virgin and recovered HFCs contained. EPA notes that the State of California currently has such a definition in its regulations. The CARB finalized a regulation, effective January 1, 2022, that defines ''certified reclaimed refrigerant'' as containing no more than 15 percent virgin refrigerant by weight and the certified reclaimer must provide supporting documentation showing as such.[82] CARB arrived at a maximum allowable amount of virgin HFCs of 15 percent by weight in ''certified reclaimed refrigerant'' based on feedback from multiple stakeholders (including reclaimers, OEMs, and industry trade groups) who commented that having an allowable amount of virgin HFCs in reclaimed HFCs would be necessary for rebalancing out-of-ratio recovered HFCs and HFC blends.[83] During a November 2022 stakeholder meeting EPA hosted and in comments submitted in response to the October 2022 NODA, several participants referred to CARB's 15 percent requirement as a workable limit for reclaimed refrigerant. The ENGO report suggests that a 15 percent requirement should be the maximin amount of virgin refrigerant the Agency should consider; however, EPA is not aware of a specific alternative proposed limit that the groups that developed this report are suggesting.

Based on the information described above from CARB and others, EPA is proposing to conclude that placing a limit on virgin HFCs in reclaimed HFC refrigerant is necessary to avoid situations where unlimited virgin HFCs could be sold as reclaimed HFC refrigerant if even a small amount of reclaimed HFCs are present. EPA notes that the limit of 15 percent virgin HFC refrigerant, by weight, in reclaimed HFCs as proposed in this action is consistent with the requirements in the State of California for what is defined as ''certified reclaimed refrigerant.'' Accordingly, EPA anticipates that regulated entities could draw on the experience of those regulated entities complying with California's limit in implementing this requirement. As part of developing this proposal, EPA considered the process which CARB underwent with industry and trade associations, both of which have a national presence, to land on this limit. Further, EPA acknowledges CARB's consideration of avoiding a scenario in which reclaimed HFCs could be sold as such, but actually contain mostly virgin HFC refrigerant with minimal amounts of recovered HFCs. Such a scenario would be inconsistent with the purpose identified in the subsection (h) of the AIM Act to maximize the reclamation of regulated substances and could cause strain on the supply of virgin HFC refrigerants available as EPA implements the provisions in the AIM Act related to phasing down the production and consumption of HFCs.

As part of the initial regulations to implement subsection (h), for specified subsectors and applications, EPA is proposing to establish requirements that specific practices, processes, or activities regarding the servicing, repair, or installation of equipment be conducted using reclaimed HFCs, meeting the proposed criteria described in this section. In particular, EPA is proposing to require that HFCs that are considered to be reclaimed must contain no more than 15 percent, by weight, of virgin HFCs. EPA recognizes that some amount of virgin HFC refrigerant may be needed to meet the required purity standard and correct blend composition for HFC blends and/or HFC and HFC substitute blends.

In the case of reclaimed refrigerant blends that contain other components that are substitutes for HFCs (*e.g.,* HFOs, hydrocarbons), EPA is proposing that only the HFC portion of the reclaimed blend is required to meet the virgin substance limit (*i.e.,* 15 percent, by weight). EPA notes that subsection (h)(1) of the AIM Act provides authority to promulgate regulations to control, where appropriate, practices, processes, or activities related to the servicing, repair, disposal, or installation of equipment that involves reclaiming of a substitute for a regulated substance used as a refrigerant. EPA interprets this provision to provide it authority which could include requiring, where appropriate, the use of reclaimed HFC substitute refrigerants in practices, processes, or activities related to the servicing, repair, disposal, or installation of equipment. However, at this time, we are not proposing a requirement on establishing a standard limiting the amount of virgin material for what is considered a reclaimed substitute for HFCs.

EPA is proposing labeling and recordkeeping requirements to support the proposed provision implementing a standard for reclaimed HFC refrigerants to contain no more than 15 percent, by weight, virgin HFCs. These requirements would help ensure that reclaimed HFCs would not exceed the limit for virgin HFCs and also help ensure that reclaimed HFCs are used for servicing, repair, and/or installation of equipment as proposed in sections IV.D.3. and IV.D.4. of this proposal. EPA is proposing that certified reclaimers would be required to affix a label to containers that are being sold or distributed or offered for sale or distribution that would certify that the reclaimed HFC refrigerant meets the proposed requirements to contain no more than 15 percent virgin HFCs. The label would further serve to inform owners or operators of refrigerant-containing equipment that the reclaimed HFCs meet the proposed requirements to be used for servicing, repair, and/or installation of equipment in the covered subsectors of this proposal (see sections IV.D.3. and IV.D.4.). EPA is proposing that certified reclaimers must affix this label to reclaimed HFCs being sold or distributed or offered for sale or distribution beginning January 1, 2026. The label would be required to follow the specifications as described in the proposed regulatory text at § 84.112.

EPA is also proposing a recordkeeping requirement related to the proposed provision to limit reclaimed HFCs to not exceed 15 percent virgin HFCs, by weight. The recordkeeping requirement would help provide certainty that the reclaimed HFCs that are in a container do not exceed the limit for virgin HFCs. EPA is proposing to require that certified reclaimers create and maintain a record related to the reclaimed HFCs that would be filled in containers. As described above, reclaimed HFCs may be reprocessed in a batch, from which containers, such as cylinders, may be filled and sold or distributed. As noted, EPA is not proposing to require that each individual container or cylinder be rationed out to meet the allowable limit of virgin HFCs. Rather, EPA would expect that at the batch level, the reclaimed HFCs do not exceed 15 percent, by weight, virgin HFCs. EPA is proposing that a certified reclaimer would be required to provide a record of certification that the reclaimed HFCs being sold in a container were sourced from a batch that met the proposed standard. Further, the record generated would be required to contain the following information: the name, address, contact person, email address, and phone number of the certified reclaimer, the date the container was filled with reclaimed HFC(s), the amount and name of the HFC(s) in the container, certification that the contents

[82] California Code of Regulations, Prohibitions on Use of Certain Hydrofluorocarbons in Stationary Refrigeration, Stationary Air-conditioning, and Other End-Uses. Available: *https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2020/hfc2020/frorevised.pdf.*

[83] Final Statement of Reasons for Rulemaking, Including Summary of Comment sand Agency Response, State of California Air Resources Board, available at: *https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2020/hfc2020/fsorrevised.pdf.*

of the container are from a batch where the amount of virgin HFCs does not exceed 15 percent, by weight, of the total HFCs, the unique serial number of the container(s) filled from the batch, identification of the batch of reclaimed HFCs used to fill the container(s) and the percent, by weight, of virgin HFC(s) in the batch used to fill the container(s). EPA is proposing to require that such record would be required to be generated beginning January 1, 2026 and be maintained for three years.

EPA is seeking comment on considering whether the requirements for generating a machine-readable tracking identifier per section IV.F.3. of this proposal would satisfy these proposed labeling and recordkeeping requirements to implement the limit of 15 percent virgin HFCs, by weight, in reclaimed HFCs. For example, EPA is seeking comment on whether the data elements required for generating the machine-readable tracking identifier would be sufficient for certifying that the limit for virgin HFCs is not exceeded. EPA is also seeking comment on whether or how the information proposed to be required in the generation of a machine-readable tracking identifier would serve the purpose of ensuring that a certified reclaimer has certified that no more than 15 percent virgin HFCs, by weight were used to formulate the reclaimed HFCs, and whether or how this information would also help to inform owners and operators in the proposed RACHP subsectors who would be required to use reclaimed HFCs for the servicing, repair, and/or installation of equipment, that they are using reclaimed HFCs meeting the proposed standards. Further, EPA seeks comment on whether an additional label would be required or any current labels affixed to a container of reclaimed HFCs could be adjusted to accommodate these proposed requirements.

EPA is requesting comments on all aspects of this proposal, and in particular, aspects of setting a standard for the amount of virgin HFC refrigerant in reclaimed HFCs. EPA is seeking comment on whether to establish a lower percentage of allowable virgin HFC refrigerants, for example, EPA could allow no more than 10 percent virgin HFCs, by weight, in reclaimed HFCs that are used to meet these proposed requirements. EPA is also seeking comment on our proposal to not require a limit on the amount of virgin refrigerant used in reclaimed substitutes for HFCs. The Agency is seeking comment on the proposed recordkeeping and labeling requirements to ensure that the reclaimed HFCs do not exceed 15 percent, by weight, virgin HFCs, and which party or parties should be responsible for maintaining the record. Specifically, EPA is seeking comment on adding a label to reclaimed HFC refrigerants that would identify them as such, since it is EPA's understanding that not all reclaimed HFC refrigerants are explicitly marketed as such.

3. Proposed Requirements for Initial Charge of Equipment for Subsectors in the RACHP Sector

EPA is proposing that for certain subsectors and applications in the RACHP sector where HFCs or a blend containing HFCs are used, the initial charge of refrigerant-containing equipment must be with reclaimed HFCs starting January 1, 2028. Specifically, in the case of certain factory-charged refrigerant-containing equipment that use HFCs as the refrigerant, EPA is proposing that such equipment in the covered subsectors and applications sold or distributed, or offered for sale or distribution, for installation, or installed, in the United States would be required to have reclaimed HFCs be used for the initial charge. For certain refrigerant-containing equipment using HFCs that are initially charged in the field (*e.g.,* on-site),[84] EPA is proposing to require that reclaimed HFCs be used for the initial charge during installation of the equipment. These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as these provisions would control practices, processes, or activities regarding the installation of equipment, and would involve a regulated substance or the reclaiming of a regulated substances used as a refrigerant.

In the case of field-charged equipment that are designed to be configured to particular application (*e.g.,* custom-built or not ''off-the-shelf'' equipment), EPA is proposing that for certain refrigerant-containing equipment (*e.g.,* retail food refrigeration supermarket system) a new installation would be considered to have occurred if the overall cooling capacity is increased or the entire refrigeration loop is replaced (compressor, condenser, evaporator, etc.). For example, EPA understands that in some situations components may be added to current systems, such as if the cooling demand of a particular system increases (*e.g.,* expansion of a supermarket). In other cases, components may be added to a system without changing the overall cooling capacity or replacing the refrigeration loop. In these cases, EPA is not proposing to consider this a new installation and the use of reclaimed HFCs would not be required unless the equipment had already been required to use reclaimed HFCs for its original installation. Under the proposed requirements, where equipment was already required to have been charged with reclaimed HFCs when installed, reclaimed HFCs must continue to be used even if a component is added to a system but the cooling capacity is unchanged or the refrigerant loop is not replaced. Proposed requirements for servicing or repair of certain equipment with reclaimed HFCs would apply in the event that refrigerant needs to be removed or other servicing or repair is required. Section IV.D.4 of this proposal describes what EPA is proposing for the use of reclaimed HFCs for the servicing and/or repair of certain refrigerant-containing equipment.

As explained in this section, EPA is proposing requirements for using reclaimed HFCs as the initial charge in certain refrigerant-containing equipment that will be sold or distributed or offered for sale or distribution for installation or installed in the United States in certain RACHP subsectors and applications. EPA is proposing to delay the compliance date for the requirements for using reclaimed HFCs as the initial charge in certain equipment until January 1, 2028.

On January 1, 2029, under the HFC phasedown schedule prescribed by Congress in subsection (e)(2)(C) of the AIM Act, the HFC production and consumption caps decrease by 70% as compared to historic baseline levels. While EPA anticipates that many equipment manufacturers will transition to substitutes for HFCs, reclaimed HFCs are anticipated to fill a vital role in supplying industry with usable HFCs for new and existing equipment. The experience with the phaseout of class I and class II ODS suggests that reclamation will be an important option for smoothing the phasedown. However, given the AIM Act calls for a phasedown of HFCs and not a phaseout, there also likely could be a continuing dependency on HFCs, at least for certain sectors and subsectors, indefinitely. Therefore, experience with similar chemicals and considering how markets may respond to a phasedown, were among the factors EPA considered when

[84] Field-charging of equipment occurs when of a piece of equipment shipped to the location in which it will be installed. Equipment may also be field-charged when the overall system is not a single piece of equipment, but rather is a collection of components installed to meet a particular configuration (*e.g.,* installation of a supermarket system).

developing the proposed requirements for requiring use of reclaimed HFCs.

EPA is aware that industry and, in particular, reclaimers may need time to adjust business practices and build capacity to reclaim HFCs to support this upcoming demand for reclaimed HFCs as well as make other changes. EPA publishes annual data on the trends of reclaimed refrigerants.[85] These data for reclaimed HFCs begin in 2017, when the CAA section 608 requirements for reporting reclamation of HFCs began. Reclamation of HFC refrigerants have been generally steady since 2017 through 2021; however, HFC reclamation had a sizeable increase of approximately 38 percent in 2022 compared to 2021. EPA recognizes that these data mostly represent years ahead of when HFC production and consumption was capped, but the observed increase in reported HFC reclamation in 2022 shows an important step to making reclaimed HFCs more available on the market. Continued increases in the current levels of HFC reclamation will be necessary to meet the anticipated demand of HFCs in the subsectors for which EPA is proposing requirements for the use of reclaimed HFCs. EPA also recognizes the significant steps in the HFC phasedown that will occur in 2024 and 2029, and equipment using HFCs will generally rely on reclaimed HFCs, further adding to the demand of reclaimed HFCs. Proposing requirements for the use of reclaimed HFCs beginning in 2028 will give reclaimers and industry time to adjust business practices (*e.g.,* changing suppliers) and build capacity, while allowing industry to have sufficient reclaimed HFCs ahead of the significant phasedown step which will reduce the amount of virgin HFCs that are available to meet demand for HFCs. Reclaimers who may need to build additional capacity would need this additional time to develop the necessary infrastructure to reclaim sufficient HFCs.

The report by a group of ENGOs [86] states that a requirement for new equipment to use reclaimed HFCs would further help mitigate the climate impact of sectors that are transitioning away from very-high-GWP substances to mid-GWP substances as part of the HFC phasedown. The report states that a requirement to use reclaimed refrigerant instead of virgin refrigerants in specific subsectors ''would go a long way towards building a market for reclaimed refrigerant and avoiding unnecessary emissions of virgin HFCs.'' Specifically, it advocates for requirements to use of reclaimed refrigerant for initial charge and provides examples of subsectors to be covered for initial factory-charged equipment. Such examples include air conditioning and heat pumps where refrigerants such as HFC–32 and R–454B are among the likely candidates replace R–410A. The authors of the report note that it has been uncommon to use reclaimed refrigerant in new factory-charged equipment. However, they state that the use of reclaimed refrigerant in new air conditioners and heat pumps has been successfully executed on a voluntary basis in Europe.[87]

EPA is proposing that all refrigerant-containing equipment (*i.e.,* 100 percent) in the identified subsectors in this section use reclaimed HFCs for their initial charge. EPA is also considering requiring a certain percentage of some or all refrigerant-containing equipment in the subsectors identified in this aspect of the proposal be met with reclaimed HFCs for their initial charge. There may be certain advantages to such an approach including if availability of specific HFCs or HFC blends are not available in sufficient quantity to meet demand. However, complying with a percentage-based requirement could be challenging. Such an approach could also require additional recordkeeping or reporting requirements. If EPA were to use a percentage-based approach, in other words requiring for example 25, 50, or 75 percent of the affected equipment be charged with reclaimed refrigerant, EPA anticipates that for factory-charged equipment, the recordkeeping and reporting requirements would be for the manufacturers while for field-charged equipment the requirements would be for the owners and operators. By proposing to require that all refrigerant-containing equipment in the affected subsectors have reclaimed HFCs used in their initial charge, additional recordkeeping requirements would be avoided since OEMs and owners or operators could just purchase reclaimed HFCs rather than keep track of the amount of reclaimed and virgin HFCs they purchase for the initial charge of their equipment throughout the year, as would be necessary if only a portion of the affected equipment were required to be charged with reclaimed refrigerant. EPA also understands that a variant on type of percentage-based approach is used in California in a limited manner. EPA understands that California requires those that manufacture certain equipment (*e.g.,* certain air-conditioning appliances) must purchase a certain amount of reclaimed refrigerant. However, California does not specify where or how the reclaimed refrigerants are used.

Subsectors in the RACHP Sector

EPA is proposing to require use of reclaimed HFCs in initial charges for new refrigerant-containing equipment the following subsectors that will be installed in the United States:

- Residential and light commercial AC and heat pumps;
- Cold storage warehouses;
- Industrial process refrigeration;
- Stand-alone retail food refrigeration;
- Supermarket systems;
- Refrigerated transport; and
- Automatic commercial ice makers.[88]

The types of equipment that are in these subsectors may vary by when the initial charge of the refrigerant is added to the equipment. Some types of equipment in a given subsector may be charged with the refrigerant before the equipment is sold or distributed (*i.e.,* factory-charged), while others within the same subsector or in a different subsector may have the refrigerant charged in the field (*i.e.,* field-charged). For example, self-contained equipment (*e.g.,* window air conditioning units) in the residential and light commercial air conditioning and heat pumps subsector are charged with refrigerant at the factory and sold with the refrigerant in the equipment before it is installed for its intended use. Larger pieces of equipment in the IPR or supermarket systems subsectors, for example, have the refrigerant charged in field. These larger pieces of equipment may be custom-built to meet the specific needs of the application in which they are used, and the refrigerant is charged during the installation of the equipment. Additional detail on the types of

[85] U.S. EPA, Summary of Refrigerant Reclamation Trends, available: *https://www.epa.gov/section608/summary-refrigerant-reclamation-trends.*

[86] Environmental Investigations Agency, the Natural Resources Defense Council, and the Institute for Governance & Sustainable Development, The 90 Million Ton Opportunity: Lifecycle Refrigerant Management (LMR), available at: *https://www.nrdc.org/sites/default/files/lrm-90-billion-ton-opportunity-report-20221020.pdf.*

[87] Daikin Reclaimed Refrigerant Initiative in partnership with A-Gas, available at: *https://www.chillaire.co.uk/reclaimed-refrigerant-initiative/.*

[88] EPA has proposed to restrict the use of certain higher-GWP HFCs in these seven subsectors through a rulemaking under subsection (i) of the AIM Act. (87 FR 76738, December 15, 2022). Although EPA has not yet made final decisions regarding these subsectors, such restrictions on higher-GWP HFCs could affect the use of such HFCs for initial charge in these subsectors by 2028, even if these HFCs were reclaimed prior to the initial charge.

equipment and the applications in which they are used in the listed subsectors is provided in the proposed Technology Transitions Rule (87 FR 76738, December 15, 2022). Although EPA has not yet issued a final Technology Transitions rule, we also anticipate considering, where appropriate, any further information provided on these types of equipment, applications, and subsectors in any final Technology Transitions rule as we are developing this rulemaking under subsection (h) of the AIM Act, in an effort to promote consistency where appropriate.

EPA understands that, in practice, reclaimed HFCs meet the same purity standards as their virgin counterparts and function the same when used in equipment in the RACHP sector and other sectors. Comments in response to EPA's NODA (87 FR 62843, October 17, 2022) and in stakeholder meetings hosted by the Agency noted that there are not significant barriers to using reclaimed HFCs in the initial charge of equipment. Thus, EPA's proposal to require the use of reclaimed HFCs regarding the installation of new equipment in the listed subsectors would not have any significant technical limitations. EPA is aware that the near-term capacity of reclaimed HFCs may not be sufficient to meet the total demand of HFCs in all new equipment across the whole RACHP sector and thus is proposing a subset of subsectors to be required to use reclaimed HFCs in the initial charge for the installation of new equipment. As described later in this section, the Agency also is seeking comment on requiring a percent of equipment in the subsector use reclaimed refrigerants rather than all equipment in that subsector given EPA understands that there could be other factors, such as introduction of new and/or patented refrigerants, that could affect the decision on the use of reclaimed refrigerants. For example, EPA could require manufacturers use reclaimed HFCs in 25, 50, or 75 percent of their total product lines for the covered product categories. The Agency describes later in this section in more detail and in the *Updated Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices,*[89] the anticipated demand of HFCs for new refrigerant-containing equipment in these subsectors that would need to be met with reclaimed HFCs, and notes that the proposed compliance date for these proposed requirements would not be until 2028. The proposed compliance date provides industry a transition period to facilitate necessary changes in the current business practices and to allow for the HFC reclamation market to grow. Further, based on the restrictions in the proposed Technology Transition rule (87 FR 76738, December 15, 2022), industry should have a good sense of what HFCs and blends containing HFCs would be being used in new equipment.

EPA is proposing requirements for the initial charge with reclaimed HFCs in equipment in these seven subsectors within the RACHP sector based on the Agency's assessment of available reclaimed HFCs available to meet anticipated demand and that these are uses for which reclaimed refrigerants are appropriate to use. For example, EPA understands for certain subsectors, particularly those outside the RACHP sector, such as for certain medical devices (*e.g.,* metered-dose inhalers), reclaimed HFCs would not be meet the specific quality and purification requirements. In its outreach, EPA asked about any significant challenges or barriers to using reclaimed HFCs as the initial charge of refrigerant in equipment. The Agency received comments in support of requiring reclaimed HFCs as the initial charge for equipment in response to the October 2022 NODA and did not learn of any technical barriers.[90]

Reclaimed HFCs are purified and tested to verify they meet the levels as specified in appendix A to 40 CFR part 82, subpart F (which is based on AHRI 700–2016), as consistent with the definition of reclaim in 40 CFR part 84, subpart A. The Allocation Framework Rule (86 FR 55116, October 5, 2021) also requires that virgin HFC refrigerants meet this same standard. Therefore, their purity is indistinguishable. By requiring the use of reclaimed HFCs in these seven subsectors, EPA is providing opportunities to smooth transition to using reclaimed HFCs in new equipment that would be installed.

EPA estimated the demand for initial charge of HFCs for equipment in the applicable subsectors in 2028 that would be required to be fulfilled with reclaimed HFCs per this proposal. EPA estimates that the total amount of reclaimed HFCs that would be required to meet demand for the initial charge of refrigerant-containing equipment in the covered subsectors would be approximately 23,300 metric tons, which is equivalent to 31.0 $MMTCO_2e$ in 2028. The subsector with the greatest amount of reclaimed HFCs needed to meet demand for the initial charge of equipment is the residential and light commercial subsector, at approximately 18,600 metric tons (18.6 $MMTCO_2e$) of reclaimed HFCs that would be required in 2028. Additional information on the demand of HFCs for the initial charge of refrigerant-containing equipment in the covered subsectors can be found in the *Updated Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices* in the docket for this rulemaking.

EPA is requesting comment on all aspects of this rule. With regard to the proposed requirements for using reclaimed HFCs in the initial charge of certain refrigerant-containing equipment, EPA is requesting comment on whether the requirement to use reclaimed HFCs in the initial charge of certain equipment should exclude certain HFCs or HFC blends because there are barriers to establishing the requisite availability of reclaimed refrigerants by the proposed January 1, 2028, compliance date. Such barriers could potentially include niche HFCs or HFC blends that are not manufactured or reclaimed at significant volumes but are key to certain subsectors, HFCs or HFC blends that were recently commercialized such that the amount of used material is not yet sufficient to provide the input to a supply of reclaim material, or certain refrigerants that may be subject to specific types of patents. EPA is also interested in comments regarding the proposed list of covered subsectors that would be required to use reclaimed HFCs in the initial charge of new equipment, and if EPA should consider any additional subsectors or fewer subsectors. As discussed in section IV.D.3., EPA noted that the Agency considered a percentage-based approach for the reclaim requirements for initial charge. EPA is requesting comment on this percentage-based approach where requirements for using reclaimed HFCs for initial charge of equipment in the covered subsectors could be phased in over time compared to the proposed requirement to solely use reclaimed HFCs in the initial charge of certain equipment. In other words, EPA could require, for example, 25, 50 or 75 percent of a subsector use reclaim for initial charge indefinitely, or as an alternative example, that 25 percent do so in 2026, 50 percent in 2027, 75

[89] EPA, 2023. Updated Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices. Available in the docket (EPA–HQ–OAR–2022–0606) for this proposed rulemaking at *https://www.regulations.gov.*

[90] Comments submitted to response of NODA published on October 17, 2022 (87 FR 62843) are available in the docket (EPA–HQ–OAR–2022–0606) for this proposed rulemaking at *https://www.regulations.gov.*

percent in 2028, and 100 percent in 2029. EPA also requests comment on the proposed compliance date of January 1, 2028 in general, for use of reclaimed HFCs in the initial charge of new equipment in applicable RACHP subsectors. EPA is interested in whether reclaimers anticipate being able to meet the demand in 2028.

4. Proposed Requirements for Servicing and/or Repair of Existing Equipment in Subsectors in the RACHP Sector

EPA is proposing that the servicing and/or repair of refrigerant-containing appliances in certain subsectors and applications in the RACHP sector where HFCs (whether neat or in a blend) are being used be done with reclaimed HFCs starting January 1, 2028. As noted in section IV.D.3, these requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act. The proposed requirements discussed in this section of the preamble would control practices, processes, and activities regarding the servicing and/or repair of equipment and involve HFCs and the reclaiming of HFCs used as a refrigerant by requiring that such servicing and/or repair be done with reclaimed HFCs. Existing equipment that is currently using HFCs or a blend containing HFCs is anticipated to continue to need these substances as the phasedown of the production and consumption of HFCs under other provisions of the AIM Act progresses, such as for servicing needs. As virgin HFC refrigerants become increasingly scarce, we expect industry will rely on using reclaimed HFCs to meet their needs for servicing existing equipment. EPA is proposing requirements that reclaimed HFCs be used to service and/or repair equipment within certain RACHP subsectors and applications.

As noted in the prior section on reclaim requirements for initial charge of equipment in certain RACHP subsectors, EPA is considering many types of information in developing the proposed requirements for reclaimed HFC refrigerants in the servicing and/or repair of equipment in certain RACHP subsectors. For example, EPA is drawing on the past data and history of the reclamation of ODS, as explained in section IV.D.3. EPA is also considering the experience in California and the EU. EPA also reflected on information submitted in response to the October 2022 NODA and the recent report by a group of ENGOs referred to previously. EPA is aware that as more reclaimed HFCs are used, either as required per the proposed provision or otherwise used as virgin HFCs become scarcer, market prices for reclaimed HFCs may shift. Lastly, EPA considered the anticipated effect of the overall phasedown of the production and consumption of HFCs and the vital role that reclaimed HFCs will likely play to meet the continuing need for using HFCs as refrigerants in the United States. EPA is requesting comment on these considerations and any other considerations or information that would be relevant to the proposed provisions for using reclaimed HFCs in the servicing/repair of refrigerant-containing equipment.

EPA is aware that industry, and, in particular, reclaimers will need time to adjust and build capacity to reclaim HFCs to support this upcoming demand for reclaimed HFCs. EPA is proposing a compliance date of January 1, 2028, for the required use of reclaimed HFCs in the servicing and/or repair of equipment in certain RACHP subsectors. As explained in section IV.D.3. of this proposal, requiring compliance with these requirements as of January 1, 2028, would allow industry to transition to meet the increased demand for reclaimed HFCs and make changes to their current practices prior to the significant reduction in the production and consumption of HFCs in 2029.

Subsectors in the RACHP Sector

EPA is proposing to require, for the servicing and/or repair of refrigerant-containing equipment in the following subsectors, that reclaimed HFCs be used:

- Stand-alone retail food refrigeration;
- Supermarket systems;
- Refrigerated transport; and
- Automatic commercial ice makers.

As noted in section IV.D.3., EPA understands that reclaimed HFCs function the same as virgin HFCs in refrigerant-containing equipment and are required to meet the same purity levels as their virgin counterparts, as specified in appendix A to 40 CFR part 82, subpart F (which is based on AHRI 700–2016) and consistent with the definition of reclaim in 40 CFR part 82, subpart A. In particular in the RACHP sector, it may already be a practice for refrigerant-containing equipment to be serviced or repaired with reclaimed HFCs. Owners or operators or the technicians they contract may be using reclaimed HFCs during these practices, processes, or activities related to servicing and/or repair without specifically seeking to use reclaimed HFC refrigerants. In general, reclaimers do not specifically label their reclaimed HFC products when they sell or distribute them directly to technicians or a wholesaler or distributor; however, EPA is aware of at least one reclaimer that already markets a specific product line of reclaimed refrigerants.[91] In most cases, EPA understands that owners or operators or technicians may be purchasing refrigerant for servicing and/or repair that is most cost-effective, which may involve purchasing reclaimed refrigerants.

EPA is aware that the current capacity of reclaimed HFCs may not be sufficient to meet the total demand of HFCs for practices, processes, or activities related to the servicing and/or repair of refrigerant-containing equipment across the whole RACHP sector and is proposing a subset of subsectors to be required to use reclaim in the servicing and/or repair of equipment. The Agency describes later in this section and in the *Updated Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices* in the docket for this rulemaking in more detail the anticipated demand of HFCs for servicing and/or repair of refrigerant-containing equipment in these subsectors that would need to be met with reclaimed HFCs, and notes that the compliance date for these proposed requirements is not proposed to occur until January 1, 2028. This compliance date would provide industry a transition period to have enough reclaimed HFCs available to meet the demand for servicing and/or repair of equipment.

EPA is proposing requirements for the use of reclaimed HFCs in the servicing and/or repair of equipment in four subsectors within the RACHP sector. EPA acknowledges the needed increase in the amount of HFCs available for the servicing and/or repair of equipment in these subsectors, and notes that these proposed requirements further serve one of the purposes identified in subsection (h), to maximize the reclaiming of regulated substances. Reclaimed HFCs are purified and tested to the levels as specified in appendix A to 40 CFR part 82, subpart F (which is based on AHRI 700–2016), as consistent with the definition of reclaim in 40 CFR part 82, subpart A and could be required to be used in other subsectors as well. These four subsectors in the RACHP sector provide opportunities for transitioning to using reclaimed HFCs in the servicing and/or repair of refrigerant-containing equipment as the phasedown of production and consumption virgin HFCs progresses under the AIM Act. These subsectors are expected to

[91] Hudson Technologies, Emerald Refrigerants. More information available at: *https://www.hudsontech.com/refrigerants/emerald-refrigerants/.*

continue to use HFCs in the current existing equipment and are likely to continue to have a steady demand for the HFCs in servicing and/or repair of the equipment. Thus, these subsectors are appropriate for proposing that the anticipated demand for servicing and/or repair of equipment be met with reclaimed HFC refrigerant. As noted above, there are likely already cases in which reclaimed HFC refrigerants are being used to service and/or repair equipment in these subsectors.

EPA estimated the demand for servicing and/or repair with HFCs for refrigerant-containing equipment in the applicable subsectors in 2028 that would be required to be fulfilled with reclaimed HFCs per this proposal.

EPA estimates that the total amount of reclaimed HFCs that would be required to meet the demand for the servicing and/or repair of refrigerant-containing equipment in the covered subsectors would be approximately 16,700 metric tons, which is equivalent to 46.8 $MMTCO_2e$ in 2028. The subsector with the greatest amount of reclaimed HFCs needed to meet demand for servicing and/or repair of equipment is supermarket systems, at approximately 12,900 metric tons (33.6 $MMTCO_2e$) of reclaimed HFCs that would be required in 2028. Additional information on the demand of HFCs for the servicing and/or repair of refrigerant-containing equipment in the covered subsectors can be found in the *Updated Draft Report—Analysis of the U.S. Hydrofluorocarbon Reclamation Market: Stakeholders, Drivers, and Practices* in the docket for this rulemaking.

EPA is requesting comment on all aspects of this proposal. Regarding the proposed requirements for using reclaimed HFCs in the servicing and/or repair of certain refrigerant-containing equipment, EPA is requesting comment on whether the requirement to use reclaimed HFCs in the servicing and/or repair of certain equipment should exclude certain HFCs or HFC blends because there are barriers to establishing the requisite availability of reclaimed refrigerants by the proposed January 1, 2028, compliance date. Such barriers could potentially include niche HFCs or HFC blends that are not manufactured or reclaimed at significant volumes but are key to certain subsectors, HFCs or HFC blends that were recently commercialized such that the amount of used material is not yet sufficient to provide the input to a supply of reclaim material, or certain refrigerants that may be subject to specific types of patents.

EPA requests comment on other ways to structure the requirements to use reclaimed refrigerant in certain subsectors. EPA requests comment on whether the Agency should use a percentage-based approach and/or phase the requirements in by requiring a percentage of the HFCs or HFC blends used in the servicing and/or repair of refrigerant-containing equipment be reclaimed HFCs, and then increasing that percentage over time. In other words, EPA could require, for example, 25, 50 or 75 percent of a subsector use reclaim for servicing and/or repair indefinitely, or as an alternative example, that 25 percent do so in 2026, 50 percent in 2027, 75 percent in 2028, and 100 percent in 2029. Although this an option that the Agency is considering for the final rule, EPA is not proposing that as the lead option because the Agency has potential concerns, which are similar to those described in section IV.D.3. Particularly, as related to servicing and/or repair of equipment, the Agency has potential concerns about the recordkeeping and/or reporting requirements necessary to track and verify compliance with a percentage-based approach in relation to the policy goals of the provision. By proposing to require that all refrigerant-containing equipment in the affected subsector be serviced and/or repaired with reclaimed HFCs, additional recordkeeping requirements would be avoided since owners or operator could just purchase reclaimed HFCs rather than keep track of the amount of reclaimed and virgin HFCs they purchase to service their equipment throughout the year, as would be necessary if only a portion of the affected equipment were required to be serviced and/or repaired with reclaimed refrigerant. EPA requests comment on what recordkeeping and/or reporting would be necessary to verify compliance with a percentage-based option and which entities would ultimately be responsible for that recordkeeping and/or reporting. EPA also requests comment on the proposed compliance date of January 1, 2028 in general, for use of reclaimed HFCs in the servicing and/or repair of equipment in applicable RACHP subsectors. EPA is interested in whether reclaimers anticipate being able to meet the demand in 2028.

E. How is EPA proposing to establish an HFC emissions reduction program for the fire suppression sector?

1. Background

As described in greater detail in section IV.B., HFCs and substitutes for HFCs are used in many different sectors, subsectors, and applications beyond those in the RACHP sector, and EPA interprets its authority under subsection (h) to include promulgating regulations that control the types of practices, processes, or activities identified in subsection (h)(1) in those sectors, subsectors, and applications, with the limitation that we do not interpret our regulatory authority under subsection (h) to extend to HFCs or substitutes for HFCs when they are contained in foams. For example, HFCs are also used in the fire suppression sector.

EPA understands that different sectors use HFCs and their substitutes differently, and as such, the timing for emissions and mechanisms by which emissions occur can vary greatly across sectors. HFCs used in the fire suppression sector are used as a fire suppressant and should only be discharged from fire suppression equipment in the event of a fire. If there is no event to cause the fire suppression equipment to be used, the HFCs should not be discharged, and thus not emitted. EPA considered these differences as well as the types of equipment used for fire suppression in developing this proposed rule. EPA is proposing certain requirements to address HFC management for fire suppression under subsection (h).

The Agency is not proposing any regulatory requirements under subsection (h) for HFC and HFC substitutes used in sectors, subsectors, and applications besides the RACHP and fire suppression sectors at this time. However, the Agency will continue to monitor the use and emissions of HFCs more generally and such information may inform future rulemakings under subsection (h).

2. Nomenclature Used in This Section

This section uses the term ''recycled'' or ''recycling'' to describe the testing and/or reprocessing of HFCs used in the fire suppression sector to certain purity standards.[92] HFCs that are recycled for fire suppression use include HFC–227ea, HFC–125, HFC–236fa, and HFC–23. The term ''recycled'' or ''recycling'' as used in the fire suppression sector is similar, but not identical, to the term ''reclaim'' as defined under the AIM Act. Under the AIM Act, the terms ''reclaim; reclamation'' are defined in subsection (b)(9) of the Act, and that definition refers to the purity standards under AHRI Standard 700–2016 (or an

[92] These industry standards may include NFPA 2001 (Standard on Clean Agent Fire Extinguishing Systems), NFPA 10 (Standard for Portable Fire Extinguishers), ASTM D6064–11 (Standard Specification for HFC–227ea), ASTM D6231/D6231M–21 (Standard Specification for HFC–125), ASTM D6541–21 (Standard Specification for HFC–236fa), and ASTM D6126/D6126M–21 (Standard Specification for HFC–23).

appropriate successor standard adopted by the Administrator) and the verification of purity using, at a minimum, the analytical methodology described in that standard.

The fire suppression industry describes clean agents as ''a gaseous fire suppressant that is electrically nonconducting and that does not leave a residue upon evaporation,'' and the term ''clean agents'' includes HFCs, according to the National Fire Protection Association (NFPA).[93] For the purposes of this section, EPA is generally referring to the term, ''clean agents'' as HFCs.

3. Fire Suppression Background

As part of implementing subsection (h)(1), EPA is proposing certain regulatory requirements regarding the servicing, repair, disposal, or installation of fire suppression equipment that contains HFCs, with the purpose of minimizing the release of HFCs from that equipment, as well as requirements related to technician training for servicing, repair, disposal, or installation in the fire suppression sector. These proposed requirements are similar to the halon emissions reduction requirements found at 40 CFR part 82, subpart H. EPA regulations under Title VI of the CAA prohibit the intentional release of halons during testing, maintenance, servicing, repair, or disposal of halon-containing equipment, or during the use of such equipment for technician training (subject to certain exceptions). EPA's halon emission reduction requirements at 40 CFR part 82, subpart H cover technician training requirements and proper halon disposal and recycling.[94] These regulations also prohibit halon releases that occur because an owner failed to maintain halon-containing equipment to relevant industry standards. With the production and import of virgin halons phased out in the United States since 1994, recycled halons have been the primary supply of halons in the United States for nearly 30 years. Sources of recycled halons include recovered halons from cylinders collected from decommissioned systems both in the United States and abroad. Existing halon stocks are purchased by commercial recyclers from decommissioned equipment, reprocessed to industry specifications, and sold back into the market. Demand for halons has been satisfied with recycled halons, ensuring equipment can be serviced and investments are not stranded.

Recycled halon is still available today, nearly 30 years after the United States phased out production and consumption of halons. It is this experience since the phaseout of the halons in 1994 that demonstrates the important role recovery and recycling of fire suppression clean agents can play by providing an ongoing supply of HFCs in fire suppression applications especially where other substitutes may not be suitable. EPA understands that this model has carried over on a voluntary basis to the management of HFCs by many in the fire suppression sector.[95] In 2002, the fire suppression industry developed a voluntary code of practice (VCOP) for the reduction of emissions of fire suppression agents including HFCs. The VCOP was developed by the Halon Alternatives Research Corporation (HARC), an industry organization, in partnership with EPA, the Fire Suppression Systems Association (FSSA), the Fire Equipment Manufacturers Association (FEMA), and the National Association of Fire Equipment Distributors (NAFED). Many of the practices have been voluntarily adopted by the fire suppression sector, such as equipment manufacturers or distributors.

Fire suppression agents must satisfy important environmental and safety criteria, including but not limited to acceptable ODPs, GWPs, and atmospheric lifetimes, be effective extinguishants, and, for spaces where people would be present, have sufficiently low toxicity that under normal use the discharge of agent in occupied spaces would not harm people.[96] Other important preferred features include being electrically non-conductive, and ''clean,'' meaning leaving no non-volatile residue that could damage high-value electronics, controls, or other critical systems in the protected spaces. HFCs that satisfy the above requirements are used in fixed systems for total-flooding applications and for use in portable equipment as streaming agents. These applications are generally described as follows:

- Total flooding systems are designed to automatically discharge a fire suppression agent by detection and related controls (or manually by a system operator) and achieve a specified minimum agent concentration throughout a confined space (*i.e.,* volume percent of the agent in air) that is sufficient to suppress development of a fire.
- Streaming applications use portable fire extinguishers that can be manually manipulated to discharge an agent in a specific direction and release a specific quantity of extinguishing agent at the fire.

Guidelines for clean agents, including HFCs, have been published to ensure the quality of the recycled fire suppression agents. According to HARC's comment on the October 2022 NODA, fire suppression agent recyclers follow industry standards and specifications that are generally similar to section 608 and AHRI purity specifications. In 2016, HARC developed a voluntary recycling code of practice (RCOP).[97] This code of practice includes the recommendation that prior to sale or reuse as a fire suppressant, the recovered HFC should be tested and processed to meet NFPA 2001 [98] and NFPA 10 [99] standards or American Society for Testing and Materials (ASTM) specifications. These specifications ensure that fire suppressants, including HFCs, are recycled and tested to a certain purity level, before being sold or reused as a fire suppressant. In addition, in 2018, the Montreal Protocol's Technology and Economic Assessment Panel's (TEAP) Halons Technical Options Committee (HTOC) (renamed in 2022 to the Fire Suppression Technical Options Committee or FSTOC) published recommended practices for recycling halons and other gaseous fire extinguishing agents, including certain HFCs, which covers similar specifications for testing and certification of the recycled agent prior to reuse.[100]

[93] National Fire Protection Association, NFPA Today, May 6, 2022, *https://www.nfpa.org/News-and-Research/Publications-and-media/Blogs-Landing-Page/NFPA-Today/Blog-Posts/2022/05/06/Clean-Agent-System-Basics.*

[94] These regulations were established in 1998 (63 FR 11096, March 5, 1998) and amended in 2020 (85 FR 15301, Mar. 17, 2020).

[95] EPA, 2023. American Innovation and Manufacturing Act of 2020—Subsection (h): Fire Suppression Sector. Draft Technical Support Document. Available in the docket (EPA–HQ–OAR–2022–0606) for this proposed rulemaking at *https://www.regulations.gov.*

[96] UNEP, ''TEAP 2022 Assessment: Report of the Fire Suppression Technical Options Committee,'' December 2022, available at: *https://ozone.unep.org/system/files/documents/FSTOC-2022-Assessment.pdf.*

[97] HARC, ''Code of Practice for Use of Recycled Halogenated Clean Agents,'' 2016, available at: *https://www.harc.org/_files/ugd/4e7dd1_4ab7295ac47e4bdea67020750f544f1b.pdf.*

[98] NFPA 2001 Standard on Clean Agent Fire Extinguishing Systems. Available at: *https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=2001.*

[99] NFPA 10 Standard for Portable Fire Extinguishers. Available at: *https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=10.*

[100] Technical Note #4, Revision 2—Recommended Practices for Recycling Halons and

A recent report by the TEAP's FSTOC states that ''the HFC phasedown in the US is having a large effect on the production and consumption of HFC fire extinguishants,'' noting that ''what we have seen in the US is that there has already been significant impact on cost of HFCs.'' [101] FSTOC states that the reasons for this include that HFCs used for fire extinguishing are high-GWP, that the allocation mechanism in the United States is GWP-weighted, and that market commercial factors will mean producers and importers will decide which HFCs to manufacture or import based on GWP and future market needs. The reasons for this include the extremely small use of HFCs in fire suppression compared to other uses. Additional impacts to the fire suppression sector from the global phasedown of HFCs ''could reduce the commercial viability of production of some HFC fire extinguishing agents in the future.'' FSTOC notes that ''HFCs contained in fire protection equipment have historically enjoyed a relatively high level of recycling and reuse'' and ''[as] the supply of newly produced HFCs for fire protection decreases in response to phase down regulations, recycling becomes even more important as an alternative source of supply and is likely to increase in the future.''

4. Minimizing Releases of HFCs

As part of implementing subsection (h)(1), EPA is proposing a number of requirements to minimize releases of HFCs during the servicing, repair, disposal, or installation of fire suppression equipment containing HFCs or during the use of such equipment for technician training. As previously discussed, EPA is proposing requirements that are similar to the halon emissions reduction requirements found at 40 CFR part 82, subpart H. The fact that recycled halons have been the only supply of halons in the United States nearly 30 years after its production phaseout in 1994 demonstrates the important role recovery and recycling of fire suppression clean agents can play by providing an ongoing supply where substitutes may not be suitable. EPA understands that this model has carried over on a voluntary basis to the management of HFCs by many in the fire suppression sector.

To minimize releases of HFCs, EPA is proposing that covered entities installing, servicing, repairing, or disposing of fire suppression equipment containing a regulated substance may not release into the environment any HFCs used in such equipment. EPA is also proposing that owners and operators of fire suppression equipment containing HFCs may not allow for the release of HFCs as a result of failure to maintain such equipment. In the following sections, EPA describes its proposal to require the use of recycled HFCs for initial charge and servicing and/or repair of fire suppression equipment as well as minimizing HFC releases during recycling; technician training; recycling of HFCs prior to the disposal of fire suppression equipment containing HFCs; and recordkeeping and reporting. These requirements are proposed with a compliance date of January 1, 2025.

Recognizing the extensive requirements for testing (*e.g.,* Federal Aviation Administration, United States Coast Guard, Department of Defense) associated with the approval for use of fire suppressants in certain applications, certain limited HFC releases for health, safety, environmental, and other considerations would be exempted, including:

- Releases during the testing of fire suppression equipment only if the following four criteria are met: (1) equipment employing suitable alternative fire suppression agents are not available, (2) release of fire suppression agent is essential to demonstrate equipment functionality, (3) failure of the equipment would pose great risk to human safety or the environment, and (4) a simulant agent cannot be used in place of the regulated substance for testing purposes.
- Releases associated with qualification and development testing during the design and development of equipment containing regulated substances only when (1) such tests are essential to demonstrate equipment functionality, and (2) a suitable simulant agent cannot be used in place of the regulated substance for testing purposes.

In addition, these proposed requirements to minimize HFC releases do not apply to emergency releases of HFCs for actual fire extinguishing, explosion inertion, or other emergency applications for which the equipment were designed.

EPA requests comment on the proposed compliance date of January 1, 2025, for the proposed requirements in the fire suppression sector. As discussed elsewhere in this section of the proposed rule, many covered entities may already have procedures in place given the voluntary program within the fire suppression sector as described previously. EPA views this proposed compliance date as appropriate.

a. Proposed Requirements for Initial Charge of Equipment for Fire Suppression

EPA is proposing that for the fire suppression sector where HFCs are used, the initial charge of fire suppression equipment, including both total flooding systems and streaming applications, must be with recycled HFCs starting January 1, 2025. EPA is also considering other potential compliance dates, such as January 1, 2026 or January 1, 2027. Specifically, for factory-charged equipment that use HFCs, EPA is proposing that in order to install such equipment, the equipment would be required to use recycled HFCs for the initial charge during the manufacture of the equipment. These requirements would apply whether the HFCs are used neat or in a blend. However, EPA notes that most often, where clean agents are needed and HFCs are being used, these are single component HFCs with some of the highest GWPs for the regulated HFCs. Given the high GWPs for the commonly used HFC fire suppression agents, this aspect of the proposal is anticipated to further minimize emissions by requiring that only recycled HFCs be used in fire suppression equipment.

EPA understands that, in practice, recycled HFCs are required to meet applicable purity standards and function the same as their virgin counterparts when used in equipment in the fire suppression sector. Currently, recycled HFCs are primarily used for the servicing and recharge of existing fire suppression equipment. However, HARC's comments on the October 2022 NODA indicate that it does not anticipate major barriers to using recycled HFCs in new fire suppression equipment and expects use of recycled HFCs in new equipment to increase as the supply of virgin HFCs for fire suppression decreases.

EPA notes that the proposed definition of ''fire suppression equipment'' for purposes of subsection (h) excludes mission-critical military end uses and systems used in deployable and expeditionary applications, as well as space vehicles. Finalizing the proposed definition would exempt those applications from this requirement, which is consistent with EPA's intent to not include these

Other Halogenated Gaseous Fire Extinguishing Agents. Available at: *https://ozone.unep.org/sites/default/files/Assessment_Panel/Assessment_Panels/TEAP/Reports/HTOC/technical_note4_2018.pdf.*

[101] UNEP, ''TEAP 2022 Assessment: Report of the Fire Suppression Technical Options Committee,'' December 2022, available at: *https://ozone.unep.org/system/files/documents/FSTOC-2022-Assessment.pdf.*

applications under the proposed requirements to use recycled HFCs in the installation, servicing and/or repair of such fire suppression equipment. This proposed exclusion is based on EPA's understanding that there are situations in which the unique design and use of such military equipment and space vehicles make it impossible to recover fire suppression agent during the service, repair, disposal, or installation of the equipment.

Recognizing that application-specific HFC allowances are available to other onboard aerospace fire suppression applications under regulations at 40 CFR 84.13,[102] EPA is not proposing to extend a requirement to use recycled HFCs in the installation, servicing and/or repair of such fire suppression equipment as long as they qualify for application-specific allowances in 40 CFR 84.13. Because these other onboard aerospace fire suppression applications would have the necessary allowances for virgin HFCs through qualification for application-specific allowances, these applications would not need to use recycled fire suppressants containing HFCs for the installation, servicing, and/or repair of fire suppression equipment.

EPA is requesting comment regarding the proposed requirement for using recycled HFCs in the initial charge of fire suppression equipment. EPA is requesting comment on the proposed requirement to solely use recycled HFCs in the initial charge of fire suppression equipment or if EPA should consider an approach that either uses a percentage-based approach for the affected fire suppression equipment charged with recycled HFCs (*e.g.,* 25, 50, or 75 percent of the fire suppression equipment) or phases in the requirement for using recycled HFCs over a period of time. As noted in section IV.D.3., if EPA were to finalize a percentage-based and/or phased in approach, associated recordkeeping and reporting may be required to ensure compliance with such an approach. EPA is also requesting comment on whether recycled HFCs should be used for the initial charge during the installation of fire suppression equipment as EPA understands that HFCs are generally not transferred from cylinders once in service. EPA also requests comment on the proposed compliance date of January 1, 2025, and other potential compliance dates such as January 1, 2026, or January 1, 2027, for the use of recycled HFCs in the initial charge of fire suppression equipment.

b. Proposed Requirements for Servicing and/or Repair of Existing Equipment for Fire Suppression

EPA is proposing to require the use of recycled HFCs for the servicing and/or repair of fire suppression equipment, including both total flooding systems and streaming applications, starting on January 1, 2025. EPA is also considering other potential compliance dates, such as January 1, 2026, or January 1, 2027. EPA understands that the fire suppression industry operates in accordance with requirements from NFPA 2001 or NFPA 10 or appropriate ASTM standards to recover and recycle HFCs during servicing and/or repair of fire suppression equipment. NFPA 2001 is a voluntary industry standard containing the minimum requirements for the design, installation, approval, and maintenance of total flooding systems using listed clean agents including HFCs. It includes requirements for inspection, servicing, testing, maintenance, and training to ensure the safe use and operation of these systems. Similarly, NFPA 10 is a voluntary industry standard containing the minimum requirements that apply to the selection, installation, inspection, maintenance, recharging, and testing of portable fire extinguishers and fire suppression agents including HFCs. The ASTM specifications cover the requirements (*e.g.,* purity) for the fire suppression agents, in this case the HFCs; the specifications do not typically address the associated fire suppression equipment or hardware that use the fire suppression agent or the conditions of using such equipment (*e.g.,* fixed total flooding systems, portable fire extinguishers). None of these current industry standards or specifications related to HFCs used in fire suppression contain specific requirements to minimize releases of HFCs, including during servicing or repair of the equipment. Efforts by the industry to minimize emissions of HFCs used in the fire suppression sector have to date been on a voluntary basis. For example, the VCOP includes as part of its emission reduction strategies during storage, handling, and transfer of HFCs to recover and recycle agents during servicing and to adopt maintenance practices that reduce leakage as much as is technically feasible. Considering these current voluntary practices to minimize emissions, the proposed requirements would minimize emissions of HFCs broadly within this sector of use. Covered entities are required to evacuate, as applicable, all equipment used to recover, store, and transfer HFCs prior to each use to prevent contamination, arrange for destruction of the recovered HFCs as necessary (*e.g.,* recovered HFCs that are too contaminated to be recycled), and collect and dispose of wastes from recycling process. If the recycling of HFCs is not practical, the disposal of HFCs would help to prevent releases of used HFCs into the atmosphere.

In 2015, data on recycling of HFC fire suppression agents were collected as part of the HFC Emissions Estimating Program (HEEP), which is voluntary data collection effort implemented by the fire suppression industry. HEEP collects data on sales of fire suppression agents for recharge in order to estimate annual emissions of HFCs. These data showed that the HFC–227ea, HFC–125, HFC–236fa and HFC–23 are all recycled for fire suppression use.[103] In recent years, approximately 75 percent of HFCs sold for recharge came from recyclers, with 80 percent reported in 2020, based on data submitted voluntarily to HEEP and may not include all entities in this sector.[104]

As part of servicing and/or repairing fire suppression equipment, recovery and recycling equipment is used to recover HFCs. EPA is also proposing to require that covered entities must (1) operate and maintain recovery and recycling equipment in accordance with manufacturer specifications to ensure that the equipment performs as specified; (2) repair leaks in HFC storage, recovery, recycling, or charging equipment before use; and (3) ensure that cross-contamination does not occur through the mixing of HFCs that may be contained in similar cylinders. Recovery equipment collect HFCs from equipment and recycling equipment remove contaminants from HFCs and this equipment is used during servicing and/or repair. By ensuring that this equipment is functioning properly, HFC releases can be minimized during the recovery and recycling process. The proposed requirements would ensure that releases from fire suppression equipment are minimized when

[102] On board aerospace fire suppression means use of a regulated substance in fire suppression equipment used on board commercial and general aviation aircraft, including commercial-derivative aircraft for military use; rotorcraft; and space vehicles. Mission-critical military end uses and systems used in deployable and expeditionary applications, as well as space vehicles, are applications that sometimes use HFCs and are therefore currently eligible for application-specific allowances.

[103] HARC comments on Notice of Data Availability Relevant to Management of Regulated Substances under the American Innovation and Manufacturing Act of 2020 are available in the docket (EPA–HQ–OAR–2022–0606) for this proposed rulemaking at *https://www.regulations.gov*.

[104] HARC Report of the HFC Emissions Estimating Program (HEEP) 2002–2020 Data Collection, October 2022.

recycling HFCs during servicing and/or repairing fire suppression equipment.

EPA notes that the proposed definition of ''fire suppression equipment'' for purposes of subsection (h) excludes mission-critical military end uses and systems used in deployable and expeditionary applications, as well as space vehicles. Finalizing the proposed definition would exempt those applications from this requirement, which is consistent with EPA's intent to not include these applications under the proposed requirements to use recycled HFCs in the installation, servicing and/or repair of such fire suppression equipment. This proposed exclusion is based on EPA's understanding that there are situations in which the unique design and use of such military equipment and space vehicles make it impossible to recover fire suppression agents during the service, repair, disposal, or installation of the equipment.

Recognizing that application-specific HFC allowances are available to other onboard aerospace fire suppression applications under regulations at 40 CFR 84.13,[105] EPA is not proposing to extend a requirement to use recycled HFCs in the installation, servicing and/or repair of such fire suppression equipment as long as they qualify for application-specific allowances in 40 CFR 84.13. Because these other onboard aerospace fire suppression applications would have the necessary allowances for virgin HFCs through qualification for application-specific allowances, these applications would not need to use recycled fire suppressants containing HFCs for the installation, servicing, and/or repair of fire suppression equipment.

EPA is requesting comment regarding the proposed requirements for using recycled HFCs in the servicing and/or repair of fire suppression equipment. In particular, EPA requests comments on the applicable fire suppression equipment that would be required to use recycled HFCs in the servicing and/or repair of fire suppression equipment. EPA is also requesting comment on the proposed requirement to solely use recycled HFCs in the servicing and/or repair of fire suppression equipment or if EPA should consider an approach that phases in requirements for using recycled HFCs. In addition, EPA requests comments on the practices to minimize releases from HFC recycling during servicing and/or repair as well as whether covered entities should be required to follow industry standards including NFPA 2001 (Standard on Clean Agent Fire Extinguishing Systems), NFPA 10 (Standard for Portable Fire Extinguishers), ASTM D6064–11 (Standard Specification for HFC–227ea), ASTM D6231/D6231M–21 (Standard Specification for HFC–125), ASTM D6541–21 (Standard Specification for HFC–236fa), and ASTM D6126/D6126M–21 (Standard Specification for HFC–23). EPA also requests comment on the proposed compliance date of January 1, 2025, and other potential compliance dates, such as January 1, 2026, or January 1, 2027, for the use of recycled HFCs for the servicing and/or repair of fire suppression equipment.

c. Technician Training

EPA is proposing to require all entities that employ fire suppression technicians who service, repair, install, or dispose of fire suppression equipment containing HFCs provide training regarding HFC emissions reduction. This proposed requirement is intended to control practices, processes, or activities regarding servicing, repair, disposal or installation of such fire suppression equipment by providing technicians with knowledge and skills to minimize releases of HFCs during such practices, processes, or activities, and the proposed requirements would involve a regulated substance. Fire suppression technicians are an important part in any effort to control unnecessary HFC emissions from fire suppression equipment while servicing, repairing, installing, or disposing of such equipment. By training technicians in the significance of minimizing unnecessary HFC releases from fire suppression equipment and providing information on applicable procedures such as the recovery and recycling or reclamation of HFCs from the fire suppression equipment, technician training would support EPA's effort to reduce HFC emissions from fire suppression equipment.

EPA is proposing that HFC fire suppression technician training be designed to cover: (1) an explanation of the purpose of the training requirement, including the significance of minimizing releases of HFCs and ensuring technician safety, (2) an overview of HFCs and environmental concerns with HFCs, (3) a review of relevant regulations concerning HFCs,[106] including the requirements of the HFC emissions reduction program for fire suppression equipment, and (4) specific technical instruction relevant to avoiding unnecessary HFC emissions during the servicing, repair, disposal or installation of fire-suppression equipment at each individual facility. Starting as of January 1, 2025, EPA is proposing that all entities that employ technicians who maintain, service, repair, install, or dispose of fire suppression equipment containing HFCs must provide HFC fire suppression technician training to their technicians (as described in this section) and ensure that their technicians complete this training. Technicians hired after that date must be similarly trained within 30 days of hiring, or by June 1, 2025. EPA is proposing this as a one-time training requirement. EPA is requesting comment on the requirement for technicians to be trained, the proposed content as described above, and timing of this requirement for technician training.

d. Recycling of HFCs Prior to Disposal of Fire Suppression Equipment Containing HFCs

EPA is proposing requirements related to the disposal of fire suppression equipment. The intent of these requirements is to ensure that HFCs have been recovered and recycled from the equipment prior to the final step of the disposal of the equipment so that HFCs are not released during the disposal of the equipment. EPA is proposing to require owners and operators of fire suppression equipment containing HFCs (including an HFC blend) dispose of this equipment by recovering the HFCs themselves or by arranging for HFC recovery by a fire suppression equipment manufacturer, distributor, or a fire suppressant recycler. EPA is also proposing that owners and operators dispose of HFCs used as a fire suppression agent by sending it for recycling to a fire suppressant recycler or a reclaimer certified under 40 CFR 82.164 or by arranging for its destruction using one of the controlled processes listed in 40 CFR 84.29. The voluntary industry standards that apply to the uses of HFCs in fire suppression equipment, NFPA 2001 for fire suppression systems and NFPA 10 for fire extinguishers, contain no current requirement for the recovery

[105] On board aerospace fire suppression means use of a regulated substance in fire suppression equipment used on board commercial and general aviation aircraft, including commercial-derivative aircraft for military use; rotorcraft; and space vehicles. Mission-critical military end uses and systems used in deployable and expeditionary applications, as well as space vehicles, are applications that sometimes use HFCs and are therefore currently eligible for application-specific allowances.

[106] These may include, but are not limited to, other EPA regulations, U.S. Department of Transportation (DOT) regulations, Occupational Safety and Health Administration (OSHA) regulations, codes and standards of NFPA, and other federal, state, or local fire, building, safety, and environmental codes and standards.

and disposal of HFCs prior to disposal of equipment. Efforts by the industry to minimize emissions of HFCs used in the fire suppression sector have to date been on a voluntary basis. For example, the VCOP includes as part of its emission reduction strategies during storage, handling, and transfer of HFCs to recover the agents after the end of the equipment's useful life and either recycle or destroy them. The proposed requirements would minimize emissions of HFCs through recovery of the agent prior to disposal of the equipment and ensure recycling or proper disposal of the HFC occurs broadly within this sector of use. Under the proposed requirements, the owners and operators of this equipment (*e.g.,* specialized fire suppression systems containing HFCs that protect high value equipment, such as electronic server rooms or oil and gas production facilities) must ensure that these HFCs are recovered from the fire suppression equipment before it is sent for disposal, either by recovering the HFCs themselves before sending the equipment for disposal or by leaving the HFCs in the equipment and sending it for disposal to a facility (*e.g.,* fire suppression equipment manufacturer, a distributor, or a fire suppressant recycler) operating in accordance with industry standards, *i.e.,* NFPA 10 and NFPA 2001 standards, as applicable. The proposal also would require that owner or operators of fire suppression equipment recover any HFCs as part of the disposal of such equipment be disposed of by sending it to a fire suppressant recycler operating in accordance with the relevant industry standards, which EPA understands to be the NFPA 10 and NFPA 2001 standards (depending on the type of equipment), by sending it to a reclaimer certified under 40 CFR 82.164, or by arranging for its destruction by a technology that is listed as an approved technology for destruction of the relevant regulated substance in the regulations at 40 CFR 84.29. These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as they would control practices, processes, or activities regarding the disposal of such fire-suppression equipment by establishing certain requirements that must be met as part of the disposal process and would involve a regulated substance.

Owners and operators of this fire suppression equipment who recover HFCs prior to disposal may already be aware of the importance of HFC recycling given prior communication efforts by the industry and may already take steps to ensure recovery of HFCs prior to disposal. As mentioned in section IV.E.3., the recycling of HFCs plays an important role in providing the fire suppression sector with continued supply of HFCs for fire suppression equipment during servicing. Industry trade organizations have encouraged owners and operators of fire suppression equipment and those disposing of HFCs to contact fire suppression equipment manufacturers, distributors, or fire suppressant recyclers to ensure that HFC is safely recovered from equipment and recycled for future use. Therefore, the proposed requirements are likely consistent with current industry practices. Most fire suppression systems and extinguishers in use today are purchased, installed, and serviced by fire suppression equipment distributors. EPA is aware that there are established distribution channels within the commercial and industrial sectors where these specialized systems are used and that industry representatives indicate that the simplest way in their opinion to ensure proper recycling of HFCs is to encourage equipment owners return equipment containing HFCs to distributors.[107] EPA values using established industry practices where such practices exist and can be used to meet the intended goals. EPA is requesting comment on the requirement to recover and recycle HFCs prior to the final step of disposal of the fire suppression equipment.

e. Recordkeeping and Reporting

EPA is proposing to include recordkeeping and reporting requirements on the fire suppression provisions under subsection (h) for HFCs used in the installation of new equipment and servicing and/or repair of existing equipment. These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as these provisions would control practices, processes, or activities regarding servicing, repair, disposal or installation of fire suppression equipment, and would involve a regulated substance. For example, the requirements would control recordkeeping and reporting practices, process, or activities for servicing and repair that involves HFCs. As noted in section II.B. of this document, EPA's authority to require recordkeeping and reporting under the AIM Act is also supported by section 114 of the CAA, which applies to the AIM Act and rules promulgated under it as provided in subsection (k)(1)(C) of the AIM Act.

EPA is proposing that covered entities in the fire suppression sector provide data on HFCs to the Agency. The fire suppression industry is familiar with data collection and reporting as some of the entities in this industry are voluntarily reporting data to HEEP as mentioned in section IV.E.4.b. Relevant reporting entities covered under this requirement include entities that perform first fill of equipment, service (*e.g.,* recharge) equipment and/or recycle regulated substances, such as equipment manufacturers, distributors, agent suppliers or installers that recycle regulated substances. EPA is proposing that these records related to the fire suppression sector be maintained for three years. Specifically, EPA is proposing that the covered entities report annually by February 14th of each year, covering the prior year's activity from January 1 through December 31:

- The quantity of material (the combined mass of regulated substance and contaminants) by regulated substance broken out by sold, recovered, recycled, and virgin for the purpose of installation of new equipment and servicing of fire suppression equipment,
- The total mass of each regulated substance broken out by sold, recovered, recycled, and virgin; and
- The total mass of waste products sent for disposal, along with information about the disposal facility if waste is not processed by the reporting entity.

EPA acknowledges that these recordkeeping and reporting requirements proposed herein may overlap with recordkeeping and reporting requirements under 40 CFR part 84, subpart A. EPA is requesting comments on these recordkeeping and reporting requirements, the timing of recordkeeping and reporting requirements (*e.g.,* whether it should be five years similar to recordkeeping requirements under 40 CFR part 84, subpart A), and whether compliance with one set of requirements would satisfy both obligations.

EPA is proposing that covered entities maintain an electronic or paper copy of the fire suppression technician training as discussed in IV.E.4.c., and that EPA can request to view a copy of the training on an as needed basis. EPA is also proposing that facilities must document that they have provided training to personnel. For example, local personnel records could be annotated, indicating where and when the training

[107] HARC comments, dated November 7, 2022, to Notice of Data Availability Relevant to Management of Regulated Substances Under the American Innovation and Manufacturing Act of 2020 are available in the docket (EPA–HQ–OAR–2022–0606) for this rulemaking at *https://www.regulations.gov.*

occurred. Alternatively, records could be centralized. Where EPA is proposing requirements for recordkeeping, we are proposing that the record be maintained for three years in either electronic or paper format.

As discussed in IV.E.4.d., EPA is proposing that covered entities maintain records documenting that HFCs are recovered from the fire suppression equipment before it is sent for disposal, either by recovering the HFCs themselves before sending the equipment for disposal or by leaving the HFCs in the equipment and sending it for disposal to a facility (*e.g.,* fire suppression equipment manufacturer, distributor, or a fire suppressant recycler). Such records must be maintained for three years.

EPA is requesting comment on the proposed recordkeeping requirements for fire suppression entities. The proposed recordkeeping requirements in this action do not change any recordkeeping and reporting requirements for fire suppressant recycling per 40 CFR 84.31(j) and EPA is not reopening, taking comment on, or revisiting those requirements through this proposal.

F. What is EPA proposing for cylinder requirements and for container tracking requirements?

1. Background

As described in more detail earlier in this action, subsection (h) directs EPA to establish certain regulations regarding the servicing, repair, disposal, or installation of equipment for certain purposes. More specifically, for purposes of maximizing reclaiming and minimizing the release of a regulated substance [108] from equipment and ensuring the safety of technicians and consumers, subsection (h)(1) of the AIM Act gives EPA authority to promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment that involves a regulated substance or its substitute or the reclaiming of a regulated substance or its substitute used as a refrigerant. Thus, EPA is proposing certain cylinder requirements and certain container tracking requirements for regulated substances as part of implementing subsection (h), as a means of controlling a practice, process, or activity regarding the servicing, repair, and installation of equipment to further serve the statutory purpose identified in subsection (h) of maximizing reclamation of HFCs, as well as providing additional HFC emission reductions.

HFCs are transported and distributed throughout the United States to a range of users, including but not limited to blenders, repackagers, distributors, wholesalers, and equipment manufacturers, as well as users engaged in the installation, service, repair, and disposal of equipment. For example, containers are used to transport HFCs to worksites for servicing, repairing, disposing, or installing equipment containing HFCs. HFCs are transported, bought, and sold in different sizes and types of containers as they move through the supply chain. These containers range from small cans with 16 ounces or less of HFCs to tank trailers, International Organization for Standardization (ISO) tanks, and tank railcars. From the larger containers, HFCs are often transferred to smaller containers (a process referred to as ''downpacking''), which include other types of refillable cylinders and disposable cylinders.

EPA provided information on the movement of HFCs used as refrigerants in the supply chain as they relate to reclamation in the draft report accompanying the NODA published on October 17, 2022 (87 FR 62843), and the Agency provides additional information in the updated report in the docket for this proposed rule. In comments submitted for the NODA and in public stakeholder meetings that the Agency hosted,[109] EPA received feedback noting that one key challenge to increasing reclamation is ensuring that HFCs are recovered and transferred to reclaimers. Accordingly, EPA views the proposed container tracking requirements in this action as measures that could ''increase opportunities for the reclaiming of regulated substances used as refrigerants,'' and thus EPA's consideration of the use of its authority under subsection (h) of the AIM Act to establish these tracking measures is consistent with subsection (h)(2)(A). Additionally, specifically tracking the movement in the market of reclaimed HFCs would have the added benefit of supporting compliance with the requirements described in this proposal for using reclaimed HFCs for initial charging and servicing of certain equipment as well as providing information that the reclaimed HFCs contain no more than 15 percent virgin material (see section IV.D.2.).

As discussed in greater detail below, EPA is proposing to require machine readable tracking identifiers (*e.g.,* QR code,[110] or another identifier(s)) on all containers of HFCs (*i.e.,* containers that contain an HFC, whether neat or in a blend), that could be used for the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment, including both refillable and disposable cylinders. EPA is proposing staggered compliance dates, ranging from January 1, 2025, to January 1, 2027, for this requirement that would apply to various entities involved in the transport of HFCs across the supply chain. EPA is also proposing certain requirements for tracking the movement of containers that contain HFCs and that have been used in the servicing, repair, or installation of equipment as they are sent to an entity capable of recovering any remaining HFCs.

After cylinders are used and considered empty, there is still an amount of HFCs remaining in the cylinders, referred to as the ''heel.'' HFC releases of heels are far more likely to occur from disposable cylinders than from other types of cylinders, and those amounts of HFCs released are not available for reclamation. Refillable cylinders are typically evacuated and recharged, thus continuing to be used to transit HFCs whereas disposable cylinders are typically sold for scrap or landfilled. To recover the remaining HFCs, including the heel, recovery equipment can be used to pull a vacuum on the cylinder. Section IV.F.2. provides additional detail on typical quantities of the heel that would remain in a cylinder. Recovering heels from disposable cylinders would increase the amount of HFCs available for reclamation. Therefore, for disposable cylinders, EPA is proposing to require as of January 1, 2025, that disposable cylinders that contain HFCs and that have been used for the servicing, repair, or installation of certain equipment must be transported to an EPA-certified reclaimer or a fire suppressant recycler. Further, EPA is proposing that reclaimers or fire-suppressant recyclers who receive these disposable cylinders would be required to remove the

[108] As noted previously in this action, ''regulated substance'' and ''HFC'' are used interchangeably in this action.

[109] Comments submitted to response of NODA published on October 17, 2022 (87 FR 62843), can be found in the docket for this action. Additionally, EPA heard feedback from participants in the public meetings it hosted on November 9, 2022, and March 16, 2023, as well as solicited feedback through a webinar for the EPA GreenChill Partnership program on April 12, 2023.

[110] A QR code is a type of matrix barcode that contains data for a locator, identifier, or tracker that points to a website or application using standardized encoding modes to store data. It is recognizable as black squares arranged in a square grid on a white background, which can be read by an imaging device such as a camera.

remaining HFCs, including the heel, prior to disposing of these cylinders.

EPA also notes that it established certain requirements for QR codes and use of refillable cylinders in the Allocation Framework Rule. Those requirements were subject to judicial review in the D.C. Circuit, and the court concluded that ''EPA has not identified a statute authorizing its QR-code and refillable-cylinder regulations'' and therefore vacated those parts of the rule and remanded to the EPA. *Heating, Air Conditioning & Refrigeration Distributors Int'l* v. *EPA,* 71 F.4th 59, 68 (D.C. Cir. 2023) (''*HARDI* v. *EPA*'').[111] The court's opinion concluded that subsection (e)(2)(B) of the AIM Act, the statutory provision the Agency had cited as authorizing those parts of the rule, did not provide the authority to support them. However, that conclusion rested on limitations on the scope of the EPA's authority under subsection (e)(2)(B) in particular, and it does not apply to other parts of the AIM Act. In fact, the court's opinion highlights the authority that EPA has under other statutory provisions, including its ''power to pass rules regulating 'practice[s], process[es], or activit[ies]' for 'servicing, repair[ing], dispos[ing of], or install[ing]' '' equipment, citing subsection (h)(1). *Id.* at 67. The cylinder requirements and tracking requirements proposed in this action are distinct from those that were established in the Allocation Framework Rule (86 FR 55116, October 5, 2021), as they are being proposed under a different statutory provision, subsection (h)(1) of the AIM Act, and are tailored to that subsection. As described in greater detail below, these requirements would regulate ''practice[s], process[es], or activit[ies] regarding the servicing, repair, disposal, or installation of equipment that involves regulated substances'' and thus are within the authority provided by subsection (h)(1).[112]

In the interest of clarity, EPA notes that it is not at this time proposing a prohibition on the use of disposable cylinders like the prohibition in the Allocation Framework Rule that was at issue in *HARDI* v. *EPA.* Rather, EPA is proposing here certain practices, processes, or activities related to the use of disposable cylinders in the servicing, repair, disposal, or installation of equipment that involves a regulated substance as discussed below.

2. Requirements for Disposable Cylinders

EPA is proposing certain requirements for users of disposable cylinders that contain HFCs that could be used in the servicing, repair, or installation of certain equipment. As described in more detail earlier in this action, subsection (h)(1) directs EPA to promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment that involves regulated substances, among other things, for purposes of maximizing reclaiming and minimizing the release of a regulated substance from equipment and ensuring the safety of technicians and consumers. Both disposable and refillable cylinders are used during the service or repair of equipment, and both could be used during the installation of a piece of equipment that is initially charged in the field. For the purpose of maximizing the reclamation of HFCs, EPA is proposing to require that disposable cylinders that contain HFCs and that have been used for the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment must be sent to an EPA-certified reclaimer or a fire suppressant recycler. EPA is also proposing that these entities (*i.e.,* reclaimers and fire suppressant recyclers) must remove all HFCs, including any remaining amount after the cylinders are considered empty for servicing, repair, and installation purposes (*e.g.,* the heel), prior to the disposal of these cylinders. The proposed requirements to send disposable cylinders and the removal of the remaining HFCs will contribute to EPA's efforts to maximize reclaiming by ensuring that any remaining HFCs (including heels) have been evacuated and recovered, and thus are available for reclamation, rather than being released over time when disposable cylinders are placed in landfills or are crushed for scrap metal recycling. EPA interprets its authority under subsection (h)(1) of the AIM Act to ''promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment'' to include authority to regulate the entire practice, process, or activity, including aspects of it that may occur before or after the servicing, repair, disposal, or installation of the equipment, especially where such regulations help achieve the purposes specified in subsection (h)(1) (*e.g.,* ''maximizing reclamation''). Thus, because use of these cylinders in servicing, repair, and installation of equipment is a practice, process, or activity regarding the servicing, repair, and installation of equipment, EPA interprets section (h)(1) to convey authority to establish the proposed requirements for the treatment of the cylinder after servicing, repair, or installation. Requiring that disposable cylinders be sent to entities able to remove the HFCs would have the effect of increasing the amount of HFCs that could be reclaimed and reused in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. In addition, the result of these proposed requirements would be fewer HFC emissions, as compared to allowing such single use, disposable cylinders to be disposed with HFCs still in the cylinder.

Compressed gases, such as HFCs, can be stored and transported in a variety of containers, which often hold as little as sixteen ounces (or even smaller for lab samples) or as much as a ton (or even more in the case of railcars and ISO tanks). The size and type of the container depend in large part on the intended use of the regulated substance. Historically, HFC refrigerant [113] sold in the United States for technicians servicing existing RACHP equipment has been predominantly contained in disposable cylinders certified to Department of Transportation (DOT) specifications. These cylinders are often called DOT–39 cylinders because the cylinders are certified to meet DOT specification 39 requirements.[114] A DOT–39 cylinder is designed for a single use and is strictly not refillable. As such, a DOT–39 cylinder tends to be less expensive and weigh less than refillable refrigerant cylinders. Disposable cylinders of the same capacity [115] typically have the same shape and are also often shipped in a box while refillable cylinders are typically not. Refillable refrigerant

[111] The court rejected the other challenges to the Allocation Framework Rule in this litigation. *Heating, Air Conditioning & Refrigeration Distributors Int'l* v. *EPA,* 71 F.4th 59, 61 (D.C. Cir. 2023).

[112] EPA further notes that in proposing separate cylinder recovery requirements and tracking requirements in this action, EPA is not proposing to change, reopen, or revisit any of the requirements related to use of refillable cylinders or certification and tracking requirements established in the Allocation Framework Rule; rather EPA expects to address the court's decision in *HARDI* v. *EPA* in a separate action.

[113] EPA understands that HFC fire suppressants are less likely to be found in disposable cylinders; however, in case they are, EPA is treating them the same as HFC refrigerants in disposable cylinders in this proposal.

[114] See 49 CFR 178.65—Specification 39 non-reusable (non-refillable) cylinders.

[115] Typically, disposable cylinders of the same designed water capacity have the same shape. For example, disposable cylinders with a ~30-pound water capacity will generally have the same shape; however, disposable cylinders with a ~16-pound water capacity would be smaller in size and shape.

cylinders are also used to a lesser extent and considered to be more durable, lasting up to 20 years. The two primary shapes of refillable refrigerant cylinders currently being used in servicing, repair, and/or installation are akin to a propane tank or a cylindrical scuba tank and have a two-way valve that can be adjusted to allow pressurized gases in or out.

HFC losses are more likely to occur, and in more significant quantities, from disposable cylinders, including losses from the residual amount of HFCs (*i.e.,* heels) that remain in cylinders after the majority of the HFC has been removed from the cylinder for use. With disposable cylinders, these heels, which can measure up to 10 percent of the quantity that was originally stored in the container, would be released to the atmosphere when the cylinder is disposed of, unless the heel was recovered prior to disposal. In addition, disposable cylinders may be disposed with greater amounts of HFCs than a typical heel in the cylinder particularly if the technician has limited space to carry partially full cylinders. This differs from a refillable cylinder, since such cylinders can be refilled whereas the design of disposable cylinders inherently means they cannot be refilled. In the *Analysis of the Economic Impacts and Benefits of the Proposed Rule* draft TSD developed to support this proposed rule, EPA considered a typical range for the heel remaining in disposable service cylinders of 2 to 6 percent while noting information that suggests heels can be as high as 10 percent. This range is consistent with previous theoretical and empirical studies, as referenced in the draft TSD, that have estimated the remaining heel in disposable 30-pound cylinders to usually range between 2 to 6 percent, though this percent could vary depending on the application in which the cylinder is used as well as the refrigerant contained in the cylinder. As also reflected in the draft TSD, industry estimates that disposable cylinders contain a heel that is typically between 1 (~3 percent) to 1.5 pounds (5 percent). The lead assumption used by EPA to assess the impacts of this proposal was to assume the heels are approximately 1.25 pounds (~4 percent) for a typical disposable cylinder of 25–30 pounds.

EPA is concerned about the reduction in the amounts of HFC that could be available for reclaiming due to losses of HFCs associated with current practices of disposing single use, disposable cylinders used in the servicing, repair, or installation of refrigerant-containing or fire suppression equipment. Accordingly, proposing to require that HFCs contained in disposable cylinders must be recovered prior to the disposal of cylinders will reduce HFC losses from disposable cylinders. EPA is also aware that as the HFC phasedown continues, scarcity of virgin HFCs will increase. HFCs recovered and reclaimed (or recycled, in the case of recovered fire suppressants) can be used for servicing, repair, disposal, or installation of equipment thus providing additional options for increasing the amounts of usable HFCs.

EPA is proposing a compliance date of January 1, 2025, for requiring that disposable cylinders be sent to a reclaimer or fire suppressant recycler and for the recovery of HFCs from disposable cylinders, in part because EPA understands that a viable distribution chain for sending HFCs in containers to reclaimers or fire suppressant recyclers already exists. This current distribution chain is currently in place for refillable cylinders and cylinders that are exclusively used for the recovery of HFCs from equipment, referred to as recovery cylinders. This distribution chain could just as effectively be used for sending disposable cylinders containing remaining HFCs to reclaimers or fire suppressant recyclers, and to some extent, already is in use for disposable cylinders. Several reclaimers indicated to EPA that their existing means for transporting recovery cylinders can also be used for disposable cylinders that contain HFCs and that have been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. Further, some reclaimers have also indicated that they currently accept disposable cylinders to remove and recover any remaining heels left in the disposable cylinders.

HFCs that are recovered from equipment during servicing, repair, or disposal of equipment are recovered into designated types of cylinders. Such recovery cylinders are, in general, uniquely identifiable (often, they are painted gray and yellow). These cylinders are sent to reclaimers or fire suppressant recyclers after HFCs have been recovered in the field from a piece of equipment, either through a distributer or wholesaler or directly from a contractor to the reclaimer or fire suppressant recycler. Refillable cylinders may be sent to producers, blenders, repackagers, reclaimers, and fire suppressant recyclers, or other entities for continued use. Therefore, HFCs in recovery and refillable cylinders are already transported from the field to reclaimers through various means, including with or without a network of distributors that collects cylinders. For example, reclaimers, wholesalers, or distributors may maintain a fleet of refillable or recovery cylinders and may use a deposit-based system for technicians and contractors to return the cylinders. EPA notes these distribution chains for returning cylinders to the entity responsible for removing the remaining the heels are already established and in use. Contractors and technicians can make use of the existing channels they may already be using to send disposable cylinders to reclaimers or fire suppressant recyclers. Thus, the proposed requirement with a compliance date of January 1, 2025, that disposable cylinders with remaining heels be sent to a reclaimer or fire suppressant recycler is feasible.

As stated previously, every cylinder, whether disposable or refillable, still retains a residual amount of its contents, (*e.g.,* heel) even when it is considered empty for purposes of servicing, repair, or installation of equipment, and some cylinders may contain more than a heel if not all the contents are used. Removing this heel requires the use of recovery equipment, like that used to recover refrigerant from an appliance. Unfortunately, it currently is not common practice to remove the heel from disposable cylinders before they are ultimately disposed. Current practices for disposal of disposable cylinders are to prevent refilling a disposable cylinder and include puncturing the rupture disk or breaking off the shutoff valve,[116] since they are not designed to have material re-enter them. The disposal practice also demonstrates that the cylinder no longer contains any remaining heel, as any heel that had been in the cylinder would be released through these disposal practices. If the practice of puncturing the rupture disk or breaking off the shutoff valve has not been performed, HFCs in disposable cylinders could be released to the atmosphere during the disposal of the cylinder, and ultimately any remaining HFCs are released if the cylinder is crushed for scrap metal recycling. Even if the cylinder is not used for scrap metal recycling, disposable cylinders that are disposed of in a landfill have the potential to release any residual HFCs as the seal can degrade over time.

EPA is proposing that the remaining heel in containers that have been used in the servicing, repair, or installation of equipment would not be considered a virgin regulated substance. As EPA

[116] EPA also notes that other Federal regulations expressly prohibit the transportation of DOT–39 cylinders if refilled (49 CFR 178.65).

understands, some reclaimers who currently recover heels or any remaining residue from cylinders treat the returned refrigerant as used recovered material that could be contaminated and run the heel through the reclamation process as though it were returned in a recovery cylinder. This practice ensures that the heel is reprocessed, and the resulting reclaimed HFC product meets the correct standard. EPA notes that under section IV.D.2. of this proposal, reclaimed HFC refrigerants would be limited to containing no more than 15 percent virgin HFCs, by weight. For the purposes of maximizing the reclaiming of HFCs, EPA does not intend for this remaining heel to count as part of the 15 percent of virgin HFC refrigerant allowed in reclaimed HFC refrigerant because this would penalize reclaimers that are recovering the heel from cylinders.

EPA is also considering and seeking comments on an alternative approach to the proposal requiring that disposable cylinders that contain HFCs and that have been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment be returned to an EPA-certified reclaimer or a fire suppressant recycler. The alternative approach would involve requiring the final processor of a disposable cylinder to ensure that all regulated substances, including the remaining heel, have been recovered prior to final disposition of the cylinder. EPA currently has similar provisions under 40 CFR 82.155 for certain appliances, including requirements that a final processor (*e.g.,* scrap recyclers and landfill operators) either recover any remaining refrigerant from the appliance or receive a verification statement that the refrigerant in the disposed appliance has previously been recovered. EPA is also considering an approach that would establish a requirement that draws from both the lead proposal and alternative approach. The distinguishing feature would be to allow more than just EPA-certified reclaimers to perform the recovery (*e.g.,* distributors and wholesalers), while requiring all recovered material be sent to an EPA-certified reclaimer. In addition, 82.155(a) states that persons recovering refrigerant from certain appliances that would be disposed are required to evacuate refrigerant from the appliances. In either case, refrigerant must be evacuated from the appliance to a specified level using recovery equipment that meets applicable standards. EPA would also consider establishing recordkeeping provisions to ensure that disposable cylinders that contained HFCs have been evacuated appropriately before final disposition (*e.g.,* landfill operator of scrap recycler). EPA is seeking comment on all aspects of this potential alternative approach. For example, EPA would be interested in comments related to the level of vacuum needed or if recovery equipment that meet specific standards would be needed to ensure the remaining amount of refrigerant in the disposable cylinder is fully removed.

EPA has separately learned via a petition for partial administrative reconsideration of the Allocation Framework Rule (see *https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0044-0229*) and other communication with one manufacturer who has been developing a redesigned disposable cylinder that, according to the company, includes features meant to prevent intentional venting and fugitive emissions, provide visually identifiable unique handle shapes, and accommodate machine-readable tracking identifiers (*e.g.,* QR codes or RFID chips). EPA has only limited information on this newly designed disposable cylinder prototype and seeks any relevant information from commenters on such newly designed disposable cylinders, whether from that manufacturer or other manufacturers. EPA understands that the newly-designed technology from the one manufacturer is proprietary and is a prototype that has not been commercialized. EPA seeks comment on whether this redesigned cylinder could address heels of HFC remaining in the cylinders upon disposal, which result in emissions rather than being reclaimed. Given that the language in subsection (h) concerns both maximizing reclaiming and minimizing the release of regulated substances from equipment and contemplates regulations to control of practices, processes, or activities regarding servicing, repair, disposal, or installation of equipment, EPA is seeking additional information about the cylinder's ability to consistently deliver leak reductions during normal use. The Agency is also seeking additional information about when or if this redesigned cylinder would be commercially available. Further, EPA is seeking information about whether this redesigned cylinder could improve the ability for the remaining heel to be recovered before the cylinder is disposed. Additionally, if commenters have information about other cylinder manufacturers meeting similar metrics, EPA seeks similar information.

EPA requests comment on all aspects of this proposal including the requirement for disposable cylinders that contain HFCs and that have been used for the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment to be sent to reclaimers or fire suppressant recyclers, respectively; the timing for compliance; and the amounts of regulated substances likely to either remain in or be emitted from discarded disposable cylinders absent requirements for HFC removal. EPA is requesting comment on the current channels by which contractors or technicians return cylinders containing HFCs to reclaimers or fire suppressant recyclers. EPA is also seeking comment on the alternative approach which involves the final processor ensuring that all regulated substances, including the remaining heel, have been recovered prior to final disposition of the cylinder. Further, EPA requests comment on the consideration to establish a requirement that draws from the lead proposal and the alternative approach. EPA is interested in comments of current disposal practices for disposable cylinders that involve the recovery of the heel and the subsequent handling of the recovered heel.

3. Container Tracking

EPA is proposing certain tracking requirements for regulated substances that are used in servicing, repair, or installation of certain equipment. These requirements are being proposed as part of implementing subsection (h)(1) of the AIM Act, as these provisions would control practices, processes, or activities regarding servicing, repair, or installation of equipment, and would involve a regulated substance or, in some cases, the reclaiming of a regulated substance used as a refrigerant. More specifically, these requirements would control practices, processes, and activities regarding the identification of regulated substances that could be used for servicing, repair, or installation of certain equipment, as well as the tracking of reclaimed HFCs in the supply chain. It is critical for technicians and owners or operators of equipment to know the identity of the regulated substances that they are using for servicing, repair, or installation of equipment, so that they can ensure that those regulated substances are compatible with the specifications of that equipment. For example, if equipment has been designed for use with non-flammable HFCs, it is important that technicians and owners or operators can confirm that the HFCs they are using to service, repair, or install the equipment is nonflammable. As described above, regulated

substances are transported or stored during various points in the supply chain, particularly for applications where the regulated substances are used for the servicing, repair, or installation of equipment that contain or will contain the regulated substances. The proposed tracking requirements would allow the technicians to verify the identity of regulated substances in a container, and that it meets any applicable regulatory requirements and technical specifications, before they use it for servicing, repair, or installation of certain equipment. In addition, understanding the movement of the regulated substances through the supply chain (both for virgin HFCs and for HFCs that have been recycled (as it relates to fire suppressants) and/or reclaimed) is important to understanding the ways they are used and where additional opportunities for recovery, reclamation, and/or recycling (related to fire suppressants) exist. Further, the ability to track regulated substances in the supply chain would allow the Agency to account for the actual amount of regulated substances used in equipment, verify adherence with the requirements of the regulations, and identify sectors, subsectors, or places in the supply chain where emissions occur. Tracking movement of regulated substances, including to reclaimers in certain circumstances, supports the goal of maximizing reclaiming of regulated substances by providing information to better identify challenges to increasing reclamation. This information may also be useful to better understanding points in the supply chain where HFC releases from equipment can be minimized in the future, and thus further serve one of the purposes stated in subsection (h)(1).

a. Container Tracking of Regulated Substances

EPA is proposing that any container (whether disposable or refillable) of regulated substances that enters into U.S. commerce and contains HFCs that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment must contain a machine-readable tracking identifier (*e.g.,* QR code, or another identifier(s)) that contains relevant information, as described in this section.

The proposed tracking requirements for HFCs entering U.S. commerce that could be used in the servicing, repair, or installation of refrigerant-containing equipment would allow for tracking the movement of reclaimed HFCs and ensure that reclaimed HFCs are used in the subsectors in which requirements regarding their use are being proposed. These proposed requirements for tracking would also apply to HFCs that could be used in the servicing, repair, and installation of fire suppression equipment and would allow for the tracking of recycled HFC fire suppressants and ensure the use of recycled HFCs for fire suppression equipment to meet the proposed requirements. As such, these proposed tracking requirements have the added benefit of supporting and facilitating efforts to ensure compliance with the proposed requirements for the use of reclaimed or recycled HFCs, as applicable, in certain RACHP subsectors and the fire suppression sector. They help to ensure that technicians and owners or operators of equipment in those sectors can easily determine whether the HFCs that they are using for servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment are reclaimed or recycled, respectively, and otherwise meet the proposed requirements. In that way, these proposed requirements would further serve the purpose described in subsection (h)(1) of the AIM Act to maximize the reclaiming of regulated substances.

For tracking the movement of HFCs, EPA is proposing to require the generation of a machine-readable tracking identifier (*e.g.,* QR code or another identifier) by importers, producers and repackagers, reclaimers, and fire suppressant recyclers. Tracking HFCs through machine-readable tracking identifiers would provide information that helps support compliance with requirements for the use of reclaimed HFCs in certain refrigerant-containing equipment, as proposed in this action, such as whether reclaimed HFCs are being used in certain RACHP subsectors. The machine-readable tracking identifiers would provide information that would more easily allow for the determination of whether a given container of reclaimed HFCs has met the proposed standard in this action that no more than 15 percent virgin HFCs are contained in the reclaimed HFCs. Further, the machine-readable tracking identifiers would also support compliance of the proposed requirements for using recycled HFCs in fire suppression equipment. The machine-readable tracking identifier must be affixed to containers of regulated substances and include certain data elements. When the machine-readable tracking identifier is scanned, it will point to a website with a database that will indicate if the HFC in the container meets regulatory requirements, and provide certain data elements, for example, the quantity and common name of the HFC or HFC blend, the name it is currently being marketed under (*e.g.,* trade name or brand), and the date the container was filled. A discussion of the information that would be required is provided in this section of the preamble and a discussion of how the data would be treated as confidential or not is described in section V. of this preamble. EPA is proposing that in the case where a machine-readable tracking identifier affixed to a container is damaged or otherwise unreadable, this would be the same as not having a machine-readable tracking identifier at all, which would be a violation of the proposed requirements.

EPA is proposing that the tracking information must be updated each time the regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment are bought/sold or portioned into another container. For example, when regulated substances in larger containers are downpacked to smaller containers, the tracking information would need to be updated. Tracking information would also be required to be updated when the regulated substances in containers are bought or sold up to the point of sale to the final customer of the regulated substance (*e.g.,* a contractor who purchases regulated substances for their use in the servicing, repair, or installation of equipment). EPA is proposing that, as the regulated substances move in the supply chain, the person selling the regulated substances must scan the machine-readable tracking identifier as the container is sold and update the tracking information, and the person buying the container of regulated substances would need to do the same. For example, EPA is proposing that a person selling a container of regulated substances would need to identify the person receiving the container and indicate if that person is a supplier or a final customer in the tracking system. This would document the chain of custody as the regulated substance moves through the supply chain. For both disposable and refillable cylinders that contain regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment, EPA is proposing certain requirements for tracking the movement of the cylinder after it is used (as described in section IV.F.3.).

EPA is proposing to require any person who produces, imports, reclaims, recycles for fire suppression uses, repackages, or fills into a container regulated substances, reclaimed regulated substances, or recycled regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment must register with EPA in the tracking system no later than the first time they would be required to generate a machine-readable tracking identifier. EPA notes that for those entities that may wish to register in advance of the required date to generate a machine-readable tracking identifier, registration in the tracking system would be available 30 or 60 days prior to the applicable compliance date (*e.g.,* as early as November 1, 2024, for producers and importers). Likewise, EPA is proposing to require that any person who purchases, sells, distributes, or offers for sale or distribution, regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment must register with EPA in the tracking system no later than the first time the person would be required to update tracking information in the system. EPA notes that for those persons involved in the purchase, sale, or distribution or offering for sale or distribution of regulated substances who wish to register earlier may do so. To support the effective implementation of the tracking system, EPA intends to offer various opportunities for training potential users through webinars, fact sheets, and other guidance materials prior to the earliest required compliance dates.

Additional detail on requirements for registering in the tracking system can be found in § 84.118 of the proposed regulatory text. To support this provision, EPA is prohibiting any person from purchasing or receiving, or attempting to purchase or receive regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment from someone that is not registered with EPA. Nevertheless, EPA is proposing that this prohibition would not apply to a person purchasing or receiving, or attempting to purchase or receive regulated substances only for uses that are not related to refrigerant-containing equipment or fire suppression equipment (*e.g.* foams, aerosol propellants). EPA notes that for larger containers that contain regulated substances that may be used in multiple sectors, the Agency is proposing to require those containers would be subject to the proposed prohibition if any regulated substances in the container could be used for refrigerant-containing equipment or fire suppression equipment in order to ensure that those regulated substances are accurately accounted for. As EPA understands the supply chain, HFCs may change hands one or more times before it is purchased by the final entity in the distribution chain and subsequently sold to the final customer. As the HFCs move through the supply chain to the final customer, sellers/distributors would need to scan the containers as they are sold and update the information as needed, and buyers who intend to purchase/receive the HFCs, other than the final customer, would need to do the same.

For importers, EPA is proposing that the following information be included in the tracking system for the generation of a machine-readable tracking identifier for regulated substances that could be used in servicing, repair, or installation of equipment:

- The name or brand the regulated substance is being sold and/or marketed under;
- The date it was imported;
- The size of the container(s);
- The entry number and entry line number associated with the import;
- The unique serial number associated with the container;
- The amount and name of the regulated substance(s) in the container;
- The name, address, contact person, email address, and phone number of the responsible party at the facility where the container of regulated substance(s) was filled; and
- Certification that the contents of the container match the substance(s) identified on the label.

For producers and repackagers of regulated substances, EPA is proposing that certain information must be included in the tracking system for the generation of a machine-readable tracking identifier for regulated substances that could be used in servicing, repair, or installation of equipment. This information would be required to be included whether a container is filled for the first time after production or when transferring regulated substances from one container to one or more smaller or larger containers. EPA is proposing the following information must be included when generating the machine-readable tracking identifier:

- The name or brand the regulated substance is being sold and/or marketed under;
- The date the container was filled and by whom;
- The unique serial number associated with the container;
- The amount and name of the regulated substance(s) in the container;
- The quantity of containers it was packaged in;
- The size of the containers;
- The name, address, contact person, email address, and phone number of the responsible party at the facility where the container(s) were filled; and
- Certification that the contents of the container match the substance(s) identified on the label.

EPA is proposing that any person filling a container with reclaimed HFC refrigerants that could be used in servicing, repair, or installation of equipment include certain information in the tracking system for the generation of the machine-readable tracking identifier. This information would include the following:

- The name or brand the regulated substance is being sold and/or marketed under;
- When the HFC was reclaimed and by whom;
- The date the reclaimed regulated substance was put into a container;
- The unique serial number associated with the container;
- The size of the containers;
- The amount and name of the regulated substance(s) in the container;
- The amount of virgin regulated substance(s) in the container, if any, and that the contents of the container are certified per § 84.112(d) of the proposed regulatory text;
- Reclaimer certification that the purity of the batch was confirmed to meet the specifications in appendix A to 40 CFR part 82, subpart F; and
- Certification that the contents of the container match the substance(s) identified on the label.

EPA is proposing that any person filling a container with recycled regulated substances that could be used for servicing or installing fire suppression equipment, including for example fire suppressant recyclers, include certain information in the tracking system for the generation of the machine-readable tracking identifier. This information would include the following:

- The name or brand the regulated substance is being sold and/or marketed under;
- The date the container was filled and by whom;
- The size of the containers;
- The unique serial number associated with the container;
- The amount and name of the regulated substance(s) in the container;

• The amount of virgin regulated substance(s) in the container, if any; and
• Certification that the contents of the container match the substance(s) identified on the label.

EPA is proposing a schedule for those required to generate a machine-readable tracking identifier and affix to containers to support the effective implementation of the tracking provisions in this proposal. As of January 1, 2025, EPA would require machine-readable tracking identifiers on all containers of HFCs that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment that are imported, sold or distributed, or offered for sale or distribution by producers and importers. As of January 1, 2026, EPA would require machine-readable tracking identifiers on all containers of HFCs that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment that are filled, sold or distributed, or offered for sale or distribution, by all other repackagers and cylinder fillers in the United States, including reclaimers and fire suppressant recyclers. As of January 1, 2027, EPA would require a machine-readable tracking identifier on every container of HFCs that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment that are sold or distributed, offered for sale or distribution, purchased or received, or attempted to be purchased or received.

EPA understands that effectively implementing the tracking system in industry will require logistical adaptation and technological investment. Thus, EPA is proposing a phased-in approach for the tracking requirements would support implementation and provide additional time after the final rule is published for industry to adjust to the proposed requirements when they are fully implemented. Under this phased-in approach, the Agency would have more time to consult industry and develop an appropriate tracking system. Similarly, industry would have more time to adapt existing systems and/or procure any technology needed to support the tracking system and train staff. Further, this tracking system would have the additional advantage of supporting the proposed requirements for the use of reclaimed HFCs. It would provide an easy means for an entity to identify reclaimed HFCs and thus helps support compliance with those aspects of this proposal. For example, the tracking system would help ensure reclaimed HFCs are being used consistent with the proposed requirements in section IV.D. of this action. EPA notes that the Agency could consider making the tracking system available for use on a voluntary basis ahead of the applicable compliance dates for different types of users.

EPA is requesting comment on all aspects of this proposal. In particular, EPA is requesting comment on the proposed requirements for the tracking system related to the timing of the requirements. EPA is seeking comment on the phased-in approach to apply the requirements for effective implementation of the proposed provisions. EPA is also seeking comment on the time needed by industry for particular technological or logistical changes to effectively implement the tracking system requirements in this proposal.

b. Container Tracking of Used Cylinders

EPA is proposing specific requirements for the tracking of cylinders that contain HFCs and that have been used for the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. As noted in section IV.F.2., after cylinders (both disposable and refillable) containing regulated substances have been used in these practices, processes, and activities, they still have a remaining portion of regulated substances (*i.e.,* the heel). Tracking these cylinders that contain a heel serves the purpose identified in subsection (h)(1) of maximizing reclaim. Further, subsection (h)(2)(A) of the AIM Act provides that EPA consider its authority for increasing opportunities for reclaiming of regulated substances. Requiring tracking of the remaining heel in cylinders would ensure that the heel could be recovered and promote additional reclaim.

As proposed in section IV.F.2., EPA would require that disposable cylinders that contain HFCs and that have been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment be required to be returned to a reclaimer or fire suppressant recycler so that the remaining regulated substances, including heels, can be recovered. EPA is proposing that after a disposable cylinder is used in the servicing, repair, or installation of such equipment, it would be required to be tracked until it reaches an EPA-certified reclaimer or a fire suppressant recycler. As EPA understands and describes above, technicians and contractors (for refrigerant-containing equipment or fire suppression equipment) currently have channels for returning recovery cylinders. EPA anticipates that technicians and contractors would be able to use these same channels for returning disposable cylinders to reclaimers or fire suppressant recyclers. In some cases, there may be a direct connection between technicians or contractors to reclaimers or fire suppression recyclers and there is no intermediary step to returning a cylinder. In this case, the only tracking step required would be by the reclaimer or fire suppressant recycler, who would be registered in the tracking system. EPA is proposing that when a reclaimer or fire suppressant recycler receives a disposable cylinder with a remaining heel, they would be required to scan the machine-readable tracking identifier that was already affixed on the disposable cylinder and update the following information to confirm receipt:

• The date that the disposable cylinder was received; and
• The name, address, contact person, email address, and phone number of the person who sent the disposable cylinder.

EPA is proposing that when the reclaimer or fire suppressant recycler removes the remaining regulated substances from the disposable cylinder, they would be required to enter in the tracking system the following data elements:

• The date that the regulated substances were removed from the disposable cylinder;
• Certification that all remaining regulated substances were removed;
• The amount and the name of the recovered regulated substance(s).

In other cases, technicians or contractors may return cylinders to a distributor or wholesaler who collects cylinders and then sends them to a reclaimer or fire suppressant recycler. In this case, there would be an additional tracking step required by the wholesaler or distributor, who would already be registered in the tracking system. EPA is proposing to require that the distributor or wholesaler collecting the disposable cylinders scan the affixed machine-readable tracking identifier when they receive it. The wholesaler or distributor would be required to enter in the tracking system the following information:

• The date that the disposable cylinder was received; and
• The name, address, contact person, email address, and phone number of the person who sent the disposable cylinder.

EPA is proposing to require that when a reclaimer or fire suppressant recycler receives a disposable cylinder with a

remaining heel from a distributor or wholesaler, they would be required to scan the machine-readable tracking identifier and update information in the tracking system. The proposed requirements for reclaimers and fire suppressant recyclers to update information in the tracking system are the same as would be required if the reclaimer or fire suppressant recycler were to receive the disposable cylinder directly from a technician or contractor.

EPA is proposing that the tracking of disposable cylinders to reclaimers or fire suppressant recyclers would be required as of January 1, 2026. This date aligns with the proposed requirement for reclaimers and fire suppressant recyclers to track containers they fill, sell, or distribute, or offer for sale or distribution with regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. Thus, they would be registered in the tracking system already and could scan and update information as they receive disposable cylinders. This proposed date would also require distributors and wholesalers who receive returned disposable cylinders to be registered in the tracking system. For those distributors and wholesalers that would be receiving disposable cylinders, EPA is proposing that they would be required to register in the tracking system the first time they would need to access the system to update tracking information.

EPA is proposing to include additional requirements for the tracking of refillable cylinders that contain HFCs and that have been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. By nature, EPA expects that refillable cylinders would be involved with a return trip after they are used and have only a heel remaining. As EPA understands, fleets of refillable cylinders may be maintained by those who would frequently fill and refill them. For example, some producers, blenders, repackagers, and reclaimers may maintain a fleet of refillable cylinders. In some cases, these entities may even operate a system to track or otherwise maintain their own inventory of refillable cylinders. Refillable cylinders differ from disposable in a number of ways, notably as it relates to how the remaining regulated substances are handled after the refillable cylinder has been used and a heel remains. The remaining heel in a refillable cylinder can either be recovered, or additional HFC could be added to the refillable cylinder if it is the same chemical or blend. EPA understands this practice is common especially for larger cylinders, such as ISO tanks and rail cars.

EPA is proposing certain requirements for tracking the return of refillable cylinders that have been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. Contractors or technicians who are using the refillable cylinders for the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment could return refillable cylinders to a distributor or wholesaler or they could return refillable cylinders directly to a cylinder owner (*e.g.,* reclaimer, blender). In either case, EPA is proposing similar tracking requirements as those for the tracking of the return of a disposable cylinder.

EPA is proposing that reclaimers or fire suppressant recyclers would be required to enter the following information in the tracking system when they receive a refillable cylinder that contains HFCs and that has been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment:

- The date that the refillable cylinder was received;
- The name, address, contact person, email address, and phone number of the person who sent the refillable cylinder.

EPA is proposing that when the reclaimer or fire suppressant recycler removes the remaining regulated substances from the refillable cylinder, they would be required to enter in the tracking system the following data elements:

- The date that the regulated substances were removed from the refillable cylinder;
- Certification that all remaining regulated substances were removed; and
- The amount and name of the recovered regulated substance(s).

In the case that a refillable cylinder is first sent to a distributor or wholesaler, EPA is proposing that the wholesaler or distributor enter the following information to the tracking system upon receipt of the refillable cylinder:

- The date that the refillable cylinder was received; and
- The name, address, contact person, email address, and phone number of the person who sent the refillable cylinder.

In the case where a refillable cylinder is sent to a person, other than an EPA-certified reclaimer or a fire suppressant recycler, capable of refilling it with additional HFCs or blend containing HFCs, the person filling the container would be required to enter the following data elements in the tracking system upon receipt of the refillable cylinder:

- The date that the refillable cylinder was received; and
- The name, address, contact person, email address, and phone number of the person who sent the refillable cylinder.

EPA is proposing that when the person, other than an EPA-certified reclaimer or a fire suppressant recycler, who received the refillable cylinder removes any remaining regulated substances from the refillable cylinder or refills the refillable cylinder, that person must scan the machine-readable tracking identifier and update the following information in the tracking system:

- The date the remaining regulated substance was removed or the date the refillable was refilled; and
- The amount and name of the remaining regulated substance(s) removed from the refillable cylinder or the amount and name of the regulated substance(s) remaining in the refillable cylinder before it is refilled.

EPA is proposing similar timing requirements for the tracking of refillable cylinders as they are returned to the cylinder owners (*e.g.,* producers, reclaimers, fire suppressant recyclers). The tracking of refillable cylinders as they are returned to cylinder owners would be required as of January 1, 2026. Again, this date aligns with the proposed requirement for reclaimers and fire suppressant recyclers to track of containers they fill, sell, or distribute, or offered for sale or distribution with regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment. Any producers who would be involved with tracking steps associated with the return of refillable cylinders would have already had experience in the tracking system for a full year. For those distributors and wholesalers that would be receiving refillable cylinders, EPA is proposing that they would be required to register in the tracking system the first time they would need to access the system to update tracking information.

EPA is considering requirements associated with the tracking of cylinders that are used for the purpose of recovering regulated substances (*i.e.,* recovery cylinders) from refrigerant-containing equipment or fire suppression equipment. As described above, these recovery cylinders are only intended for the recovery of refrigerants or fire suppressants from equipment for the intention of sending the material to a reclaimer or fire suppressant recycler. As noted, fleets of recovery cylinders may be owned by reclaimers or

wholesalers or distributors who maintain them using a deposit-based system for the return of the cylinders. Contractors and technicians would pay a deposit and obtain the recovery cylinders from these entities and have the deposit returned when the cylinder is returned. In this case, EPA is considering and requesting comment on whether to establish tracking requirements for the entities that maintain the fleet of recovery cylinders. Such requirements would allow EPA the ability to track the amount of material that is recovered from equipment and how that material moves in the supply chain until it reaches a reclaimer or fire suppressant recycler. EPA is also interested in the tracking of recovery cylinders as it would provide additional information on the HFCs that are recovered from equipment that is being serviced, repaired, or disposed of, and their movement in the market and supply chain, and on practices, processes, or activities associated with the servicing, repair, or disposal of equipment. EPA is requesting comment on these topics, as well as additional information on how recovery cylinders are maintained in practice. For example, EPA is seeking information regarding whether contractors or technicians are owners of recovery cylinders and how they return them to reclaimers or fire suppressant recyclers.

EPA is seeking comment on all aspects of this proposal. Specifically, EPA is seeking comment on the timing for requirements to track containers (both disposable and refillable) that contain HFCs and that have been used in the servicing, repair, or installation of equipment. EPA is also seeking additional information on the overall movement of cylinders (disposable, refillable, or recovery) in the supply chain as they are returned to an entity to recover the regulated substances (or refill the container, if it is a refillable cylinder).

4. Small Cans of Refrigerant

Small cans of refrigerant, that typically contain 2 pounds or less of regulated substances, are commonly used by individuals to service their own MVACs. This do-it-yourself (DIY) servicing practice is unique to the MVAC subsector within the RACHP sector. In the 2016 CAA section 608 Rule (81 FR 82272, November 18, 2016), EPA finalized an exemption from the sales restriction at 40 CFR 82.154(c) for small cans of MVAC refrigerant with self-sealing valves. EPA is not proposing to include requirements for small cans of refrigerant with self-sealing valves (*i.e.,* those that qualify for exemption from the sales restriction under 40 CFR 82.154(c)(ix)) to be sent to a reclaimer after use or to include such small cans in the proposed container tracking requirements. As noted, they are typically used only by DIYers in the servicing of their own MVACs and contain no more than 2 pounds of regulated substances. Another distinguishing factor is the distribution chain for small cans, which are commonly sold directly to DIYers by retailers. Accordingly, EPA concludes it is not necessary to require that small cans of refrigerant (*i.e.,* those meeting the 608 requirements) be sent to a reclaimer after use or to include small cans in the proposed container tracking system to serve the regulatory goals, as described throughout section IV.F. above.

EPA welcomes comment on all aspects of this proposal. In particular, EPA seeks comments on its proposal to not include requirements for small cans of refrigerant to be returned to a reclaimer after use and to not include them in the proposed container tracking system in this rulemaking. In particular, EPA is interested in comments related to this provision as it relates to the regulatory purpose of maximizing reclaiming of regulated substances and also reducing the potential emissions of regulated substances.

G. How is EPA proposing to establish RCRA refrigerant recycling alternative standards?

1. Nomenclature Used in This Section

This section uses the term ''ignitable spent refrigerant'' to describe the refrigerants that are potentially subject to RCRA hazardous waste regulation under the current rules, and that would instead be subject to the proposed RCRA alternative standards for refrigerants when recycled for reuse, if these standards are finalized. ''Ignitability'' is one of the RCRA hazardous waste characteristics and is used to identify waste that may pose a risk to human health and the environment due to their potential to cause fires if improperly managed.[117] The characteristic of ignitability is defined in 40 CFR 261.21. As discussed in more detail below in this section, ''ignitable'' is similar, but not identical, to the term ''flammable'' as used in ASHRAE Standard 34–2022. ''Spent'' is used in the same context as ''spent material,'' which is defined in 40 CFR 261.1(c)(1) as ''any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.'' Thus, an ''ignitable spent refrigerant'' is a used refrigerant that cannot be reused without first being cleaned, and that exhibits the hazardous characteristic of ignitability per 40 CFR 261.21.

In addition, the terms ''reclaim'' and ''recycle'' have different regulatory purposes and definitions under RCRA than under the CAA and the AIM Act. Under RCRA, a material is ''reclaimed'' if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents (See 40 CFR 261.1(c)(4)). Reclamation is one of the four types of ''recycling'' identified in 40 CFR 261.2(c) that can involve management of a solid waste under RCRA. Materials that are solid waste under RCRA are potentially subject to RCRA hazardous waste requirements.

In contrast, under title VI of the CAA and its implementing regulations, ''reclaim'' is a more precise term, requiring the reclaimed refrigerant to meet regulatory specifications based on AHRI Standard 700–2016, while ''recycle'' means to extract refrigerant from an appliance and clean it for reuse in equipment of the same owner without meeting all of the CAA requirements for reclamation. See those definitions in 40 CFR 82.152. Similarly, under the AIM Act, ''reclaim; reclamation'' are defined in subsection (b)(9) of the Act, and that definition refers to the purity standards under AHRI Standard 700–2016 (or an appropriate successor standard adopted by the Administrator) and the verification of purity using, at a minimum, the analytical methodology described in that standard. ''Recycle'' is not defined in the AIM Act.

To avoid confusion when discussing what regulatory requirements would apply to ignitable spent refrigerant, for the purposes of the proposed RCRA alternative standards, EPA is using the term ''recycle for reuse'' as defined at 40 CFR 266.601 to mean to process an ignitable spent refrigerant to remove contamination and prepare it to be used again. This umbrella term includes reclaiming ignitable spent refrigerants as defined in the context of the RCRA regulations at 40 CFR 261.1(c), and either reclaiming or recycling refrigerants as defined in 40 CFR 82.152. ''Recycle for reuse'' would not include recycling that involves burning for energy recovery or use in a manner constituting disposal (use in or on the land) as defined in 40 CFR 261.2(c), or

[117] EPA 1980, *Background Document for the Hazardous Waste Characteristic of Ignitability,* May 2, 1980, p.7 *https://www.epa.gov/hw/background-document-hazardous-waste-characteristic-ignitability.*

sham recycling as defined in 40 CFR 261.2(g).

2. Background

On February 13, 1991, EPA promulgated an interim final rule excluding spent chlorofluorocarbon (CFC) refrigerants from the definition of hazardous waste under RCRA when recycled for reuse (56 FR 5910). EPA was concerned that subjecting used CFC refrigerants to RCRA hazardous waste regulations would result in increased venting of these refrigerants, resulting in increased levels of ODS in the stratosphere. As described above in section III.C., EPA promulgated a series of rules implementing provisions under CAA title VI to phase out class I and class II ODS, including CFCs used as refrigerants, and establishing standards applicable to the use, disposal, and recycling of ODS refrigerants and their substitutes.

Some of these acceptable substitutes are flammable and likely to exhibit the hazardous waste characteristic of ignitability found in 40 CFR 261.21.[118] As described in section IV.C.4., ASHRAE Standard 34–2022 assigns a safety group classification for each refrigerant which consists of two alphanumeric characters (*e.g.,* A2 or B1). The capital letter indicates the toxicity class (''A'' for lower toxicity) and the numeral denotes the flammability. ASHRAE recognizes three classifications and one subclass for refrigerant flammability. The three main flammability classifications are Class 1, for refrigerants that do not propagate a flame when tested as per the ASHRAE 34 standard, ''Designation and Safety Classification of Refrigerants;'' Class 2, for refrigerants of lower flammability; and Class 3, for highly flammable refrigerants, such as the hydrocarbon refrigerants. ASHRAE recently updated the safety classification matrix to include a new flammability subclass 2L, for flammability Class 2 refrigerants that burn very slowly.[119] Since 2010, EPA's SNAP program has listed a number of flammable substitute refrigerants that have ASHRAE safety classifications of A3 (higher flammability, lower toxicity refrigerants such as propane or isobutane) or A2L (lower flammability, lower toxicity refrigerants such as HFC–32 or HFO–1234yf).

The standard for flammability under ASHRAE 34 does not correspond precisely with the RCRA standards for ignitability found in 40 CFR 261.21, but in general, refrigerants with a flammability Class of 2 or 3 are expected to be ignitable under RCRA. Spent refrigerants with a flammability class of 2L may or may not be ignitable hazardous waste, depending on the specific chemical(s) used in the refrigerant and contamination of the refrigerant during use. Note that even refrigerants that do not exhibit the characteristic of ignitability as a virgin material could become ignitable with use, especially if contaminated with oil or other lubricants, posing a risk of fire if mismanaged.[120] Similarly, the flash point of a refrigerant that is a blend of two or more chemicals can change if there is a leak during operation or during recovery and storage, when the refrigerant from multiple appliances is combined, or if the recovery process is incomplete, potentially changing the hazardous waste characteristic of the spent refrigerant when collected.

However, these ignitable spent refrigerant substitutes do not fall under the 40 CFR 261.4(b)(12) RCRA exclusion for refrigerants, since that exclusion is limited to CFC refrigerants.[121] The applicability of RCRA to flammable refrigerants is discussed in the 2016 SNAP final rule. (81 FR at 86799–86800, December 1, 2016). Consistent with that discussion, EPA considers incidental releases of spent refrigerant that occur during the maintenance, service, and repair of appliances subject to CAA section 608 (which would include venting from appliances of refrigerants that are exempt from the venting prohibition under 40 CFR 82.154(a)), and releases resulting from the disposal of household appliances both generally not to be considered disposal of a hazardous waste under RCRA. However, ignitable spent refrigerant from commercial and industrial appliances (*i.e.,* non-household appliances) would be classified as hazardous waste and would need to be managed under the applicable RCRA regulations (40 CFR parts 260 through 270) when recovered (*i.e.,* removed from an appliance and stored in an external container) or disposed of (*e.g.,* vented from a container after recovery). These requirements would include generator notification and on-site accumulation standards, emergency preparedness and other requirements, hazardous waste manifest and transportation requirements for the ignitable spent refrigerant, and RCRA permit requirements for refrigerant recyclers that store the refrigerant prior to recycling.

3. Proposed Alternative RCRA Standards for Spent Ignitable Refrigerants Being Recycled for Reuse

Similar to EPA's concerns expressed in the 1991 rulemaking establishing the CFC refrigerant recycling exclusion, EPA is concerned that applying RCRA hazardous waste requirements to the substitute refrigerants that exhibit the hazardous characteristic of ignitibility would discourage recycling and could result in an increase in releases of ignitable refrigerants, including HFC ignitable refrigerants, contrary to the goals of RCRA and to one of the purposes of regulations under subsection (h)(1) of the AIM Act, which is to minimize releases of HFCs from equipment. Moreover, inadvertently incentivizing releases of refrigerants would be contrary to RCRA section 3004(n), which requires EPA to control air emissions from hazardous waste management, as may be necessary to protect human health and the environment. Finally, the current requirements for recovery of refrigerants under the CAA section 608 rules help ensure that the ignitable spent refrigerants are legitimately recycled for reuse, and also address the flammability risks posed by ignitable spent refrigerants.

For the reasons stated above, EPA is proposing to add standards under 40 CFR part 266, subpart Q applicable to certain ignitable spent refrigerants that are recycled for reuse that would apply instead of the full RCRA Subtitle C hazardous waste requirements. The purpose of these standards is to help reduce emissions of ignitable spent refrigerants to the lowest achievable level by maximizing the recapture and safe recycling of such refrigerants during the maintenance, service, repair, and disposal of appliances.

[118] ''Flammability'' as identified by the ASHRAE standards and ''ignitability'' as identified by the RCRA 40 CFR 261.21 standard are both intended to capture the potential for a substance to cause fires. However, since the methodology used under these two systems differs, EPA is using ''flammability'' when describing the ASHRAE standard and ''ignitability'' when describing wastes that are regulated under RCRA when they meet the ignitable characteristic in § 261.21 and therefore are subject to hazardous waste management requirements. In general, a flammable substance would be presumed to be also ignitable under RCRA unless testing were to demonstrate otherwise.

[119] ASHRAE Fact Sheet *Update on New Refrigerants Designations and Safety Classification* November 2022. *https://www.ashrae.org/file%20library/technical%20resources/bookstore/factsheet_ashrae_english_november2022.pdf.*

[120] S N Kopylov et al 2019 IOP Conf. Ser.: Earth Environ. Sci. 272 022064; *https://iopscience.iop.org/article/10.1088/1755-1315/272/2/022064.*

[121] EPA is not reopening the original CFC refrigerant recycling exclusion and is not requesting comment on 40 CFR 261.4(b)(12). Any comments received on the CFC refrigerant recycling exclusion will be considered out of scope of this rulemaking.

a. Scope of the Proposed RCRA Alternative Standards

EPA is proposing that the 40 CFR part 266, subpart Q RCRA alternative standards would apply to HFCs and substitutes that do not belong to flammability Class 3. EPA is proposing to limit the alternative standards to lower flammability substitutes (Class 1, 2 and 2L) because of the lower risk of fire from the collection and recycling for reuse of these refrigerants, and the greater market value of these refrigerants, which supports the conclusion that these spent refrigerants will be recycled for reuse and not stockpiled, mismanaged, or abandoned. EPA has found that a low market value for a reclaimed product can increase the likelihood of mismanagement and abandonment occurring during hazardous waste recycling activities.[122]

In addition to this proposal, EPA is also considering the option of expanding the applicability of the RCRA alternative standards to some or all A3 refrigerants. Broadening the applicability of the exemption could encourage the development of markets for these other recycled refrigerants, even if current markets are limited, provided that they can be safely recycled for reuse.

EPA requests comment on the scope of the RCRA alternative standards, including the option of expanding the applicability of the RCRA alternative standards to Class 3 refrigerants. In addition, EPA requests comment on which additional refrigerants should qualify for the RCRA alternative standards in the final rule, if EPA determines such an expansion is appropriate. EPA requests information on the safety and economic feasibility of recycling for reuse Class 2L, 2, and 3 refrigerants both under current and projected future market conditions.

b. Proposed Requirements for the RCRA Alternative Standards

The specific standards EPA is proposing for ignitable spent refrigerant being recycled for reuse either on-site for further use in equipment of the same owner, or by the owner of the recovery equipment in compliance with MVAC standards in 40 CFR part 82, subpart B, are (1) the ignitable spent refrigerants that are recovered (*i.e.,* removed from an appliance and stored in an external container) and/or recycled for reuse using equipment that is certified for that type of refrigerant under 40 CFR 82.36 or 40 CFR 82.158; and (2) the ignitable spent refrigerants are not speculatively accumulated as defined in 40 CFR 261.1(c).

The specific standards that EPA is proposing for facilities receiving refrigerant from off-site to be recycled for reuse are (1) the reclaimer must maintain certification by EPA under 40 CFR 82.164; (2) the facility must meet the emergency preparedness and response requirements of 40 CFR part 261 subpart M, and (3) the ignitable spent refrigerants must not be speculatively accumulated as defined in 40 CFR 261.1(c). EPA is proposing these requirements be included as part of the RCRA alternative standard in order to ensure that the ignitable spent refrigerant is legitimately recycled for reuse in a way that is protective of human health and the environment.

The proposed requirement that the recovery and/or recycling equipment be certified for that type of refrigerant and appliance under 40 CFR 82.36 (for MVAC systems) or 40 CFR 82.158 (for on-site recycling) would specifically address the ignitability hazard during refrigerant recovery and recycling for reuse at MVAC recycling operations in compliance with 40 part 82 subpart B, or for recycling on-site for reuse in appliances by the same owner. In particular, appendix B4 to subpart F of 40 CFR part 82—Performance and Safety of Flammable Refrigerant Recovery and/or Recycling Equipment requires all recovery and/or recycling equipment to be tested to meet standards for the test apparatus, test gas mixtures, sampling procedures, analytical techniques, and equipment construction that will be used to determine the performance and safety of refrigerant recovery.

The proposed requirement that the spent refrigerant regulated under the new alternative standards not be speculatively accumulated per 40 CFR 261.1(c) would help prevent over-accumulation, mismanagement, and abandonment of the spent refrigerant. Restrictions on speculative accumulation have been an important element of the RCRA hazardous waste recycling regulations since they were originally promulgated on January 4, 1985 (50 FR 634–637). According to this regulatory provision, hazardous secondary materials as defined in 40 CFR 260.10 (which would include ignitable spent refrigerants) are accumulated speculatively if the person accumulating them cannot demonstrate that the material is potentially recyclable. Further, the person accumulating the hazardous secondary material must demonstrate that during a calendar year (beginning January 1) the amount of such material that is recycled or transferred to a different site for recycling is at least 75% by weight or volume of the amount of the hazardous secondary material present at the beginning of the calendar year (January 1). Hazardous secondary materials to be recycled must be placed in a storage unit with a label indicating the first date that the material began to be accumulated, or the accumulation period must be documented through an inventory log or other appropriate method. Otherwise, the hazardous secondary material is considered to be speculatively accumulated and not eligible for the alternative standards in 40 CFR part 266, subpart Q.

The requirement that facilities receiving refrigerant from off-site to be recycled for reuse maintain certification by EPA under 40 CFR 82.164 helps ensure that the recycler is experienced in proper refrigerant reclamation techniques and will manage the spent refrigerant in a manner that minimizes releases, with an explicit limit under the CAA section 608 rules of no more than 1.5 percent of the refrigerant released during the reclamation process (see 40 CFR 82.164(a)(3)). The certification requirement also helps with the transparency of the RCRA alternative standard since the list of EPA-certified refrigerant reclaimers is publicly available on EPA's website.[123] In addition, these facilities certified reclaimers under CAA section 608 and must follow recordkeeping and reporting requirements, per 40 CFR 82.164(d) including (1) maintaining records of the names and addresses of persons sending them material for reclamation and the quantity of the material (the combined mass of refrigerant and contaminants) sent to them for reclamation, and (2) reporting annually the quantity of material sent to them for reclamation by refrigerant type, the mass of refrigerant reclaimed by refrigerant type, and the mass of waste products. Finally, EPA-certified refrigerant reclaimers must verify that each batch of reclaimed refrigerant meets the specifications in the regulations (40 CFR 82.164(a)(2)), which helps ensure that the reclamation process is legitimate recycling under the RCRA regulations. EPA notes that reclaimed refrigerant that does not meet the required specifications would be considered an off-specification

[122] U.S. EPA *A Study of the Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling,* November 2006, available at *https://www.regulations.gov/document/EPA-1HQ-RCRA-2002-0031-0358.*

[123] EPA-Certified Refrigerant Reclaimers *https://www.epa.gov/section608/epa-certified-refrigerant-reclaimers.* Retrieved December 27, 2022.

commercial chemical product under 40 CFR 261.2(c) and subject to all applicable RCRA regulatory requirements. EPA further notes that persons who reclaim HFCs that are listed as regulated substances under the AIM Act must meet recordkeeping and reporting requirements as set forth in 40 CFR 84.31(a) and 84.31(i).

Finally, including the requirement that facilities receiving refrigerant to be recycled for reuse meet the RCRA standards under 40 CFR part 261, subpart M, Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials, would also address risks posed specifically for ignitable spent refrigerants, which are a subset of hazardous secondary materials.[124] EPA is proposing that facilities receiving ignitable spent refrigerants from other parties for recycling for reuse be subject to this additional emergency preparedness requirement because these third-party recyclers would be receiving ignitable spent refrigerant from multiple sources, and are likely to store greater volumes for longer time periods than companies that recycle for reuse onsite or as part of an MVAC refrigerant recovery and recycling system in compliance with 40 CFR part 82, subpart B. Proposed requirements include maintaining appropriate emergency equipment on site, having access to alarm systems, maintaining needed aisle space, making arrangements with local emergency authorities, and having a designated emergency coordinator who is responsible for responding in the event of an emergency. This requirement will help protect human health and the environment in the event of a fire or other emergency at the recycler.

EPA is also specifically proposing that all recycling facilities receiving ignitable spent refrigerant from off-site meet the emergency preparedness and response requirements under 40 CFR 261.410 and 40 CFR 261.420, which include general personnel training requirements for facilities (40 CFR 261.420(g)). While these provisions currently only apply to facilities that accumulate more than 6,000 kg of hazardous secondary materials at a time, given the ignitability risk posed by the spent refrigerants at relatively small volumes, EPA's view is that these provisions are the most appropriate for all facilities accumulating ignitable spent refrigerants. EPA requests comment on these emergency preparedness and response requirements for reclaimers receiving ignitable spent refrigerants, including whether more specific training requirements for managing ignitable spent refrigerants should be included in the alternative RCRA standards, and if so, what aspects of refrigerant management those additional training requirements should address.

4. Very Small Quantity Generator Wastes

Very Small Quantity Generators (VSQGs) generate less than 100 kg of hazardous waste per month and one kilogram or less per month of acutely hazardous waste and are subject to a limited set of federal RCRA Subtitle C hazardous waste regulations, provided that they comply with the conditions set forth in 40 CFR 262.14. Among those conditions is that the VSQG must either treat and dispose of its hazardous waste in an on-site facility or ensure delivery to an off-site facility listed in 40 CFR 262.14(a)(5). Included in this list is a facility that: (1) beneficially uses or reuses, or legitimately recycles or reclaims its waste; or (2) treats its waste prior to beneficial use or reuse, or legitimate recycling or reclamation.

For ignitable spent refrigerant regulated under the new proposed RCRA alternative standard, EPA is proposing to make a conforming change to 40 CFR 262.14(a)(5) to require that these refrigerants be sent to a facility that meets the requirements of 40 CFR part 266, subpart Q if sent off-site for recycling. EPA notes that while this change is more stringent than the current RCRA regulations, VSQGs would experience no additional burden since under the CAA section 608 rules, all reclaimers receiving used ODS refrigerants or non-exempt substitute refrigerants from off-site for reclamation must meet EPA's certification requirements in 40 CFR 82.164. This proposed revision would not affect refrigerants not subject to the new RCRA alternative standard (*e.g.,* ignitable spent refrigerants that are not sent off-site to be recycled for reuse).

5. RCRA Regulation of Exports and Imports of Ignitable Spent Refrigerants

The proposed RCRA alternative standard is limited to ignitable spent refrigerants that are recycled for reuse in the United States, and it requires that off-site recycling for reuse be performed at an EPA-certified reclaimer per 40 CFR 82.164. Therefore, ignitable spent refrigerants intended for export would not qualify for the proposed RCRA alternative standard, and would instead be regulated under the full RCRA Subtitle C requirements, including the relevant hazardous waste export requirements in 40 CFR part 262, subpart H.

Imports of ignitable spent refrigerants would be allowed under the alternative RCRA standards, as long as the imported refrigerants meet the requirements of the proposed RCRA alternative standard, including being recycled for reuse at an EPA-certified reclaimer per 40 CFR 82.164. This proposal does not affect or reopen any of the requirements for regulated substances established under the AIM Act that are codified at 40 CFR part 84, subpart A. EPA requests comment on the regulation of exports and imports of ignitable spent refrigerants under RCRA, including whether to add export and/or import requirements to the RCRA alternative standard under 40 CFR part 266, subpart Q.

6. Applicability of Proposed Alternative Standard in RCRA-Authorized States

Under section 3006 of RCRA, EPA may authorize states to administer the RCRA Subtitle C hazardous waste program. Following authorization, the authorized state program operates in lieu of the federal regulations. EPA retains authority to enforce the authorized state RCRA Subtitle C program, although authorized states have primary enforcement authority. EPA also retains its authority under RCRA sections 3007, 3008, 3013, and 7003. The standards and requirements for state authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a state with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. EPA did not issue permits for any facilities in that state, since the state was now authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new requirements did not take effect in an authorized state until the state adopted the equivalent state requirements.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. While states must still adopt HSWA-related provisions as state law to retain authorization, EPA implements the HSWA provisions in

[124] Per 40 CFR 260.10, ''hazardous secondary materials'' means a secondary material (*e.g.,* spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under 40 CFR part 261. Spent ignitable refrigerant meets this definition.

authorized states, including the issuance of any permits pertaining to HSWA requirements, until the state is granted authorization to do so.

Authorized states are required to modify their programs only when EPA promulgates federal requirements that are more stringent or broader in scope than existing federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (see 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations.

7. Effect on State Authorization

This action proposes to add a new subpart Q to 40 CFR part 266 *Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities,* and it is being proposed under the authority of HSWA due to its purpose of reducing air emissions from the management of ignitable spent refrigerants, in accordance with EPA's mandate to control air emissions from hazardous waste management, as may be necessary to protect human health and the environment, per RCRA section 3004(n), which was promulgated under HSWA. In addition, the changes to the Very Small Quantity Generator Regulations in 40 CFR 262.14 would be promulgated under RCRA section 3001(d)(4), also a HSWA provision.

While the proposed exclusion reduces the applicability of many RCRA requirements to the recycling of ignitable spent refrigerant, the requirement that refrigerant be recovered and/or recycled for reuse using equipment that is certified for that type of refrigerant and appliance under 40 CFR 82.158, and that the recovered refrigerant be recycled for reuse at a facility certified by EPA under 40 CFR 82.164 would be more stringent than the current RCRA requirements applicable to recycling of ignitable spent refrigerant. In addition, the revisions to the VSQG regulations in 40 CFR 262.14 are more stringent than the current standard. Thus, the proposed amendment would be a HSWA rule that is more stringent than the current RCRA program and, if finalized, would be applicable on the effective date of the final rule in all states.

In addition to the proposed RCRA alternative standards for Class 1, 2 and 2L, EPA is also considering the option of expanding the applicability of the RCRA alternative standards to some or all A3 refrigerants. Broadening the applicability of the exemption could encourage the development of markets for these other recycled refrigerants, even if current markets are limited, provided that they can be safely recycled for reuse. In addition, EPA requests comment on which additional refrigerants should qualify for the RCRA alternative standards in the final rule, if EPA determines such an expansion is appropriate. EPA requests information on the safety and economic feasibility of recycling for reuse Class 2L, 2, and 3 refrigerants both under current and projected future market conditions.

H. MVAC Servicing and Reprocessed Material

EPA is not proposing requirements focused on implementing subsection (h)(2)(B) for MVAC servicing facilities that currently reclaim or recycle recovered MVAC refrigerant. EPA understands that under current industry practices, a variety of things might occur once refrigerant has been recovered from an MVAC system. For example, in some situations, MVAC servicing facilities recover refrigerant from the MVAC, recycle it consistent with EPA's regulations under CAA section 609 and return the recycled refrigerant to the same MVAC for continued use by the same owner.[125] In other circumstances, however, EPA understands that the recovered MVAC refrigerant is recycled and used in servicing a different MVAC system with a different owner (*e.g.,* to charge or recharge such a system), thereby in effect selling or transferring the refrigerant to a new owner. See 40 CFR 82.34(d)(2). Additionally, EPA understands that there are circumstances where refrigerant recovered from MVAC systems is reclaimed before it is reused or sold or transferred to a new owner.

The servicing and repair of MVAC systems with HFCs and HFC substitutes (*e.g.,* HFO–1234yf and R–744 (CO_2)) have long been subject to certain requirements that are separate from those that apply for the servicing and repair of stationary appliances. Regulations under CAA section 609 require that technicians use equipment approved pursuant to the standards at 40 CFR 82.36 to service and repair MVAC systems. Under those existing regulations, recovered refrigerant can either be recycled on-site or off-site using approved equipment designed to both recover and recycle refrigerant certified to meet SAE J2099.[126] SAE J2099 establishes the minimum level of refrigerant purity (*e.g.,* 98% for HFO–1234yf) required for the certification of on-site recovery and recycling machines per SAE 2843 and SAE J2788. Refrigerant from reclamation facilities that is used for the purpose of recharging MVACs must be at or above the standard of purity (*i.e.,* 99.5%) level defined in AHRI Standard 700, and EPA understands that such reclamation typically occurs off-site. See 40 CFR 82.32(e)(2).

Due to the longstanding practice of on-site recycling of MVAC refrigerant, some industry stakeholders[127] question the need to reclaim recovered MVAC refrigerant to meet the purity described in AHRI Standard 700–2016 as specified in the definition of the terms ''reclaim'' and ''reclamation'' in subsection (b)(9) of the Act. They note that equipment certified to meet SAE J2099 are rated to clean and separate material in contaminated refrigerant to a 98% purity level, which provides the same level of performance and durability as virgin refrigerant for purposes of use in MVACs. They also pointed out the ambiguity in the phrase ''(or an appropriate successor standard adopted by the Administrator)'' in definition of ''reclaim'' and ''reclamation'' in the AIM Act. While there may be a variety of situations that could lead to the adoption of a successor standard by the Administrator within the meaning of subsection (b)(9), in EPA's view one such circumstance would be if AHRI published a subsequent standard or addendum regarding the reprocessing of a recovered regulated substance to a specified purity standard and the analytical methodology to verify the purity of that regulated substance, and that standard were adopted by the Administrator as a successor standard.

EPA is aware that AHRI is in consultations with SAE International, the Mobile Air Climate Systems (MACS), and other industry stakeholders to develop a standard (or update an existing standard) that may be more appropriate for MVAC servicing than the AHRI Standard 700–2016.[128] If

[125] Another example of an instance where there is no change in ownership is the off-site servicing and recharge of MVAC systems for a fleet of trucks that are owned by the same company.

[126] SAE International, 2012. SAE J2099: Standard of Purity for Recycled R–134a (HFC–134a) and R–1234yf (HFO–1234yf) for Use in Mobile Air-conditioning Systems.

[127] March 6, 2023, EPA meeting with Mobile Air Climate Systems (MACS) Association and SAE International. Meeting materials available in the docket (EPA–HQ–OAR–2022–0606) for this proposed rulemaking at *https://www.regulations.gov.*

[128] Letter to EPA from AHRI, Alliance for Automotive Innovation, Alliance for Responsible Atmospheric Policy, and MACS dated June 9, 2023.

Continued

such a standard is finalized, EPA intends to review it, and any supporting information, and consider what implications it might have for potential approaches that the Agency might consider in future rulemakings to implement subsection (h)(2)(B) for MVAC systems. Additionally, the Agency could consider establishing its own purity standard and analytical methodology for verification of the purity of recovered regulated substances, as well as specifying minimum equipment requirements for MVAC systems under subsection (h). Among other things, such a standard could be based on consideration of input from stakeholders and consensus standards bodies. EPA could consider adopting any such standard in a future rulemaking. In light of the time needed to develop such standards (whether developed by EPA or standard setting organizations) and for EPA to consider whether they are appropriate for EPA to adopt as successor standards in the context of subsection (h), as well as the implications that such standards might have on the regulations that EPA might propose to implement subsection (h)(2)(B) for MVAC systems, EPA is not proposing such regulations in this NPRM. Instead, EPA intends to issue proposed regulations for this sector at a later date, once it has additional clarity on the development of such a successor standard and its likely content.

V. How is EPA proposing to treat data reported under this rule?

Consistent with EPA's commitment to transparency in program implementation, as well as to proactively encourage compliance, support enforcement of program requirements and enable third-party engagement to complement EPA's enforcement efforts, EPA is proposing several ways it intends to release data that would be collected if this rule were finalized as proposed.

EPA has reviewed the data elements that are proposed to be reported under this rule. Based on that review, EPA is proposing certain categorical emissions data and confidentiality determinations in advance through this notice and comment rulemaking for individual reported data elements that EPA would be collecting through this rulemaking. This proposal identifies certain information categories that must be submitted to EPA that will be subject to disclosure to the public without further notice because the information has been determined to be either ''emission data'' under 40 CFR 2.301(a), or the Agency has found that the information does not meet the standard for confidential treatment under Exemption 4 of the Freedom of Information Act (FOIA). EPA is also proposing to identify certain other categories of information that may be entitled to confidential treatment. For information EPA is not determining in this rulemaking to be emission data or not otherwise entitled to confidential treatment, EPA will apply the 40 CFR part 2 process for establishing case-by-case confidentiality determinations. As explained further in the following discussion, the emission data and confidentiality determinations in this proposed action are intended to increase the efficiency with which the Agency responds to FOIA requests and to provide consistency in the treatment of the same or similar information. Establishing these determinations through this rulemaking will provide predictability for both information requesters and submitters. The emission data and confidentiality determinations in this proposed rule will also increase transparency, as well as supporting compliance with, and enforcement of, the program's requirements.

A. Background on Determinations of Whether Information Is Entitled to Treatment as Confidential Information

1. Confidential Treatment of Reported Information

Regulated entities that must submit information to EPA frequently claim that some or all of that information is entitled to confidential treatment and therefore exempt from disclosure under Exemption 4 of the FOIA.[129] Exemption 4 exempts from disclosure ''trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'' [130] In order for information to meet the requirements of Exemption 4, EPA must find that the information is either: (1) a trade secret, or (2) commercial or financial information that is: (a) obtained from a person, and (b) privileged or confidential.

Generally, when we have information that we intend to disclose publicly that is covered by a claim of confidentiality under FOIA Exemption 4, EPA has a process to make case-by-case or class determinations under 40 CFR part 2 to evaluate whether such information qualifies for confidential treatment under the exemption.[131] [132] In this action, EPA is proposing to make categorical emission data and confidentiality determinations in advance through this notice and comment rulemaking for some information that must be submitted to EPA under the proposed requirements. If EPA finalizes these determinations, that information would be subject to disclosure to the public without further notice.

The U.S. Supreme Court decision in *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019) (*Argus Leader*) addresses the meaning of ''confidential'' within the context of FOIA Exemption 4. The Court held that ''[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4.'' [133] The Court identified two conditions ''that might be required for information communicated to another to be considered confidential.'' [134] Under the first condition, ''information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it.'' [135] The second condition provides that ''information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.'' [136] The Court found the first condition necessary for information to be considered confidential within the meaning of Exemption 4, but did not address whether the second condition must also be met.

Following the issuance of the Court's opinion in *Argus Leader,* the U.S. Department of Justice (DOJ) issued guidance concerning the confidentiality prong of Exemption 4, articulating ''the newly defined contours of Exemption 4'' post-*Argus Leader.*[137] Where the

Available in the docket (EPA–HQ–OAR–2022–0606) for this proposed rulemaking at *https://www.regulations.gov.*

[129] 5 U.S.C. 552(b)(4).

[130] 5 U.S.C. 552(b)(4).

[131] 40 CFR 2.205.

[132] This approach of making categorical determinations for a class of information is a well-established Agency practice. Prior examples of rules where EPA has made such categorical determinations include *Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Amendments to Special Rules Governing Certain Information Obtained Under the Clean Air Act* (76 FR 30817) (May 26, 2011); *Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards* (88 FR 4296) (January 24, 2023); and *Renewable Fuel Standard (RFS) Program: RFS Annual Rules* (87 FR 39600) (July 1, 2002).

[133] Argus Leader, 139 S. Ct. at 2366.

[134] Id. at 2363.

[135] Id. (internal citations omitted).

[136] Id. (internal citations omitted).

[137] ''Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media and Accompanying Step-by-Step Guide,''

Government provides an express or implied indication to the submitter prior to or at the time the information is submitted to the Government that the Government would publicly disclose the information, then the submitter generally cannot reasonably expect confidentiality of the information upon submission, and the information is not entitled to confidential treatment under Exemption 4.[138] In this proposed rule, EPA intends to clearly assert that certain information will not be kept confidential and will be disclosed publicly, if it is determined to not be entitled to confidential treatment in the final version of this rule. This assertion aligns with the Supreme Court's decision, and the subsequent DOJ guidance that the government's assurances that a submission will be treated as *not* confidential should dictate the expectations of submitters. If EPA were to finalize these determinations, submitters would be on notice before they submit any information that EPA has determined that the identified data elements outlined in the tables below, as well as in the memorandum provided in the docket for this action titled *Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in the Proposed Rule,* will not be entitled to confidential treatment upon submission and may be released by the Agency without further notice. As a result, submitters will not have a reasonable expectation that the information will be treated as confidential; rather, they should have the expectation that the information will be disclosed.

As described further below, EPA is proposing to make categorical confidentiality determinations as some of the proposed data elements that would be submitted to EPA contain information that is not entitled to confidential treatment because either: it is not the type of information that submitters customarily keep private or closely held; it is already publicly available; or it is discernible information that is self-evident or readily observable through reverse engineering by a third party.

2. Emissions Data Under Section 114 of the Clean Air Act

The AIM act provides that, ''[s]ections 113, 114, 304, and 307 of the Clean Air Act (42 U.S.C. 7413, 7414, 7604, 7607) shall apply to this section and any rule, rulemaking, or regulation promulgated by the Administrator pursuant to this section as though this section were expressly included in title VI of that Act (42 U.S.C. 7671 *et seq.*).'' The CAA states that ''[a]ny records, reports or information obtained under [section 114] shall be available to the public. . . .'' [139] Thus, the CAA begins with a presumption that the information submitted to EPA will be available to be disclosed to the public. It then provides a narrow exception to that presumption for information that ''would divulge methods or processes entitled to protection as trade secrets. . . .'' The CAA then narrows this exception further by excluding ''emission data'' from the category of information eligible for confidential treatment. While the CAA does not define ''emission data,'' EPA has done so by regulation at 40 CFR 2.301(a)(2)(i). EPA releases, on occasion, some of the information submitted under CAA section 114 to parties outside of the Agency of its own volition, through responses to requests submitted under the FOIA,[140] or through civil litigation. As noted in the prior section, generally, when we have information that we intend to disclose publicly that is covered by a claim of confidentiality under FOIA Exemption 4, EPA has a process to make case-by-case or class determinations under 40 CFR part 2. This process includes an evaluation of whether such information is or is not emission data, and whether it otherwise qualifies for confidential treatment under FOIA Exemption 4.[141]

The regulations at 40 CFR 2.301 [142] define emission data to include the following:

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

In this proposal, we are applying the regulatory definition of ''emission data'' in 40 CFR 2.301(a)(2)(i) to propose that certain categories of source certification and compliance information are not entitled to confidential treatment because they qualify as emissions data. If EPA finalizes these determinations, that information would be subject to disclosure to the public without further notice. As relevant to this proposal, a ''source'' for purposes of the definition in 40 CFR 2.301 is generally the equipment covered by a proposed regulatory requirement, such as a refrigerant-containing appliance or fire suppression equipment. EPA's broad general definitions of emissions data also exclude certain information related to products still in the research and development phase or products not yet on the market except for limited purposes. Thus, for example, 40 CFR 2.301(a)(2)(ii) excludes information related to ''any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.'' This specific exclusion from the definition of emissions data is limited in time. EPA does not believe data related to this exclusion are implicated in this proposed rulemaking because these data relate to equipment currently in use and HFCs moving through commerce.

B. Data Elements Reported to EPA Under the Leak Repair Provisions

Consistent with EPA's commitment to transparency in program implementation, EPA has reviewed the data elements in the chronically leaking appliance report and the other ad hoc reports proposed under the leak repair requirements to see if information under the umbrella of those data elements could be considered entitled to confidential treatment. EPA is proposing to treat certain data elements under the leak repair provisions as not entitled to confidential treatment. Tables 2 and 3 outline individual data elements that will not be handled as confidential, emission data, or

Office of Information Policy, U.S. DOJ, (October 4, 2019), available at *https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media.*

[138] *See id.;* see also ''Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential under Exemption 4 of the FOIA,'' Office of Information Policy, U.S. DOJ, (updated October 7, 2019), available at *https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential.*

[139] CAA section 114(c); 42 U.S.C. 7414(c).

[140] 5 U.S.C. 552.

[141] 40 CFR 2.301(a)(2)(i).

[142] The Agency is not reopening, taking comment on, or proposing to modify this definition.

otherwise not entitled to confidential treatment. Additional information on these proposed determinations is provided in the memorandum titled *Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in the Proposed Rule,* which is available in the docket for this action. There may be additional reasons not to release individual data elements determined to not be entitled confidential treatment, for example if it is personally identifiable information (PII). The Agency will separately determine whether any data should be withheld from release for reasons other than business confidentiality before data is released. EPA requests comment on the following proposed confidentiality determinations.

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Table 2. Proposed Determination of Confidentiality Status for Data Elements Related to Reports on Chronically Leaking Appliances

Description of data element	Confidentiality status and Rationale[a]
Identification Information (owner name, facility name, facility address where appliance is located)	No confidential treatment/Emissions Data
Appliance ID or Description (for facilities with multiple appliances)	No confidential treatment/Emissions Data
Appliance type (comfort cooling, IPR, or commercial refrigeration)	No confidential treatment/Emissions Data
Refrigerant type	No confidential treatment/Emissions Data
Full charge of appliance (pounds)	No confidential treatment/Emissions Data
Annual percent refrigerant loss	No confidential treatment/Emissions Data
Dates of refrigerant addition	No confidential treatment/Emissions Data
Amounts of refrigerant added	No confidential treatment/Emissions Data
Date of last successful follow-up verification test	No confidential treatment/Emissions Data
Explanation of cause of refrigerant losses (Narrative)	No confidential treatment/Emissions Data
Description of the repair actions taken (Narrative)	No confidential treatment/Emissions Data
Whether a retrofit or retirement plan been developed for the appliance, and, if so, the anticipated date of retrofit or retirement	No confidential treatment/Emissions Data

[a] EPA provides rationale of the confidentiality determination in the memorandum titled *Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in the Proposed Rule*, which is available in the docket (EPA-HQ-OAR-2022-0606) of this proposed rulemaking at *https://www.regulations.gov*.

Table 3. Proposed Determination of Confidentiality Status for Data Elements Related to Other Leak Repair Notifications and Extension Requests

Description of data element	Confidentiality status and Rationale[a]
Extension of time to complete repairs: Identification and address of the facility; the name of the owner or operator of the appliance; the leak rate; the method used to determine the leak rate and full charge; the date the appliance exceeded the applicable leak rate; the location of leak(s) to the extent determined to date; any repair work that has been performed thus far, including the date that work was completed; the reasons why more than 30 days (or 120 days if an industrial process shutdown is required) are needed to complete the repair; and an estimate of when the work will be completed. If the estimated completion date is to be extended, a new estimated date of completion and documentation of the reason for that change must be submitted to EPA within 30 days of identifying that the completion date must be extended.	No confidential treatment/Emissions Data
Relief from the obligation to retrofit or retire an appliance: The date that the requirement to develop a retrofit or retirement plan was triggered; the leak rate; the method used to determine the leak rate and full charge; the location of the leak(s) identified in the leak inspection; a description of repair work that has been completed; a description of repair work that has not been completed; a description of why the repair was not conducted within the applicable time frame; and a statement signed by an authorized official that all identified leaks will be repaired and an estimate of when those repairs will be completed (not to exceed one year from date of the plan).	No confidential treatment/Emissions Data
Extension of time to complete the retrofit or retirement of an appliance: Identification of the appliance; name of the owner or operator; the leak rate; the method used to determine the leak rate and full charge; the date the appliance exceeded the applicable leak rate; the location of leaks(s) to the extent determined to date; any repair work that has been finished thus far, including the date that work was finished; a plan to finish the retrofit or retirement of the appliance; the reasons why more than one year is necessary to retrofit or retire the appliance; the date of notification to EPA; and an estimate of when retrofit or retirement work will be finished.	No confidential treatment/Emissions Data
Notification of exclusion of purged refrigerants that are destroyed from annual leak rate calculations: The identification of the facility and a contact person, including the address and telephone number; A description of the appliance, focusing on aspects relevant to the purging of refrigerant and subsequent destruction; A description of the methods used to determine the quantity of refrigerant sent for destruction and type of records that are being kept by the owners or operators where the appliance is located; The frequency of monitoring and data-recording; and A description of the control device, and its destruction efficiency.	No confidential treatment/Emissions Data
[a] EPA provides rationale of the confidentiality determination in the memorandum titled *Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in the Proposed Rule*, which is available in the docket (EPA-HQ-OAR-2022-0606) of this proposed rulemaking at *https://www.regulations.gov*.	

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EPA is proposing to find that the information contained within these data elements would categorically not be eligible for confidential treatment because they are either readily apparent or easily ascertainable by an outsider (*e.g.,* owner name, facility name, facility address where appliance is located, appliance ID or description, and appliance type (comfort cooling, IPR, or commercial refrigeration)) or they are considered emissions data under 40 CFR 2.301 (*e.g.,* refrigerant type, full charge of appliance, annual percent refrigerant loss, dates of refrigerant addition, amounts of refrigerant added, date of last successful follow-up verification test, explanation of cause of refrigerant losses, repair actions taken, and whether a retrofit or retirement plan been developed for the appliance, and, if so, the anticipated date of retrofit or retirement), or they fit into both categories. Similarly, the items included in a request for an extension for leak repair, request for relief from the obligation to retrofit or retire an appliance, request for an extension of time to complete the retrofit or retirement of an appliance, and a notification of exclusion of purged refrigerants that are destroyed from annual leak rate calculations are likewise not eligible for confidential treatment because this information is readily ascertainable/observable by an outside entity, or are considered emissions data under 40 CFR 2.301, or both. EPA notes that in these provisions, the source of the emissions would be the regulated equipment, and in the case of all of these notifications these data are necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source and/or information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under the proposed leak repair provisions, the source was authorized to emit; and a general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

C. Data Elements Related to the Generation of Machine-Readable Tracking Identifiers and the Tracking of HFCs

Building on EPA's experience implementing similar requirements under the AIM Act, EPA is proposing to maximize program transparency. Market transparency would facilitate program implementation and increase the public and current market participants' ability to provide complementary compliance assurances and engagement.

Maximizing transparency incentivizes compliance and promotes accountability and allows the public and competing companies to identify and report noncompliance to EPA.

As previously noted, EPA is proposing to establish a tracking system using machine-readable tracking identifiers to track the movement of regulated substances that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment through commerce, including requiring anyone that introduces into interstate commerce or sells a regulated substance that could be used in servicing, repair, or installation of equipment to be registered in the system. This program will allow buyers to able to know that they are purchasing regulated substances that meet the regulatory requirements and to help determine whether they consist of reclaimed material.

This proposal involves the collection of certain data elements. Anyone who is filling a container or cylinder, whether for the first time or when transferring HFCs from one container to one or more smaller or larger containers, would be required to enter information in the tracking system and, in the case of a container being filled for the first time, generate a new machine-readable tracking identifier. Such information includes: the brand it would be sold under, the quantity and composition of HFC(s) in the container, the date it was packaged or repackaged, the quantity of containers it was packaged in, and the size of the containers. To help ensure regulated HFCs sold by reclaimers are legally reclaimed material and eligible for sale, EPA is proposing that reclaimers would need to log into the tracking system and, for each container of HFCs prior to selling regulated substances, provide information such as the date the HFC was reclaimed and by whom; what regulated substance(s) (and/or the blend containing regulated substances) is in the container; how many kilograms were put in the container and on what date the container was filled; whether the purity of the batch was confirmed to meet the specifications in appendix A to 40 CFR part 82, subpart F; on what date the batch was tested; and who certified it met the specifications. If a container is filled with reclaimed and virgin HFC(s), EPA proposes that the reclaimer would have to also provide information on how much virgin HFC was used.

If EPA were to finalize a tracking system with machine-readable tracking identifiers, EPA is proposing to release several data elements associated with each container of HFCs to potential buyers of HFC material, to support this system, because it is not the type of information that is customarily closely held or kept private by companies. We further note that the EPA recently made categorial determinations that this same type of information would not be eligible for confidential treatment in the Allocation Framework Rule (86 FR 55116, 55186, October 5, 2021).[143] Accordingly, submitters of this data have no reasonable expectation that these data elements are entitled to confidential treatment, and the Agency is therefore not required to treat this information as confidential when it is received and maintained in Agency records.

To allow buyers of HFCs to determine whether the HFC they are purchasing complies with regulatory requirements, EPA proposes to release the following information: (1) Whether the HFC being sold is legal to purchase based on information available to EPA; (2) when the container was filled; (3) the specific HFCs in the container; and (4) and the brand name the HFCs are being sold under. EPA will also release a list of registered suppliers so purchasers know where they can buy HFCs that conform to regulatory requirements. As noted above, EPA determined in the Allocation Framework Rule that these data elements would not be eligible for confidential treatment, and accordingly, there would be no reasonable expectation of confidentiality when this information is submitted in this context. A more granular description of these data elements, together with their proposed confidentiality status, is presented in Table 4. There may be additional reasons not to release individual data elements determined to not be entitled to confidential treatment, for example if it is PII. The Agency will

[143] As noted elsewhere in this proposal, petitions for judicial review challenging aspects of the Allocation Framework Rule were filed in the D.C. Circuit. The court rejected all of those challenges except for the challenges to the QR code and refillable-cylinder regulations, which were vacated. *Heating, Air Conditioning & Refrigeration Distributors Int'l* v. *EPA,* 71 F.4th 59 (D.C. Cir. 2023). Although that vacatur may affect some of the underlying requirements that lead to the categorical determinations in the Allocation Framework Rule, the categorical determinations themselves were not challenged, and the court's opinion does not address them. Thus, the court opinion does not affect the validity of the grounds for the categorical determinations in the Allocation Framework Rule.

separately determine whether any data should be withheld from release for reasons other than business confidentiality before data is released. EPA has also provided in the docket for this action a memorandum that provides additional information on the proposed determinations, including listing each individual data element required to be reported under this proposed regulation and the proposed determination whether each element is entitled to confidential treatment or not. The Agency will separately determine whether any data should be withheld from release for reasons other than business confidentiality before data release. Certification-specific data would accompany each kilogram of HFC moving through commerce (as tracked with a machine-readable tracking identifier). EPA requests comment on these proposed determinations.

Based on the information available at this time of this proposal, EPA is proposing to determine that the entry number and entry line number associated with the import (if imported) would be entitled to confidential treatment because it is EPA's understanding that these numbers could be used to identify the import broker, and thus have the potential to reveal confidential business relationships (*i.e.,* the relationship between the importer and the import broker). EPA requests comment on this determination, including comments on why this information may not be entitled to confidential treatment. Specifically, EPA requests comment on whether these numbers could be used to identify import brokers that would not otherwise be identifiable via publicly available information. EPA also requests comment on whether the existence of a business relationship between an import broker and an importer is information that is customarily closely held.

Based on the information available at this time of this proposal, EPA is proposing to determine that the entity/company that fills a container is eligible for confidential treatment. EPA's understanding is that these data are customarily and actually considered to be confidential and closely held by companies. In EPA's experience, these data could implicate confidential business relationships (*i.e.,* one supplier filling for several brands) and that the revelation of these business relationships could implicate the submitter's business or competitive position. EPA requests comment from all stakeholders on this determination, including comments on why this information may not be entitled to confidential treatment. EPA may, based on public comment, revise this determination.

Based on the information available at this time of the proposal, EPA is proposing to determine that the chain of custody of the HFCs, beyond the two parties currently involved in any specific transaction, is eligible for confidential treatment. EPA's understanding is that these data elements are customarily and actually considered to be confidential and closely held by companies. In EPA's experience, business submitters actually and customarily treat their company customer lists and supply chains as confidential because public release of this information would cause harm to the submitter's business or competitive position. For instance, releasing a submitter's customer list would allow competitors access to the submitter's valuable and otherwise private business asset, which could cause the company to lose their market advantage. EPA requests comment from all stakeholders on this determination, including comments on why this information may not be entitled to confidential treatment.

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Table 4. Proposed Determination of Confidentiality Status for Data Elements Related to HFC Tracking

Description of data element	Confidentiality status and Rationale[a]
Tracking system registration data elements	
Name and address of the company, contact information for the owner of the company, the date(s) of and State(s) in which the company is incorporated and State license identifier(s), and the address of each facility that sells or distributes or offers for sale or distribution HFCs	No confidential treatment
How the company introduces HFCs into U.S. commerce	No confidential treatment
Tracking system data elements	
Whether the HFC being sold complies with regulatory requirements based on information available to EPA	No confidential treatment
Date the container was filled	No confidential treatment
The specific HFCs in the container	No confidential treatment
The brand name the HFCs are being sold under	No confidential treatment
List of suppliers registered with the system	No confidential treatment
Date of import (if imported)	No confidential treatment
The entry number and entry line number associated with the import (if imported)	Confidential treatment
Unique serial number associated with the container	No confidential treatment
Quantity of each HFC in the container	No confidential treatment
Name, address, contact person, email address, and phone number of the responsible party at the facility where the container of regulated substance(s) was filled	No confidential treatment
Certification that the contents of the cylinder match the substance(s) identified on the label.	No confidential treatment
The entity/company that filled the container	Confidential treatment
Quantity of containers the HFC was packaged in (if part of a batch fill)	No confidential treatment
The size of the container	No confidential treatment
Date the HFCs were reclaimed (if reclaimed)	No confidential treatment
Certification that the purity of the batch was confirmed to meet the specifications in appendix A to 40 CFR part 82, subpart F. (if reclaimed)	No confidential treatment
The amount of the HFCs in the container that are virgin HFCs, reclaimed HFCs, or recycled HFCs	No confidential treatment
Certification that reclaimed HFCs in a container meet the requirements under § 84.112(d) of the proposed regulatory text	No confidential treatment
The current owner of the container of HFCs	No confidential treatment
The chain of custody of the HFCs, beyond the two parties currently involved in any specific transaction, including an indication if the person receiving the HFCs is an intermediate supplier or a final customer	Confidential treatment
Date that a cylinder (disposable or refillable) that	No confidential treatment

contains HFCs and that had been used in the servicing, repair, or installation of certain equipment was received	
The name, address, contact person, email address, and phone number of the person who sent a used cylinder (disposable or refillable)	No confidential treatment
Date that any remaining HFC heel or residue in a cylinder (disposable or refillable) had been removed	No confidential treatment
Certification that all HFCs have been removed from a cylinder (disposable or refillable)	No confidential treatment
The amount and name of the removed HFCs from a used cylinder or the amount remaining in a refillable cylinder before it is refilled	No confidential treatment
[a] EPA provides rationale of the confidentiality determination in the memorandum titled *Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in the Proposed Rule*, which is available in the docket (EPA-HQ-OAR-2022-0606) of this proposed rulemaking at *https://www.regulations.gov*.	

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D. Data Elements Related to Fire Suppression

As described in section IV.E. of this document, EPA is proposing certain reporting requirements related to the use of regulated substances in the fire suppression sector. These reporting requirements allow for the monitoring of program implementation and of compliance with the proposed requirements.

EPA is proposing to require that certain entities in the fire suppression sector provide data to the EPA that is similar to the data they already voluntarily collect and report to HEEP as mentioned in section IV.E.4.b. Relevant reporting entities covered under this proposed requirement include entities that perform first fill of equipment, service (*e.g.,* recharge) equipment and/or recycle regulated substances, such as equipment manufacturers, distributors, agent suppliers or installers that recycle regulated substances. EPA is proposing that the covered entities report annually: (1) the quantity of each regulated substance held in inventory onsite broken out by recovered, recycled, and virgin; (2) the quantity of material (the combined mass of regulated substance and contaminants) by regulated substance sold and/or recycled for the purpose of installation of new equipment and servicing (*e.g.,* recharge) of fire suppression equipment; (3) the total mass of each regulated substance sold and/or recycled; and (4) the total mass of waste products sent for disposal, along with information about the disposal facility if waste is not processed by the reporting entity. Table 5 presents a more granular description of these data elements, together with their proposed confidentiality status. There may be additional reasons not to release individual data elements determined to not be entitled confidential treatment, for example if it is PII. The Agency will separately determine whether any data should be withheld from release for reasons other than business confidentiality before data is released.

EPA proposes to determine that these data are emissions data as described at 40 CFR 2.301 because they provide a general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources. As a separate alternative basis, EPA proposes to determine that these data are not entitled to confidential treatment because they are not closely held as confidential by the submitter. EPA requests comment on these proposed determinations. Additional information on the rationale for these proposed determinations is provided in a memorandum, which is available in the docket for this action.

Table 5. Proposed Determination of Confidentiality Status for Data Elements Related to Reports on Fire Suppression

Description of data element	Confidentiality status and Rationale[a]
Identification Information (owner name, facility name, facility address where appliance is located)	No confidential treatment
Quantity of material (the combined mass of regulated substance and contaminants) by regulated substance sold, recovered, recycled, and virgin for the purpose of installation of new equipment and servicing of fire suppression equipment	No confidential treatment
Total mass of each regulated substance sold, recovered, recycled, and virgin	No confidential treatment
Total mass of waste products sent for disposal, along with information about the disposal facility if waste is not processed by the reporting entity	No confidential treatment

[a] EPA provides rationale of the confidentiality determination in the memorandum titled *Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in the Proposed Rule*, which is available in the docket (EPA-HQ-OAR-2022-0606) of this proposed rulemaking at *https://www.regulations.gov*.

VI. What are the costs and benefits of this proposed action?

A. Background

EPA is providing information on the costs and benefits for the provisions related to managing regulated substances and their substitutes in this proposed rule. The analyses, presented in the *Analysis of the Economic Impact and Benefits of the Proposed Rule* draft TSD and the RIA addendum, are contained in the docket to this proposed rule and are intended to provide the public with information on the relevant costs and benefits of this action, if finalized as proposed, and to comply with executive orders. To the extent that EPA has considered these analyses in developing an aspect of this proposed rule, EPA has summarized those analyses and the relevant results in the *Analysis of the Economic Impact and Benefits of the Proposed Rule* draft TSD, which is available in the docket for this proposed rule. In the RIA addendum, EPA also included estimates of the social cost of HFCs in order to quantify climate benefits, for the purpose of providing useful information to the public and to comply with E.O. 12866. Although EPA is using the social costs of HFCs for purposes of that assessment, this proposed action does not rely on the estimates of these costs as a record basis for the agency action, and EPA would reach the proposed conclusions even in the absence of the social costs of HFCs.

The climate benefits and compliance costs stemming from this proposed rule include those related to: (1) the proposed provisions on leak repair, leak detection, ALD systems, and recordkeeping and reporting related to leak-related provisions; (2) the proposed amendments to the RCRA hazardous waste regulations; (3) requiring the tracking and management of cylinders for HFCs; (4) requiring use of reclaimed HFCs in the initial charging and servicing of certain types of refrigerant-containing equipment, along with certification that reclaimed refrigerant contains no more than 15 percent, by weight, virgin HFCs; and (5) minimizing emissions of HFCs from certain types of fire suppression equipment.

As detailed in the RIA addendum, EPA finds that in some cases specific provisions of the proposed rule would result in compliance costs for industry, while in other cases they may result in cost savings. Provisions that result in a net cost savings may still be considered as part of the economic benefits attributable to this rule, under the assumption that these activities would not otherwise be undertaken at the same scale or rate of adoption in the absence of regulation. More discussion of these assumptions and supporting literature may be found in section 3.2.2 of the Allocation Framework Rule RIA.

From the Agency's analyses, EPA provides the costs and benefits associated with the management of regulated substances and their substitutes under the AIM Act as well those associated with the proposed amendments to the RCRA hazardous waste regulations. These analyses—as summarized below—highlight economic cost and benefits, including benefits from leak repair and emissions reductions. Given that the provisions EPA is proposing concern HFCs, which are subject to the overall phasedown of production and consumption under the AIM Act, EPA relied on its previous estimates of the impacts of already finalized AIM Act rules as a starting point for the assessment of costs and benefits of this rule. Specifically, the Allocation Framework Rule, ''Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act'' (86 FR 55116, October 5, 2021) and the 2024 Allocation Rule, ''Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years'' (88 FR 46836, July 20, 2023) are assumed as a baseline for this proposed rule. In this way, EPA analyzed the potential incremental impacts of the proposed rule, attributing benefits only insofar as they are additional to those already assessed in the Allocation Framework Rule RIA and the 2024 Allocation Rule RIA addendum (collectively referred to as ''Allocation Rules'' in this discussion). For example, a mitigation option in the MAC analysis for the Allocation Rules assumed a reduction in refrigerant leaks; all costs and benefits calculated for this proposed rule are for leak reductions over and above those assumed in the previous analysis. Because the proposed Technology Transitions Rule has not

been finalized as of the above analyses, those proposed restrictions are not considered part of the baseline for assessing the costs and benefits of this proposed rule.

Climate benefits presented in the RIA Addendum are based on changes (increases or reductions) in HFC emissions compared to the Allocation Framework Rule compliance case (*i.e.,* after consideration of the Allocation Framework Rule and proposed 2024 Allocation Rule) and are calculated using four different global estimates of the social cost of HFCs (SC–HFCs): the model average at 2.5 percent, 3 percent, and 5 percent discount rates and the 95th percentile at 3 percent discount rate.

EPA estimates the climate benefits for this rule using a measure of the social cost of each HFC (collectively referred to as SC–HFCs) that is affected by the rule. The SC–HFCs is the monetary value of the net harm to society associated with a marginal increase in HFC emissions in a given year, or the benefit of avoiding that increase. In principle, the SC–HFCs include the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. As with the estimates of the social cost of other GHGs, the SC–HFC estimates are found to increase over time within the models—*i.e.,* the societal harm from one metric ton emitted in 2030 is higher than the harm caused by one metric ton emitted in 2025—because future emissions produce larger incremental damages as physical and economic systems become more stressed in response to greater climatic change, and because gross domestic product (GDP) is growing over time and many damage categories are modeled as proportional to GDP. The SC–HFCs, therefore, reflects the societal value of reducing emissions of the gas in question by one metric ton. The SC–HFCs is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect HFC emissions. See the RIA addendum for this rule and for the Allocation Framework Rule for a more detailed discussion of SC–HFCs and how they were derived.

The gas-specific SC–HFC estimates used in this analysis were developed using methodologies that are consistent with the methodology underlying estimates of the social cost of other GHGs (carbon dioxide [SC–CO_2], methane [SC–CH_4], and nitrous oxide [SC–N_2O]), collectively referred to as SC–GHG, presented in the Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) (IWG 2021). As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, EPA agrees that the TSD represents the most appropriate methodology for estimating the social cost of GHGs until revised estimates have been developed reflecting the latest, peer-reviewed science. Therefore, EPA views the SC–HFC estimates used in analysis to be appropriate for use in benefit-cost analysis until improved estimates of the social cost of other GHGs are developed.

EPA has developed a draft updated SC–GHG methodology within a sensitivity analysis in the regulatory impact analysis of EPA's November 2022 supplemental proposal for oil and natural gas emissions standards that is currently undergoing external peer review and a public comment process. While that process continues EPA is continuously reviewing developments in the scientific literature on the SC–GHG, including more robust methodologies for estimating damages from emissions, and looking for opportunities to further improve SC–GHG estimation going forward. Most recently, EPA presented a draft set of updated SC–GHG estimates within a sensitivity analysis in the regulatory impact analysis of EPA's December 2022 supplemental proposal for oil and gas standards that that aims to incorporate recent advances in the climate science and economics literature.[144] Specifically, the draft updated methodology incorporates new literature and research consistent with the National Academies near-term recommendations on socioeconomic and emissions inputs, climate modeling components, discounting approaches, and treatment of uncertainty, and an enhanced representation of how physical impacts of climate change translate to economic damages in the modeling framework based on the best and readily adaptable damage functions available in the peer reviewed literature. EPA solicited public comment on the sensitivity analysis and the accompanying draft technical report, which explains the methodology underlying the new set of estimates, in the docket for the proposed oil and natural gas rule. EPA is also conducting an external peer review of this technical report. More information about this process and public comment opportunities is available on EPA's website. The agency is in the process of reviewing public comments on the updated estimates within the oil and natural gas rulemaking docket as well as the recommendations of the external peer reviewers. EPA remains committed to using the best available science in its analyses. Thus, if EPA's updated SC–GHG methodology is finalized before this rule is finalized, EPA intends to present monetized climate benefits using the updated SC–GHG methodology in the final RIA.

As discussed in the February 2021 TSD, the IWG emphasized the importance and value of considering the benefits calculated using all four estimates (model average at 2.5, 3, and 5 percent discount rates, and 95th percentile at 3 percent discount rate). In addition, the TSD explained that a consideration of climate benefits calculated using discount rates below 3 percent, including 2 percent and lower, is also warranted when discounting intergenerational impacts. As a member of the IWG involved in the development of the February 2021 TSD, EPA agrees with this assessment for the purpose of estimating climate benefits from HFC reductions as well and will continue to follow developments in the literature pertaining to this issue.

B. Estimated Costs and Benefits of Leak Repair and ALD Provisions

As detailed in the RIA addendum, the number, charge sizes, leak rates, and other characteristics of potentially affected RACHP equipment were estimated using EPA's Vintaging Model.[145] The leak repair and ALD system provisions proposed are assumed to lead to leaking systems to be repaired earlier than they otherwise would have, leading to reduced emissions of HFCs. The reduction in HFC emissions results in climate benefits due to reduced climate forcing as calculated by multiplying avoided emissions by the social cost of each SC–HFC.

In the years 2025–2050, the proposed leak repair and ALD system provisions would prevent an estimated 78 $MMTCO_2e$ in HFC emissions, and the

[144] Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review (87 FR 74702, December 6, 2022).

[145] EPA. 2023. EPA's Vintaging Model representing the Allocation Framework Rule as modified by the 2024 Allocation Rule RIA Addendum. VM IO file_v4.4_02.04.16_2024 Allocation Rule.

present value of the economic benefit of avoiding the damages associated with those emissions is estimated at $5.4 billion (in 2022 dollars, discounted to 2024 using a 3 percent discount rate). The annual benefits are estimated to decrease over time due to the HFC phasedown and the transition out of the higher-GWP HFCs over time, lowering the average GWP of later emissions. For example, it is estimated that the leak repair and ALD system provisions would prevent 3.8 $MMTCO_2e$ of HFC emissions in 2030, which decreases to 2.8 $MMTCO_2e$ of HFC emissions in 2040. Table 6 shows the estimated reductions in HFC emissions for each year from 2025 to 2050 for leak repair and ALD provisions in the proposed rule.

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Table 6. Annual GHG Emissions Avoided in 2025 through 2050 from Leak Repair and ALD System Provisions

Year	HFC Emissions Avoided ($MTCO_2e$)
2025	3,800,000
2026	3,810,000
2027	3,820,000
2028	3,820,000
2029	3,810,000
2030	3,790,000
2031	3,780,000
2032	3,750,000
2033	3,720,000
2034	3,640,000
2035	3,510,000
2036	3,370,000
2037	3,230,000
2038	3,080,000
2039	2,930,000
2040	2,780,000
2041	2,630,000
2042	2,480,000
2043	2,330,000
2044	2,180,000
2045	2,060,000
2046	1,970,000
2047	1,900,000
2048	1,860,000
2049	1,850,000
2050	1,860,000

Reducing HFC emissions due to fixing leaks earlier would also be anticipated to lead to savings for system owner/operators, as less new refrigerant would need to be purchased to replace leaked refrigerant. In 2025, it is estimated that the proposed leak repair and ALD system provisions would lead to savings of approximately $13 million (2022$).

Unlike the climate benefits, these savings would not be expected to decrease over time, as the cost of refrigerant would not decrease with the average GWP.

The compliance costs of the proposed leak repair and inspection requirements include the costs of purchasing and operating ALD systems, costs of required inspections, and the cost of repairing leaks earlier than would have been necessary without the proposed provisions. In the years 2025–2050, these proposed provisions would result in compliance costs with a present value estimated at $3.6 billion (2022 dollars, discounted to 2024 at a 3 percent discount rate). When combined with the refrigerant savings, the estimated present value of 2025–2050 net compliance costs would be $3.4 billion. Table 7 shows the estimated compliance costs, including refrigerant savings, for each year 2025–2050, as well as the total net costs discounted to 2024 and the equivalent annual costs using discount rates of 3 percent and 7 percent.

Table 7. Incremental Annual Compliance Costs from Leak Repair and ALD System Provisions (2022$)

Year	Total Incremental Compliance Costs	Refrigerant Savings	Total Incremental Compliance Costs Minus Refrigerant Savings
2025	$278,400,000	$13,100,000	$265,300,000
2026	$219,100,000	$13,400,000	$205,700,000
2027	$229,900,000	$13,600,000	$216,300,000
2028	$242,700,000	$13,700,000	$229,000,000
2029	$250,000,000	$13,900,000	$236,100,000
2030	$190,600,000	$13,900,000	$176,700,000
2031	$191,900,000	$14,000,000	$177,900,000
2032	$192,700,000	$14,000,000	$178,700,000
2033	$193,600,000	$14,000,000	$179,600,000
2034	$194,300,000	$13,900,000	$180,400,000
2035	$194,500,000	$13,700,000	$180,800,000
2036	$194,600,000	$13,400,000	$181,200,000
2037	$195,200,000	$13,100,000	$182,100,000
2038	$195,700,000	$12,800,000	$182,900,000
2039	$196,100,000	$12,500,000	$183,600,000
2040	$196,500,000	$12,200,000	$184,300,000
2041	$196,800,000	$11,900,000	$184,900,000
2042	$197,100,000	$11,600,000	$185,500,000
2043	$197,300,000	$11,200,000	$186,100,000
2044	$197,500,000	$10,900,000	$186,600,000
2045	$197,800,000	$10,600,000	$187,200,000
2046	$198,400,000	$10,300,000	$188,100,000
2047	$199,200,000	$10,200,000	$189,000,000
2048	$200,300,000	$10,100,000	$190,200,000
2049	$201,600,000	$10,100,000	$191,500,000
2050	$203,300,000	$10,200,000	$193,100,000

Discount Rate	3%	7%
NPV	$3,395,000,000	$2,203,000,000
EAV	$196,000,000	$199,000,000

C. Summary of Estimated Costs and Benefits of All Rule Provisions

As discussed above, the HFC Allocation Framework Rule serves as the status quo from which incremental impacts of the proposed rule are evaluated. EPA assumes that under the HFC allowance trading mechanism promulgated under the Allocation Framework Rule, one possible result of some of the proposed provisions in this rule is that industry will maximize the use of allowances still available to meet remaining demand for HFC production and consumption in a given year. Therefore, provisions in this rule requiring the use of reclaimed HFCs for refrigerant-containing equipment in certain RACHP subsectors and recycled HFCs in fire suppression equipment may not yield significant additional HFC consumption reductions, relative to what was previously modeled in the Allocation Framework Rule Reference Case. For example, if additional reclaimed HFCs are utilized in the commercial refrigeration subsector, industry may still shift the use of available consumption and production allowances to import or produce HFCs to meet demand for other subsectors that are not covered by a reclaim requirement. However, the extent of such offsetting effects is uncertain.

To account for this uncertainty, this analysis provides two scenarios to illustrate the range of potential incremental impacts. In our base case scenario, we conservatively estimate that abatement from provisions in this rule may be offset by additional HFC consumption in subsectors not covered by this rule, even if these subsectors were previously assumed to have consumption abatement in the Allocation Rule Reference Case. To illustrate the potential upper bound incremental benefits of the proposed rule, we then provide a ''high additionality'' case, in which abatement in these additional subsectors is included.

The present value of the net benefits of this proposed rule are equal to the sum of the net costs or benefits of the various provisions in each year 2025–2050, discounted to 2024. These estimates are provided by each rule provision in Table 8 below. The provisions which contribute to the total net benefits are those covering leak inspections, leak repair, recordkeeping and reporting, reduced emissions and use of recycled HFCs in the fire suppression sector, management and ultimate evacuation of disposable cylinders and tracking provisions for disposable and refillable cylinders, and the required use of reclaimed HFCs in the initial charging and service of certain appliances.

The use of recycled/reclaimed HFCs was already anticipated as a path to compliance with the HFC phasedown consumption caps in the analysis of the Allocation Framework Rule, but the specific provisions of this proposed rule would likely increase the use of recycled/reclaimed HFCs beyond what was already accounted for in that RIA. To the extent this additional use of recycled/reclaimed HFCs displaces consumption of virgin HFCs either (a) the reduced consumption of virgin HFCs in one sector would free up allocation allowances that would then be used elsewhere for consumption of HFCs, or (b) the reduction in the consumption of virgin HFCs would result in incremental climate benefits under this proposed rule. The former scenario is presented as part of the base case and the latter as part of the high additionality case for the net benefits in in Table 8.

Table 8. Present Value and Equivalent Annual Value of Rule Provisions 2025–2050 in Base Case and High Additionality Scenarios [a,b]

		Base Case Net Benefits 2025–2050 (millions 2022$)		High Additionality Case Net Benefits 2025–2050 (millions 2022$)	
Rule Provisions	Costs Discount Rate	3%	7%	3%	7%
Leak Repair, Leak Inspection,& ALD	NPV	$1,964	$3,156	$1,964	$3,156
	EAV	$113	$109	$113	$109
Fire Suppression	NPV	$0	$0	$337	$338
	EAV	$0	$0	$18	$18
Cylinder Management	NPV	$4,453	$4,457	$4,453	$4,457
	EAV	$257	$256	$257	$256
Required Use of Reclaim	NPV	$0	$0	$251	$256
	EAV	$0	$0	$14	$14
Recordkeeping and Reporting	NPV	($298)	($186)	($298)	($186)
	EAV	($17)	($17)	($17)	($17)
TOTAL (AIM Act)	NPV	$6,120	$7,427	$6,708	$8,021
	EAV	$353	$349	$385	$381
RCRA Amendments	NPV	$0–$1.6	$0–$1.0	$0–$1.6	$0–$1.0
	EAV	$0–$0.1	$0–$0.1	$0–$0.1	$0–$0.1
TOTAL (AIM Act + RCRA)	NPV	$6,120-$6,122	$7,427-$7,428	$6,708-$6,710	$8,021-$8,022
	EAV	$353-$353	$349-$349	$385-$385	$381-$381

a. Values representing costs are shown in parentheses.
b. Totals may not sum due to independent rounding.

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VII. How is EPA considering environmental justice?

Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14008 (86 FR 7619, January 27, 2021) establish federal executive policy on environmental justice. Executive Order 14096, signed April 21, 2023, builds on the prior Executive Orders to further advance environmental justice (88 FR 25251).

Executive Order 12898's main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on people of color and low-income populations in the United States. EPA defines [146] environmental justice 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.[147] Meaningful involvement means that: (1) potentially affected populations have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/

[146] EPA recognizes that E.O. 14096 (88 FR 25251, April 21, 2023) provides a new terminology and a new definition for environmental justice, as follows: ''the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: (i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.'' For additional information, see *https://www.federalregister.gov/documents/2023/04/26/2023-08955/revitalizing-our-nations-commitment-to-environmental-justice-for-all.*

[147] See, *e.g.,* Environmental Protection Agency. ''*Environmental Justice.*'' Available at: *https://www.epa.gov/environmentaljustice.*

or health; (2) the public's contribution can influence the regulatory Agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the rule-writers and decision-makers seek out and facilitate the involvement of those potentially affected.[148] The term ''disproportionate impacts'' refers to differences in impacts or risks that are extensive enough that they may merit Agency action. In general, the determination of whether there is a disproportionate impact that may merit Agency action is ultimately a policy judgment which, while informed by analysis, is the responsibility of the decision-maker. The terms ''difference'' or ''differential'' indicate an analytically discernible distinction in impacts or risks across population groups. It is the role of the analyst to assess and present differences in anticipated impacts across population groups of concern for both the baseline and proposed regulatory options, using the best available information (both quantitative and qualitative) to inform the decision-maker and the public.[149]

Executive Order 14008 calls on agencies to make achieving environmental justice part of their missions ''by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.'' Executive Order 14008 further declares a policy ''to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and under-investment in housing, transportation, water and wastewater infrastructure, and health care.''

In addition, the Presidential Memorandum on Modernizing Regulatory Review calls for procedures to ''take into account the distributional consequences of regulations, including as part of a quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit, and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.'' [150] EPA also released its June 2016 ''Technical Guidance for Assessing Environmental Justice in Regulatory Analysis'' (2016 Technical Guidance) to provide recommendations that encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time and resource constraints, and analytic challenges will vary by media and circumstance.[151]

For this action, EPA conducted an environmental justice analysis [152] using a methodology similar to that we used as part of the Allocation Framework Rule (86 FR 55116, October 5, 2021). The information provided in this section is for informational purposes only; EPA is not relying on the information in this section as a record basis for this proposed action. Following the analytical approach used in the Allocation Framework Rule RIA, EPA has provided demographic data and the cancer and respiratory risks to surrounding communities. This update includes the most recent data available for the AirToxScreen dataset from 2020.

The analysis shows that communities near the nineteen identified HFC reclamation facilities are generally more diverse than the national average with respect to race and ethnicity. While the median income of these communities is slightly higher than the national average, there are more low-income households. Across the nineteen facilities, total respiratory risk and total cancer risk are lowest for the communities nearest the reclamation sites. While the total respiratory index for communities within one mile of these nineteen facilities are slightly higher (.32 compared to the national average of .31), the risk for those closest to the facilities appears smaller than for those at greater distances (3-, 5-, and 10-mile radii).

This rule is expected to result in benefits in the form of reduced GHG emissions. The analysis conducted for this rule also estimates that a portion of these benefits would be incremental to emissions reductions that were anticipated under the Allocation Framework Rule alone, thus further reducing the risks of climate change.

While providing additional overall climate benefits, this rule may also result in changes in emissions of air pollutants or other chemicals which are potential byproducts of HFC reclamation processes at affected facilities. The market for reclaimed HFCs could drive changes in potential risk for communities living near these facilities, but the changes in emissions that could have local effects are uncertain. However, the nature and location of the emission changes are uncertain. Moreover, there is insufficient information at this time about which facilities will change reclamation processes. Given limited information at this time, it is unclear to what extent this rule will impact existing disproportionate adverse effects on communities living near HFC reclamation facilities.[153] The Agency will continue to evaluate the impacts of this proposed rulemaking on communities with environmental justice concerns and consider further action, as appropriate, to protect health in communities affected by HFC reclamation. While the environmental justice analysis was conducted for informational purposes only, EPA welcomes the public's input on the environmental justice analysis contained in the RIA addendum for this proposed rule, as well as broader input

[148] The criteria for meaningful involvement are contained in EPA's May 2015 document ''*Guidance on Considering Environmental Justice During the Development of an Action.*'' Environmental Protection Agency, 17 Feb. 2017. Available at: *https://www.epa.gov/environmentaljustice/guidance-considering-environmental-justice-during-development-action.*

[149] The definitions and criteria for ''disproportionate impacts,'' ''difference,'' and ''differential'' are contained in EPA's June 2016 document ''Technical Guidance for Assessing Environmental Justice in Regulatory Analysis.'' Available at: *https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis.*

[150] Presidential Memorandum on Modernizing Regulatory Review, January 20, 2021. Available at: *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.*

[151] Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, June 2016. Available at: *https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.*

[152] EPA recognizes that new terminology and a new definition for environmental justice were established in E.O. 14096 (88 FR 25251, April 21, 2023). When the analysis of this proposed rule was performed, EPA was operating under prior guidance available here: *https://www.epa.gov/sites/default/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf.*

[153] Statements made in this section on the environmental justice analysis draw support from the following citations: Banzhaf, Spencer, Lala Ma, and Christopher Timmins. 2019. Environmental justice: The economics of race, place, and pollution. Journal of Economic Perspectives; Hernandez-Cortes, D. and Meng, K.C., 2020. Do environmental markets cause environmental injustice? Evidence from California's carbon market (No. w27205). NBER; Hu, L., Montzka, S.A., Miller, B.R., Andrews, A.E., Miller, J.B., Lehman, S.J., Sweeney, C., Miller, S.M., Thoning, K., Siso, C. and Atlas, E.L., 2016. Continued emissions of carbon tetrachloride from the United States nearly two decades after its phaseout for dispersive uses. Proceedings of the National Academy of Sciences; Mansur, E. and Sheriff, G., 2021. On the measurement of environmental inequality: Ranking emissions distributions generated by different policy instruments.; U.S. EPA. 2011. Plan EJ 2014. Washington, DC: U.S. EPA, Office of Environmental Justice.; U.S. EPA. 2015. Guidance on Considering Environmental Justice During the Development of Regulatory Actions. May 2015.; USGCRP. 2016. The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment. U.S. Global Change Research Program, Washington, DC.

on other health and environmental risks the Agency should assess.

VIII. Request for Advance Comment on Approaches for Establishing Requirements for Technician Training

For purposes of ensuring the safety of technicians and consumers, subsection (h)(1) directs EPA to promulgate regulations to control, where appropriate, any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment that involves: a regulated substance, a substitute for a regulated substance, the reclaiming of a regulated substance used as a refrigerant, or the reclaiming of a substitute for a regulated substance used as a refrigerant (42 U.S.C. 7675(h)(1)). Subsection (h)(1) further provides that this includes requiring, where appropriate, that any such servicing, repair, disposal, or installation be performed by a trained technician meeting minimum standards, as determined by EPA.

As discussed above in section III.C., regulations issued under CAA section 608 for managing stationary refrigeration and air conditioning appliances include, among other things, technician certification requirements (40 CFR 82.161). Additionally, regulations issued under CAA section 609 currently requires that anyone servicing or repairing an MVAC system for consideration must be properly trained and certified (40 CFR 82.34(a)(2)). However, since establishing these regulatory programs in the 1990s, the use of flammable or mildly flammable refrigerants have increased.[154] [155]

EPA is aware that many innovative technologies are being introduced to continue to meet the air conditioning and refrigeration needs in the United States and around the world. Typically, newer equipment meets higher efficiency standards. For many applications, there has been and likely will continue to be an increased use of flammable and mildly flammable refrigerants. While these refrigerants can be safely used in equipment properly designed for their use, it is not advisable to use these refrigerants in equipment specifically designed for non-flammable refrigerants. Previously, when listing certain flammable refrigerants for specific end-uses as acceptable subject to use conditions under the SNAP program, EPA took advance comment on a requirement for training (85 FR 35874, June 12, 2020). EPA is also aware that many entities, including equipment manufacturers, trade associations, unions, trade schools, and other organizations provide training for technicians and many offer specific training for refrigerants designated by ASHRAE as 2, 2L, and 3.

EPA requests advance comment on whether the Agency should establish requirements for RACHP technician training and/or certification to address servicing equipment using ASHRAE 2, 2L, and 3 refrigerants, and if so, potential approaches for doing so. EPA is particularly seeking advance comment on whether through a separate rulemaking, EPA should propose to establish training and/or certification requirements for technicians under subsection (h), and, if so, how such a training and/or certification program might be managed, and to what extent or for which types of HFCs and/or their substitutes such requirements should apply. EPA is also requesting advance comment on whether technicians who are currently trained and certified under CAA sections 608 (for servicing of stationary refrigeration appliances) and/or CAA section 609 (for servicing of MVAC systems) should be required to be certified under subsection (h) of the AIM Act, and whether any future technician training requirements should also be incorporated into the proposed RCRA 40 CFR part 266, subpart Q requirements for ignitable spent refrigerants being recycled for reuse, or if the Agency should provide grandfathering for technicians certified by an approved CAA section 608 or 609 certifier. EPA is not proposing and will not be finalizing a technician training and certifying program on which it is seeking advance comment as part of this rulemaking. Accordingly, EPA does not intend to respond to any advance information received on the options discussed in these sections in any final rulemaking for this proposal. However, EPA will consider those comments as part of a potential future notice and comment rulemaking to establish a training and/or certification program.

IX. Statutory and Executive Order Review

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a ''significant regulatory action'', as defined under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA, submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, *Draft Regulatory Impact Analysis Addendum: Analysis of the Economic Impact and Benefits of the Proposed Rule: American Innovation and Manufacturing (AIM) Act Subsection H Management of Regulated Substances,* is available in the docket for this action (Docket Number EPA–HQ–OAR–2022–0606) and is summarized in section I.C. and section VI. of this preamble.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2778.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

Subsection (k)(1)(C) of the AIM Act states that section 114 of the CAA applies to the AIM Act and rules promulgated under it as if the AIM Act were included in title VI of the CAA. Thus, section 114 of the Clean Air Act, which provides authority to EPA Administrator to require recordkeeping and reporting in carrying out provisions of the CAA, also applies to and supports this rulemaking.

EPA is proposing certain data collection for registration in the tracking system for containers of HFC refrigerants as well as HFC fire suppression agents that could be used in the servicing, repair, and/or installation of refrigerant-containing or fire suppression equipment in order to encourage compliance and aid enforcement. Separately, EPA is proposing certain labeling requirements for containers of reclaimed HFCs. EPA is also proposing recordkeeping and reporting requirements for owners or operators of applicable refrigerant-containing appliances that contain HFCs

[154] TEAP 2022 Progress Report (May 2022) and 2018 Quadrennial Assessment Report. Available online at: *https://ozone.unep.org/science/assessment/teap.*

[155] Volume 3: Decision XXXIII/5—Continued provision of information on energy-efficient and low-global-warming-potential technologies, Technological and Economic Assessment Panel, United Nations Environment Programme (UNEP), May 2022. Available online at: *https://ozone.unep.org/system/files/documents/TEAP-EETF-report-may-2022.pdf.*

or their substitutes to support compliance with the leak repair provisions, as well as recordkeeping and reporting requirements for the proposed fire suppression provisions for HFCs. Additionally, where ALD systems are required, EPA is proposing that owners or operators maintain records regarding the annual calibration or audit of the system.

Respondents/affected entities: Respondents and affected entities will be individuals or companies that own, operate, service, repair, recycle, dispose, or install equipment containing HFCs or their substitutes addressed by this proposed rule, as well as individuals or companies that recover, recycle, or reclaim HFCs or their substitutes.

Respondent's obligation to respond: Mandatory (AIM Act and section 114 of the CAA).

Estimated number of respondents: 851,304.

Frequency of response: Quarterly, annually, and as needed depending on the nature of the report.

Total estimated burden: 223,432 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $15,966,834 (per year), includes annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to EPA using the docket identified at the beginning of this rule. EPA will respond to any ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *https://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. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than November 20, 2023.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities (SISNOSE) under the RFA. The small entities subject to the requirements of this action include those that may use as refrigerant, use as a fire suppression agent, reclaim, or recycle HFCs. EPA estimates that approximately 896 of the 176,042 potentially affected small entities could incur costs in excess of one percent of annual sales/revenue and that approximately 70 small entities could incur costs in excess of three percent of annual sales/revenue. Because there is not a substantial number of small entities that may experience a significant impact, it can be presumed that this action will have no SISNOSE. Details of this analysis are presented in Appendix H of ''Analysis of the Economic Impact and Benefits of the Proposed Rule: American Innovation and Manufacturing (AIM) Act Subsection H Management of Regulated Substances.'' (Docket ID EPA–HQ–OAR–2022–0606).

D. Unfunded Mandates Reform Act (UMRA)

This action contains a federal mandate under UMRA, 2 U.S.C. 1531–1538, that may result in expenditures of $100 million or more for state, local and Tribal governments, in the aggregate, or the private sector in any one year. Accordingly, EPA has prepared a written statement required under section 202 of UMRA. The statement is included in the docket for this action and briefly summarized here. This action contains a federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million by the private sector in any one year, but it is not expected to result in expenditures of this magnitude by state, local, and Tribal governments in the aggregate. The rule is estimated to result in average annual cost to the private sector of $228 million for the period 2025 through 2050. When adjusted for inflation, the $100 million UMRA threshold established in 1995 is equivalent to approximately $184 million in 2022 dollars, the year dollars for the cost estimates in this proposed rule. Thus, the cost of the rule to the private sector in the aggregate exceeds the inflation-adjusted UMRA threshold.

This action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

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. It will 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action. EPA periodically updates Tribal officials on air regulations through the monthly meetings of the National Tribal Air Association and will share information on this rulemaking through this and other fora.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045 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 subject to Executive Order 13045 because it is a significant regulatory action under section 3(f)(1) of Executive Order 12866, and EPA believes that the environmental health or safety risk addressed by this action has a disproportionate effect on children. Accordingly, we have evaluated the environmental health or safety effects of climate change on children.

GHGs, including HFCs, contribute to climate change. The GHG emissions reductions resulting from implementation of this rule will further improve children's health. The assessment literature cited in EPA's 2009 and 2016 Endangerment Findings concluded that certain populations and life stages, including children, the elderly, and the poor, are most vulnerable to climate-related health effects. The assessment literature since 2016 strengthens these conclusions by providing more detailed findings regarding these groups' vulnerabilities and the projected impacts they may experience.

These assessments describe how children's unique physiological and developmental factors contribute to making them particularly vulnerable to climate change. Impacts to children are expected from heat waves, air pollution,

infectious and waterborne illnesses, and mental health effects resulting from extreme weather events. In addition, children are among those especially susceptible to most allergic diseases, as well as health effects associated with heat waves, storms, and floods. Additional health concerns may arise in low-income households, especially those with children, if climate change reduces food availability and increases prices, leading to food insecurity within households. More detailed information on the impacts of climate change to human health and welfare is provided in section III.B. of this preamble.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action applies to certain regulated substances and certain applications containing regulated substances, none of which are used to supply or distribute energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. EPA carefully evaluated available information on HFC reclamation facilities and the characteristics of nearby communities to evaluate these impacts in the context of this proposed rulemaking. Based on this analysis, EPA finds evidence of environmental justice concerns near HFC reclamation facilities from cumulative exposure to existing environmental hazards in these communities.

The analysis shows that communities near the nineteen identified HFC reclamation facilities are generally more diverse than the national average with respect to race and ethnicity. While the median income of these communities is slightly higher than the national average, there are more low-income households. Across the nineteen facilities, total respiratory risk and total cancer risk are lowest for the communities nearest the reclamation sites. While the cancer risk within 1-mile of the facilities is lower than the national average, the cancer and respiratory risks are otherwise slightly elevated compared to the average.

This rule is expected to result in benefits in the form of reduced GHG emissions. The analysis conducted for this rule also estimates that a portion of these benefits would be incremental to emissions reductions that were anticipated under the Allocation Framework Rule alone, thus further reducing the risks of climate change.

While providing additional overall climate benefits, this rule may also result in changes in emissions of air pollutants or other chemicals which are potential byproducts of HFC reclamation processes at affected facilities. The market for reclaimed HFCs could drive changes in potential risk for communities living near these facilities due to the changes in emissions that could have local effects is uncertain. However, the nature and location of the emission changes are uncertain. Moreover, there is insufficient information at this time about which facilities will change reclamation processes. Given limited information at this time, it is unclear to what extent this rule will impact existing disproportionate adverse effects on communities living near HFC reclamation facilities. The Agency will continue to evaluate the impacts of this proposed rulemaking on communities with environmental justice concerns and consider further action, as appropriate, to protect health in communities affected by HFC reclamation. The information supporting this Executive Order review is contained in section VII. of this preamble.

List of Subjects

40 CFR Part 84

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Climate change, Emissions, Reclaiming, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 261

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

40 CFR Part 262

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

40 CFR Part 266

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

40 CFR Part 270

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Michael S. Regan,

Administrator.

For the reasons stated in the preamble, EPA proposes to amend 40 CFR parts 84, 261, 262, 266, 270, and 271 as follows:

PART 84—PHASEDOWN OF HYDROFLUOROCARBONS

■ 1. The authority citation for part 84 continues to read as follows:

Authority: Pub. L. 116–260, Division S, Sec. 103.

■ 2. Add to part 84, subpart C consisting of §§ 84.100 through 84.124 to read as follows:

Subpart C—Management of Regulated Substances

Sec.

§ 84.100 Purpose.

The purpose of the regulations in this subpart is to implement subsection (h) of 42 U.S.C. 7675, with respect to

controls for any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment, for purposes of maximizing reclaiming, minimizing the release of regulated substances from equipment, and ensuring the safety of technicians and consumers.

§ 84.102 Definitions.

For the terms not defined in this subpart but that are defined in § 84.3, the definitions in § 84.3 shall apply. For the purposes of this subpart C:

Certified technician means a technician that has been certified per the provisions at 40 CFR 82.161.

Comfort cooling means the refrigerant-containing appliances used for air conditioning to provide cooling in order to control heat and/or humidity in occupied facilities including but not limited to residential, office, and commercial buildings. Comfort cooling appliances include but are not limited to chillers, commercial split systems, and packaged roof-top units.

Commercial refrigeration means the refrigerant-containing appliances used in the retail food and cold storage warehouse subsectors. Retail food appliances include the refrigeration equipment found in supermarkets, convenience stores, restaurants and other food service establishments. Cold storage includes the refrigeration equipment used to store meat, produce, dairy products, and other perishable goods.

Component, as it relates to a refrigerant-containing appliance, means a part of the refrigerant circuit within an appliance including, but not limited to, compressors, condensers, evaporators, receivers, and all of its connections and subassemblies.

Custom-built means that the industrial process refrigeration equipment or any of its components cannot be purchased and/or installed without being uniquely designed, fabricated and/or assembled to satisfy a specific set of industrial process conditions.

Disposal, as it relates to a refrigerant-containing appliance, means the process leading to and including:

(1) The discharge, deposit, dumping or placing of any discarded refrigerant-containing appliance into or on any land or water;

(2) The disassembly of any refrigerant-containing appliance for discharge, deposit, dumping or placing of its discarded component parts into or on any land or water;

(3) The vandalism of any refrigerant-containing appliance such that the refrigerant is released into the environment or would be released into the environment if it had not been recovered prior to the destructive activity;

(4) The disassembly of any refrigerant-containing appliance for reuse of its component parts; or

(5) The recycling of any refrigerant-containing appliance for scrap.

Equipment means any device that contains, uses, detects or is otherwise connected or associated with a regulated substance or substitute for a regulated substance, including any refrigerant-containing appliance, component, or system.

Fire suppression equipment means any device that is connected to or associated with a regulated substance or substitute for a regulated substance, including blends and mixtures, consisting in part or whole of a regulated substance or a substitute for a regulated substance, and that is used for fire suppression purposes. This term includes and such equipment, component, or system. This term does not include mission-critical military end uses and systems used in deployable and expeditionary situations. This term also does not include space vehicles as defined in 40 CFR 84.3.

Fire suppression technician means any person who in the course of servicing, repair, disposal, or installation of fire suppression equipment could be reasonably expected to violate the integrity of the fire suppression equipment and therefore release fire suppressants into the environment.

Follow-up verification test, as it relates to a refrigerant-containing appliance, means those tests that involve checking the repairs to an appliance after a successful initial verification test and after the appliance has returned to normal operating characteristics and conditions to verify that the repairs were successful. Potential methods for follow-up verification tests include, but are not limited to, the use of soap bubbles as appropriate, electronic or ultrasonic leak detectors, pressure or vacuum tests, fluorescent dye and black light, infrared or near infrared tests, and handheld gas detection devices.

Full charge, as it relates to a refrigerant-containing appliance, means the amount of refrigerant required for normal operating characteristics and conditions of the appliance as determined by using one or a combination of the following four methods:

(1) Use of the equipment manufacturer's determination of the full charge;

(2) Use of appropriate calculations based on component sizes, density of refrigerant, volume of piping, and other relevant considerations;

(3) Use of actual measurements of the amount of refrigerant added to or evacuated from the appliance, including for seasonal variances; and/or

(4) Use of an established range based on the best available data regarding the normal operating characteristics and conditions for the appliance, where the midpoint of the range will serve as the full charge.

Industrial process refrigeration means complex customized refrigerant-containing appliances that are directly linked to the processes used in, for example, the chemical, pharmaceutical, petrochemical, and manufacturing industries. This sector also includes industrial ice machines, appliances used directly in the generation of electricity, and ice rinks. Where one appliance is used for both industrial process refrigeration and other applications, it will be considered industrial process refrigeration equipment if 50 percent or more of its operating capacity is used for industrial process refrigeration.

Initial verification test, as it relates to a refrigerant-containing appliance, means those leak tests that are conducted after the repair is finished to verify that a leak or leaks have been repaired before refrigerant is added back to the appliance.

Installation means the process of setting up equipment for use, which may include steps such as completing the refrigerant circuit, including charging equipment with a regulated substance or substitute for a regulated substance, or connecting cylinders containing a regulated substance or a substitute for a regulated substance to a total flooding fire suppression system, such that the equipment can function and is ready for use for its intended purpose.

Leak inspection, as it relates to a refrigerant-containing appliance, means the examination of an appliance to detect and determine the location of refrigerant leaks. Potential methods include, but are not limited to, ultrasonic tests, gas-imaging cameras, bubble tests as appropriate, or the use of a leak detection device operated and maintained according to manufacturer guidelines. Methods that determine whether the appliance is leaking refrigerant but not the location of a leak, such as standing pressure/vacuum decay tests, sight glass checks, viewing receiver levels, pressure checks, and charging charts, must be used in

conjunction with methods that can determine the location of a leak.

Leak rate, as it relates to a refrigerant-containing appliance, means the rate at which an appliance is losing refrigerant, measured between refrigerant charges. The leak rate is expressed in terms of the percentage of the appliance's full charge that would be lost over a 12-month period if the current rate of loss were to continue over that period. The rate must be calculated using one of the following methods. The same method must be used for all appliances subject to the leak repair requirements located at an operating facility.

(1) Annualizing Method.

(i) *Step 1.* Take the number of pounds of refrigerant added to the appliance to return it to a full charge, whether in one addition or if multiple additions related to same leak, and divide it by the number of pounds of refrigerant the appliance normally contains at full charge;

(ii) *Step 2.* Take the shorter of the number of days that have passed since the last day refrigerant was added or 365 days and divide that number by 365 days;

(iii) *Step 3.* Take the number calculated in Step 1 and divide it by the number calculated in Step 2; and

(iv) *Step 4.* Multiply the number calculated in Step 3 by 100 to calculate a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added}}{\text{pounds of refrigerant in full charge}} \times \frac{365\ \textit{days/year}}{\textit{shorter of: \# days since refrigerant last added or 365 days}} \times 100\%$$

(2) Rolling Average Method.

(i) *Step 1.* Take the sum of the pounds of refrigerant added to the appliance over the previous 365-day period (or over the period that has passed since the last successful follow-up verification test showing all identified leaks in the appliance were repaired, if that period is less than one year);

(ii) *Step 2.* Divide the result of Step 1 by the pounds of refrigerant the appliance normally contains at full charge; and

(iii) *Step 3.* Multiply the result of Step 2 by 100 to obtain a percentage. This method is summarized in the following formula:

$$\text{Leak rate (\% per year)} = \frac{\text{pounds of refrigerant added over past 365 days (or since the last successful follow-up verification test showing all identified leaks in the appliance were repaired, if that period is less than one year)}}{\text{pounds of refrigerant in full charge}} \times 100\%$$

Mothball, as it relates to a refrigerant-containing appliance, means to evacuate refrigerant from an appliance, or the affected isolated section or component of an appliance, to at least atmospheric pressure, and to temporarily shut down that appliance.

Motor vehicle, as used in this subpart, means any vehicle which is self-propelled and designed for transporting persons or property on a street or highway, including but not limited to passenger cars, light-duty vehicles, and heavy-duty vehicles. This definition does not include a vehicle where final assembly of the vehicle has not been completed by the original equipment manufacturer.

Motor vehicle air conditioners (MVAC) means mechanical vapor compression refrigerant-containing appliances used to cool the driver's or passenger's compartment of any motor vehicle. This definition is intended to have the same meaning as defined in 40 CFR 82.32.

MVAC-like appliance means a mechanical vapor compression, open-drive compressor refrigerant-containing appliance with a full charge of 20 pounds or less of refrigerant used to cool the driver's or passenger's compartment of off-road vehicles or equipment. This includes, but is not limited to, the air-conditioning equipment found on agricultural or construction vehicles. This definition is intended to have the same meaning as defined in 40 CFR 82.152.

Normal operating characteristics and conditions, as it relates to a refrigerant-containing appliance, means appliance operating temperatures, pressures, fluid flows, speeds, and other characteristics, including full charge of the appliance, that would be expected for a given process load and ambient condition during normal operation. Normal operating characteristics and conditions are marked by the absence of atypical conditions affecting the operation of the appliance.

Owner or operator means any person who owns, leases, operates, or controls any equipment or who controls or supervises any practice, process, or activity that is subject to any requirement pursuant to this subpart.

Recover means the process by which a regulated substance, or where applicable, a substitute for a regulated substance, is removed, in any condition, from equipment; and stored in an external container, with or without testing or processing the regulated substance or substitute for a regulated substance.

Recycling, when referring to fire suppression or fire suppressants, means the testing and/or reprocessing of regulated substances used in the fire suppression sector to certain purity standards.

Refrigerant, for purposes of this subpart, means any substance, including blends and mixtures, consisting in part or whole of a regulated substance or a substitute for a regulated substance that is used for heat transfer purposes, including those that provide a cooling effect.

Refrigerant circuit, as it relates to a refrigerant-containing appliance, means the parts of an appliance that are normally connected to each other (or are separated only by internal valves) and are designed to contain refrigerant.

Refrigerant-containing appliance means any device that contains and uses a regulated substance or substitute for a regulated substance as a refrigerant including any air conditioner, motor vehicle air conditioner, refrigerator,

chiller, or freezer. For a system with multiple circuits, each independent circuit is considered a separate appliance.

Refrigerant-containing equipment means equipment as defined in this subpart that contains, uses, or is otherwise connected or associated with a regulated substance or substitute for a regulated substance that is used as a refrigerant. This definition includes refrigerant-containing components, refrigerant-containing appliances, and MVAC-like appliances. This term does not include mission-critical military end uses and systems used in deployable and expeditionary situations. This term also does not include space vehicles as defined in 40 CFR 84.3.

Repackager means an entity who transfers regulated substances, either alone or in a blend, from one container to another container prior to sale or distribution or offer for sale or distribution. An entity that services system cylinders for use in fire suppression equipment and returns the same regulated substances to the same system cylinder it was recovered from after the system cylinder is serviced is not a repackager.

Repair, for purposes of this subpart and as it relates to a particular leak in a refrigerant-containing appliance, means making adjustments or other alterations to that refrigerant-containing appliance that have the effect of stopping leakage of refrigerant from that particular leak.

Reprocess means using procedures, such as filtering, drying, distillation and other chemical procedures to remove impurities from a regulated substance or a substitute for a regulated substance.

Retire, as it relates to a refrigerant-containing appliance, means the removal of the refrigerant and the disassembly or impairment of the refrigerant circuit such that the appliance as a whole is rendered unusable by any person in the future.

Retrofit, as it relates to a refrigerant-containing appliance, means to convert an appliance from one refrigerant to another refrigerant. Retrofitting includes the conversion of the appliance to achieve system compatibility with the new refrigerant and may include, but is not limited to, changes in lubricants, gaskets, filters, driers, valves, o-rings or appliance components. Retrofits required under this subpart shall be done to a refrigerant with a lower global warming potential.

Seasonal variance, as it relates to a refrigerant-containing appliance, means the removal of refrigerant from an appliance due to a change in ambient conditions caused by a change in season, followed by the subsequent addition of an amount that is less than or equal to the amount of refrigerant removed in the prior change in season, where both the removal and addition of refrigerant occurs within one consecutive 12-month period.

Stationary refrigerant-containing equipment means refrigerant-containing equipment, as defined in this subpart, that is not a motor vehicle air conditioner or an MVAC-like appliance, as defined in this subpart.

Substitute for a regulated substance means a substance that can be used in equipment in the same or similar applications as a regulated substance, to serve the same or a similar purpose, including but not limited to a substance used as a refrigerant in a refrigerant-containing appliance or as a fire suppressant in fire suppression equipment, provided that the substance is not a regulated substance or an ozone-depleting substance.

Technician, as it relates to any person who works with refrigerant-containing appliances, means any person who in the course of servicing, repair, or installation of a refrigerant-containing appliance (except MVACs) could be reasonably expected to violate the integrity of the refrigerant circuit and therefore release refrigerants into the environment. Technician also means any person who in the course of disposal of a refrigerant-containing appliance (except small appliances as defined in 40 CFR 82.152, MVACs, and MVAC-like appliances) could be reasonably expected to violate the integrity of the refrigerant circuit and therefore release refrigerants from the appliances into the environment. Activities reasonably expected to violate the integrity of the refrigerant circuit include but are not limited to: Attaching or detaching hoses and gauges to and from the appliance; adding or removing refrigerant; adding or removing components; and cutting the refrigerant line. Activities such as painting the appliance, rewiring an external electrical circuit, replacing insulation on a length of pipe, or tightening nuts and bolts are not reasonably expected to violate the integrity of the refrigerant circuit. Activities conducted on refrigerant-containing appliances that have been properly evacuated pursuant to 40 CFR 82.156 are not reasonably expected to release refrigerants unless the activity includes adding refrigerant to the appliance. Technicians could include but are not limited to installers, contractor employees, in-house service personnel, and owners and/or operators of refrigerant-containing appliances.

Virgin regulated substance means any regulated substance that has not had any bona fide use in equipment except for those regulated substances contained in the heel or the residue of a container that has had a bona fide use in the servicing, repair, or installation of equipment.

§ 84.104 Prohibitions.

(a) *Sale of recovered refrigerant.* No person may sell, distribute, or transfer to a new owner, or offer for sale, distribution, or transfer to a new owner, any regulated substance used as a refrigerant in stationary refrigerant-containing equipment consisting in whole or in part of recovered regulated substances, unless the recovered regulated substance:

(1) Has been reclaimed by a person who has been certified as a reclaimer under 40 CFR 82.164 and has been reclaimed to the levels as specified in appendix A to 40 CFR part 82, subpart F; or

(2) Is sold, distributed, or transferred to a new owner, or offered for sale, distribution, or transfer to a new owner solely for the purposes of being reclaimed or destroyed.

(b) [Reserved]

§ 84.106 Leak repair.

(a) *Applicability.* This section applies to refrigerant-containing appliances with a full charge of 15 or more pounds of refrigerant where the refrigerant is composed in whole or in part of:

(1) A regulated substance as listed in subsection (c) of the AIM Act or in appendix A to part 84, or

(2) A substitute for a regulated substance that has a global warming potential greater than 53, where the global warming potential is as determined under the following hierarchy:

(i) Where trans-dichloroethylene, also referred to as HCO–1130(E), is used neat or in a blend, the global warming potential shall be five;

(ii) Where cis-1-chloro-2,3,3,3-tetrafluoropropene, also referred to as HCFO–1224yd(Z), is used neat or in a blend, the global warming potential shall be one;

(iii) For each substitute for a regulated substance that is not HCO–1130(E) or is not HCFO–1224yd(Z), but does have a global warming potential listed in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, the global warming potential of the substitute for a regulated substance shall be that listed as the 100-year integrated global warming potential and shall be the net global warming potential;

(iv) For each substitute for a regulated substance that is not HCO–1130(E), is not HCFO–1224yd(Z), and is not listed in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, the global warming potential of the substitute for a regulated substance shall be that listed as the 100-year integrated global warming potential in the 2022 report by the World Meteorological Organization, titled ''Scientific Assessment of Ozone Depletion: 2022'';

(v) For each substitute for a regulated substance, that is not HCO–1130(E), is not HCFO–1224yd(Z), is not listed in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, and is not listed in the 2022 report by the World Meteorological Organization, the global warming potential of the substitute for a regulated substance shall be that listed in Table A–1 to 40 CFR part 98, as it existed on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], including the use of default global warming potential values for substitutes for regulated substances that are not specifically listed in that table;

(vi) For cases in (iii) through (v) above where a qualifier, including but not limited to approximately, ~, less than, <, much less than, <<, and greater than, >, is provided with a global warming potential value, the value shown shall be the global warming potential of the constituent without consideration of the qualifier;

(vii) For constituents that do not have a global warming potential as provided in paragraphs (a)(2)(i) through (vi) of this section, the global warming potential of the constituent shall be zero.

(3) Notwithstanding the criteria in paragraphs (1) and (2) of this section, the requirements of this section do not apply to:

(i) Appliances (as defined in 40 CFR 82.152) containing solely an ozone-depleting substance as a refrigerant;

(ii) Refrigerant-containing appliances used for the residential and light commercial air conditioning and heat pumps subsector.

(4) Compliance dates. The requirements of this section apply for refrigerant-containing appliances with a full charge of 50 or more pounds as of 60 days after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] in the **Federal Register** and for refrigerant-containing appliances with a full charge between 15 and 50 pounds as of 1 year after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] in the **Federal Register**.

(b) *Leak rate calculation.* Persons adding or removing refrigerant from a refrigerant-containing appliance must, upon conclusion of that installation, service, repair, or disposal provide the owner or operator with documentation that meets the applicable requirements of paragraph (l)(2) of this section. The owner or operator must calculate the leak rate every time refrigerant is added to an appliance unless the addition is made immediately following a retrofit, installation of a new appliance, or qualifies as a seasonal variance.

(c) *Requirement to address leaks through appliance repair, or retrofitting or retiring an appliance.* (1) Owners or operators must repair refrigerant-containing appliances with a leak rate over the applicable leak rate in this paragraph in accordance with paragraphs (d) through (f) of this section unless the owner or operator elects to retrofit or retire the refrigerant-containing appliance in compliance with paragraphs (h) and (i) of this section. If the owner or operator elects to repair leaks but fails to bring the leak rate below the applicable leak rate, the owner or operator must create and implement a retrofit or retirement plan in accordance with paragraphs (h) and (i) of this section.

(2) Leak rates:

(i) 20 percent leak rate for commercial refrigeration equipment;

(ii) 30 percent leak rate for industrial process refrigeration equipment; and

(iii) 10 percent leak rate for comfort cooling appliances, refrigerated transport appliances, or other refrigerant-containing appliances with a full charge of 15 or more pounds of refrigerant not covered by (c)(2)(i) or (ii) of this section.

(d) *Appliance repair.* Owners or operators must identify and repair leaks in accordance with this paragraph within 30 days (or 120 days if an industrial process shutdown is required) of when refrigerant is added to a refrigerant-containing appliance exceeding the applicable leak rate in paragraph (c) of this section.

(1) A certified technician must conduct a leak inspection, as described in paragraph (g) of this section, to identify the location of leaks.

(2) Leaks must be repaired such that the leak rate is brought below the applicable leak rate. This must be confirmed by the leak rate calculation performed upon the next refrigerant addition. The leaks will be presumed to be repaired if, over the 12-month period after the repair, there is no further refrigerant addition or if the leak inspections required under paragraph (g) of this section and/or automatic leak detection systems required by § 84.108 do not find any leaks in the appliance. Repair of leaks must be documented by both an initial and a follow-up verification test or tests.

(3) The time frames in paragraphs (d) through (f) of this section are temporarily suspended when an appliance is mothballed. The time will resume on the day additional refrigerant is added to the refrigerant-containing appliance (or component of a refrigerant-containing appliance if the leaking component was isolated).

(e) *Verification tests.* The owner or operator must conduct both initial and follow-up verification tests on each leak that was repaired under paragraph (d) of this section.

(1) *Initial verification test.* Unless granted additional time, an initial verification test must be performed within 30 days (or 120 days if an industrial process shutdown is required) of a refrigerant-containing appliance exceeding the applicable leak rate in paragraph (c) of this section. An initial verification test must demonstrate that for leaks where a repair attempt was made, the adjustments or alterations to the refrigerant-containing appliance have held.

(i) For repairs that can be completed without the need to open or evacuate the refrigerant-containing appliance, the test must be performed after the conclusion of the repair work and before any additional refrigerant is added to the refrigerant-containing appliance.

(ii) For repairs that require the evacuation of the refrigerant-containing appliance or portion of the refrigerant-containing appliance, the test must be performed before adding any refrigerant to the refrigerant-containing appliance.

(iii) If the initial verification test indicates that the repairs have not been successful, the owner or operator may conduct as many additional repairs and initial verification tests as needed within the applicable time period.

(2) *Follow-up verification test.* A follow-up verification test must be performed within 10 days of the successful initial verification test or 10 days of the refrigerant-containing appliance reaching normal operating characteristics and conditions (if the refrigerant-containing appliance or isolated component was evacuated for the repair(s)). Where it is unsafe to be present or otherwise impossible to conduct a follow-up verification test when the system is operating at normal operating characteristics and conditions, the verification test must, where practicable, be conducted prior to the system returning to normal operating characteristics and conditions.

(i) A follow-up verification test must demonstrate that leaks where a repair attempt was made are repaired. If the follow-up verification test indicates that the repairs have not been successful, the owner or operator may conduct as many additional repairs and verification tests as needed to bring the refrigerant-containing appliance below the leak rate within the applicable time period and to verify the repairs.

(f) *Extensions to the appliance repair deadlines.* Owners or operators are permitted more than 30 days (or 120 days if an industrial process shutdown is required) to comply with paragraphs (d) and (e) of this section if they meet the requirements of (f)(1) through (4) of this section or the refrigerant-containing appliance is mothballed. The request will be considered approved unless EPA notifies the owners or operators otherwise.

(1) One or more of the following conditions must apply:

(i) The refrigerant-containing appliance is located in an area subject to radiological contamination or shutting down the refrigerant-containing appliance will directly lead to radiological contamination. Additional time is permitted to the extent needed to conduct and finish repairs in a safe working environment.

(ii) Requirements of other applicable Federal, state, local, or Tribal regulations make a repair within 30 days (or 120 days if an industrial process shutdown is required) impossible. Additional time is permitted to the extent needed to comply with the pertinent regulations.

(iii) Components that must be replaced as part of the repair are not available within 30 days (or 120 days if an industrial process shutdown is required). Additional time is permitted up to 30 days after receiving delivery of the necessary components, not to exceed 180 days (or 270 days if an industrial process shutdown is required) from the date the refrigerant-containing appliance exceeded the applicable leak rate.

(2) Repairs to leaks that the technician has identified as significantly contributing to the exceedance of the leak rate and that do not require additional time must be completed and verified within the initial 30 day repair period (or 120 day repair period if an industrial process shutdown is required);

(3) The owner or operator must document all repair efforts and the reason for the inability to make the repair within the initial 30 day repair period (or 120 day repair period if an industrial process shutdown is required); and

(4) The owner or operator must request an extension from EPA electronically, in the manner specified by EPA, within 30 days (or 120 days if an industrial process shutdown is required) of the refrigerant-containing appliance exceeding the applicable leak rate in paragraph (c) of this section. Extension requests must include: Identification and address of the facility; the name of the owner or operator of the refrigerant-containing appliance; the leak rate; the method used to determine the leak rate and full charge; the date the refrigerant-containing appliance exceeded the applicable leak rate; the location of leak(s) to the extent determined to date; any repair work that has been performed thus far, including the date that work was completed; the reasons why more than 30 days (or 120 days if an industrial process shutdown is required) are needed to complete the repair; and an estimate of when the work will be completed. If the estimated completion date is to be extended, a new estimated date of completion and documentation of the reason for that change must be submitted to EPA within 30 days of identifying that the completion date must be extended. The owner or operator must keep a dated copy of this submission.

(g) *Leak inspections.* (1) The owner or operator must conduct a leak inspection in accordance with the following schedule on any refrigerant-containing appliance exceeding the applicable leak rate in paragraph (c)(2) of this section.

(i) For commercial refrigeration and industrial process refrigeration appliances with a full charge of 500 or more pounds, leak inspections must be conducted once every three months until the owner or operator can demonstrate through the leak rate calculations required under paragraph (b) of this section that the appliance has not leaked in excess of the applicable leak rate for four quarters in a row.

(ii) For commercial refrigeration and industrial process refrigeration appliances with a full charge of 50 or more pounds but less than 500 pounds, leak inspections must be conducted once per year until the owner or operator can demonstrate through the leak rate calculations required under paragraph (b) of this section that the appliance has not leaked in excess of the applicable leak rate for one year.

(iii) For comfort cooling appliances and other appliances not covered by paragraphs (g)(1)(i) and (ii) of this section, leak inspections must be conducted once per year until the owner or operator can demonstrate through the leak rate calculations required under paragraph (b) of this section that the appliance has not leaked in excess of the applicable leak rate for one year.

(2) Leak inspections must be conducted by a certified technician using method(s) determined by the technician to be appropriate for that refrigerant-containing appliance.

(3) All visible and accessible components of a refrigerant-containing appliance must be inspected, with the following exceptions:

(i) Where components are insulated, under ice that forms on the outside of equipment, underground, behind walls, or are otherwise inaccessible;

(ii) Where personnel must be elevated more than two meters above a support surface; or

(iii) Where components are unsafe to inspect, as determined by site personnel.

(4) Quarterly or annual leak inspections are not required on refrigerant-containing appliances, or portions of refrigerant-containing appliances, continuously monitored by an automatic leak detection system that is audited or calibrated annually. An automatic leak detection system may directly detect refrigerant in air, monitor its surrounding in a manner other than detecting refrigerant concentrations in air, or monitor conditions of the appliance. An automatic leak detection system being used for this purpose must meet the requirements for automatic leak detection systems per § 84.108(c) through (g) and § 84.108(i).

(i) When an automatic leak detection system is only being used to monitor portions of a refrigerant-containing appliance, the remainder of the refrigerant-containing appliance continues to be subject to any applicable leak inspection requirements.

(ii) [Reserved]

(h) *Retrofit or retirement plans.* (1) The owner or operator must create a retrofit or retirement plan within 30 days of:

(i) A refrigerant-containing appliance leaking above the applicable leak rate in paragraph (c) of this section if the owner or operator intends to retrofit or retire rather than repair the leak;

(ii) A refrigerant-containing appliance leaking above the applicable leak rate in paragraph (c) of this section if the owner or operator fails to take any action to identify or repair the leak; or

(iii) A refrigerant-containing appliance continues to leak above the applicable leak rate after having conducted the required repairs and verification tests under paragraphs (d) and (e) of this section.

(2) A retrofit or retirement plan must, at a minimum, contain the following information:

(i) Identification and location of the refrigerant-containing appliance;

(ii) Type and full charge of the refrigerant used in the refrigerant-containing appliance;

(iii) Type and full charge of the refrigerant to which the refrigerant-containing appliance will be converted, if retrofitted;

(iv) Itemized procedure for converting the refrigerant-containing appliance to a different refrigerant, including changes required for compatibility with the new substitute, if retrofitted;

(v) Plan for the disposition of recovered refrigerant;

(vi) Plan for the disposition of the refrigerant-containing appliance, if retired; and

(vii) A schedule, not to exceed one year, for completion of the appliance retrofit or retirement.

(3) The retrofit or retirement plan must be signed by an authorized company official, dated, accessible at the site of the refrigerant-containing appliance in paper copy or electronic format, and available for EPA inspection upon request.

(4) All identified leaks must be repaired as part of any retrofit under such a plan.

(5) A retrofit or retirement plan must be implemented as follows:

(i) Unless granted additional time, all work performed in accordance with the plan must be finished within one year of the plan's date (not to exceed 12 months from when the plan was finalized as required in paragraph (h)(1) of this section).

(ii) The owner or operator may request that EPA relieve it of the obligation to retrofit or retire a refrigerant-containing appliance if the owner or operator can establish within 180 days of the plan's date that the refrigerant-containing appliance no longer exceeds the applicable leak rate and if the owner or operator agrees in writing to repair all identified leaks within one year of the plan's date consistent with paragraph (h)(4) and (h)(5)(i) of this section. The owner or operator must submit to EPA the retrofit or retirement plan as well as the following information: The date that the requirement to develop a retrofit or retirement plan was triggered; the leak rate; the method used to determine the leak rate and full charge; the location of the leak(s) identified in the leak inspection; a description of repair work that has been completed; a description of repair work that has not been completed; a description of why the repair was not conducted within the time frames required under paragraphs (d) and (f) of this section; and a statement signed by an authorized official that all identified leaks will be repaired and an estimate of when those repairs will be completed (not to exceed one year from date of the plan). The request will be considered approved unless EPA notifies the owners or operators within 60 days of receipt of the request that it is not approved.

(i) *Extensions to the one-year retrofit or retirement schedule.* Owners or operators may request more than one year to comply with paragraph (h) of this section if they meet the requirements of this paragraph. The request will be considered approved unless EPA notifies the owners or operators within 60 days of receipt of the request that it is not approved. The request must be submitted to EPA electronically, in the manner specified by EPA, within seven months of discovering the refrigerant-containing appliance exceeded the applicable leak rate. The request must include the identification of the refrigerant-containing appliance; name of the owner or operator; the leak rate; the method used to determine the leak rate and full charge; the date the refrigerant-containing appliance exceeded the applicable leak rate; the location of leaks(s) to the extent determined to date; any repair work that has been finished thus far, including the date that work was finished; a plan to finish the retrofit or retirement of the refrigerant-containing appliance; the reasons why more than one year is necessary to retrofit or retire the refrigerant-containing appliance; the date of notification to EPA; and an estimate of when retrofit or retirement work will be finished. A dated copy of the request must be available on-site in either electronic or paper copy. If the estimated completion date is to be revised, a new estimated date of completion and documentation of the reason for that change must be submitted to EPA electronically, in the manner specified by EPA, within 30 days. Additionally, the time frames in paragraphs (h) and (i) of this section are temporarily suspended when a refrigerant-containing appliance is mothballed. The time will resume running on the day additional refrigerant is added to the refrigerant-containing appliance (or component of a refrigerant-containing appliance if the leaking component was isolated).

(1) *Extensions available to industrial process refrigeration.* Owners or operators of industrial process refrigeration equipment may request additional time beyond the one-year period in paragraph (h) of this section to finish the retrofit or retirement under the following circumstances.

(i) Requirements of other applicable Federal, state, local, or Tribal regulations make a retrofit or retirement within one year impossible. Additional time is permitted to the extent needed to comply with the pertinent regulations;

(ii) The new or the retrofitted equipment is custom-built as defined in this subpart and the supplier of the appliance or one of its components has quoted a delivery time of more than 30 weeks from when the order is placed. The appliance or appliance components must be installed within 120 days after receiving delivery of the necessary parts;

(iii) The equipment is located in an area subject to radiological contamination and creating a safe working environment will require more than 30 weeks; or

(iv) After receiving an extension under paragraph (i)(1)(ii) of this section, owners or operators may request additional time if necessary to finish the retrofit or retirement of equipment. The request must be submitted to EPA before the end of the ninth month of the initial extension and must include the same information submitted for that extension, with any necessary revisions. A dated copy of the request must be available on-site in either electronic or paper copy. The request will be considered approved unless EPA notifies the owners or operators within 60 days of receipt of the request that it is not approved.

(j) *Chronically leaking appliances.* Owners or operators of refrigerant-containing appliances containing 15 or more pounds of refrigerant that leak 125 percent or more of the full charge in a calendar year must submit a report containing the information required in paragraph (m)(4) of this section to EPA by March 1 of the subsequent year.

(k) *Purged refrigerant.* In calculating annual leak rates, purged refrigerant that is destroyed at a verifiable destruction efficiency of 98 percent or greater will not be counted toward the leak rate.

(l) *Recordkeeping.* All records identified in this paragraph must be kept for at least three years in electronic or paper format, unless otherwise specified.

(1) Upon installation or [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] owners or operators must determine the full charge of all refrigerant-containing appliances with 15 or more pounds of refrigerant

and maintain the following information for each appliance until three years after the appliance is retired:

(i) The identification of the owner or operator of the refrigerant-containing appliance;

(ii) The address where the appliance is located;

(iii) The full charge of the refrigerant-containing appliance and the method for how the full charge was determined;

(iv) If using method 4 (using an established range) for determining full charge, records must include the range for the full charge of the refrigerant-containing appliance, its midpoint, and how the range was determined;

(v) Any revisions of the full charge, how they were determined, and the dates such revisions occurred.

(vi) The date of installation.

(2) Owners or operators must maintain a record including the following information for each time a refrigerant-containing appliance with a full charge of 15 or more pounds is installed, serviced, repaired, or disposed of, when applicable.

(i) The identity and location of the refrigerant-containing appliance;

(ii) The date of the installation, service, repair, or disposal performed;

(iii) The part(s) of the refrigerant-containing appliance being installed, serviced, repaired, or disposed;

(iv) The type of installation, service, repair, or disposal performed for each part;

(v) The name of the person performing the installation, service, repair, or disposal;

(vi) The amount and type of refrigerant added to, or in the case of disposal removed from, the appliance;

(vii) The full charge of the refrigerant-containing appliance; and

(viii) The leak rate and the method used to determine the leak rate (not applicable when disposing of the refrigerant-containing appliance, following a retrofit, installing a new refrigerant-containing appliance, or if the refrigerant addition qualifies as a seasonal variance).

(3) If the installation, service, repair, or disposal is done by someone other than the owner or operator, that person must provide a record containing the information specified in paragraph (l)(2)(i) through (vi) of this section, when applicable, to the owner or operator.

(4) Owners or operators must keep records of leak inspections that include the date of inspection, the method(s) used to conduct the leak inspection, a list of the location of each leak that was identified, and a certification that all visible and accessible parts of the refrigerant-containing appliance were inspected. Technicians conducting leak inspections must, upon conclusion of that service, provide the owner or operator of the refrigerant-containing appliance with documentation that meets these requirements.

(5) If using an automatic leak detection system, the owner or operator must maintain records regarding the installation and the annual audit and calibration of the system, a record of each date the monitoring system identified a leak, and the location of the leak.

(6) Owners or operators must maintain records of the dates and results of all initial and follow-up verification tests. Records must include the location of the refrigerant-containing appliance, the date(s) of the verification tests, the location(s) of all repaired leaks that were tested, the type(s) of verification test(s) used, and the results of those tests. Technicians conducting initial or follow-up verification tests must, upon conclusion of that service, provide the owner or operator of the appliance with documentation that meets these requirements.

(7) Owners or operators must maintain retrofit or retirement plans developed in accordance with paragraph (h) of this section.

(8) Owners or operators must maintain retrofit and/or retirement extension requests submitted to EPA in accordance with paragraph (i) of this section.

(9) Owners or operators that suspend the deadlines in this section by mothballing a refrigerant-containing appliance must keep records documenting when the appliance was mothballed and when additional refrigerant was added to the appliance (or isolated component).

(10) Owners or operators who exclude purged refrigerants that are destroyed from annual leak rate calculations must maintain records to support the amount of refrigerant claimed as sent for destruction. Records must be based on a monitoring strategy that provides reliable data to demonstrate that the amount of refrigerant claimed to have been destroyed is not greater than the amount of refrigerant actually purged and destroyed and that the 98 percent or greater destruction efficiency is met. Records must include flow rate, quantity or concentration of the refrigerant in the vent stream, and periods of purge flow. Records must include:

(i) The identification of the facility and a contact person, including the address and telephone number;

(ii) A description of the refrigerant-containing appliance, focusing on aspects relevant to the purging of refrigerant and subsequent destruction;

(iii) A description of the methods used to determine the quantity of refrigerant sent for destruction and type of records that are being kept by the owners or operators where the appliance is located;

(iv) The frequency of monitoring and data-recording; and

(v) A description of the control device, and its destruction efficiency.

(11) Owners or operators that exclude additions of refrigerant due to seasonal variance from their leak rate calculation must maintain records stating that they are using the seasonal variance flexibility and documenting the amount added and removed under paragraph (l)(2) of this section.

(12) Owners or operators that submit reports to EPA in accordance with paragraph (m) of this section must maintain copies of the submitted reports and any responses from EPA.

(m) *Reporting.* All notifications must be submitted electronically in the manner specified by EPA.

(1) Owners or operators must notify EPA electronically, in the manner specified by EPA, in accordance with paragraph (f) of this section when seeking an extension of time to complete repairs.

(2) Owners or operators must notify EPA electronically, in the manner specified by EPA, in accordance with paragraph (h)(5)(ii) of this section when seeking relief from the obligation to retrofit or retire an appliance.

(3) Owners or operators must notify EPA electronically, in the manner specified by EPA, in accordance with paragraph (i) of this section when seeking an extension of time to complete the retrofit or retirement of an appliance.

(4) Owners or operators must report to EPA electronically, in a manner specified by EPA, the following in accordance with paragraph (j) of this section for any refrigerant-containing appliance that leaks 125 percent or more of the full charge in a calendar year.

(i) Basic identification information (*i.e.,* owner name or operator, facility name, facility address where appliance is located, and appliance ID or description);

(ii) Refrigerant-containing appliance type (comfort cooling or other, industrial process refrigeration, or commercial refrigeration);

(iii) Refrigerant type;

(iv) Full charge of appliance (pounds);

(v) Annual percent refrigerant loss;

(vi) Dates of refrigerant addition;

(vii) Amounts of refrigerant added;

(viii) Date of last successful follow-up verification test;

(ix) Explanation of cause refrigerant losses;

(x) Description of repair actions taken; and

(xi) Whether a retrofit or retirement plan been developed for the refrigerant-containing appliance and if so, the anticipated date of retrofit or retirement.

(5) When excluding purged refrigerants that are destroyed from annual leak rate calculations, owners or operators must notify EPA electronically, in the manner specified by EPA, within 60 days after the first time the exclusion is used by the facility where the appliance is located. The report must include the information included in paragraph (l)(10) of this section.

§ 84.108 Automatic leak detection systems.

(a) Owners or operators of refrigerant-containing appliances used for industrial process refrigeration or commercial refrigeration with a full charge of 1,500 pounds or greater of a refrigerant containing a regulated substance or a substitute for a regulated substance with a GWP greater than 53 must install and use an automatic leak detection system in accordance with this section.

(b) (1) Owners and operators of refrigerant-containing appliances subject to paragraph (a) of this section installed on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] must install and use automatic leak detection systems within 30 days of the appliance installation.

(2) Owners and operators of refrigerant-containing appliances subject to paragraph (a) of this section installed before [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] must install and use automatic leak detection systems by [DATE 1 YEAR AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(c) Automatic leak detection systems must be installed in accordance with manufacturer instructions.

(d) Automatic leak detection systems must be audited and calibrated annually.

(e) Automatic leak detection systems are required to monitor components located inside an enclosed building or structure.

(f) For automatic leak detection systems that directly detect the presence of a refrigerant in air, the system must:

(1) Have sensors or intakes placed so that they will continuously monitor the refrigerant concentrations in air in proximity to the compressor, evaporator, condenser, and other areas with a high potential for a refrigerant leak;

(2) Accurately detect a concentration level of 10 parts per million of vapor of the specific refrigerant or refrigerants used in the refrigerant-containing appliance(s); and

(3) Alert the owner or operator when a refrigerant concentration of 100 parts per million of vapor of the specific refrigerant or refrigerants used in the appliance(s) is reached.

(g) For automatic leak detection systems that monitor conditions of the refrigerant-containing appliance, the system must automatically alert the owner or operator when measurements indicate a loss of 50 pounds of refrigerant or 10 percent of the full charge, whichever is less.

(h) When an automatic leak detection system alerts an owner or operator of a leak as described in this paragraph owners and operators of refrigerant-containing appliances using automatic leak detection systems must:

(1) Calculate the leak rate within 30 days (or 120 days where an industrial process shutdown would be necessary) of an alert and, if the leak rate is above the applicable leak rate as described in § 84.106(c)(2), comply with the full suite of leak repair provisions in § 84.106; or

(2) Preemptively repair the identified leak before adding refrigerant to the appliance and then calculate the leak rate within 30 days (or 120 days where an industrial process shutdown would be necessary) of an alert. If the leak rate is above the applicable leak rate as described in § 84.106(c)(2), the owner or operator must comply with the full suite of leak repair provisions in § 84.106.

(3) Where a refrigerant-containing appliance using an automatic leak detection system is found to be leaking above the applicable leak rate as described in § 84.106(c)(2), and the automatic leak system is only being used to monitor portions of an appliance, the remainder of the appliance continues to be subject to any applicable leak inspection requirements, as described in § 84.106(g).

(i) *Recordkeeping.* The owner or operator must maintain records for at least three years in electronic or paper format, unless otherwise specified, regarding:

(1) The installation of the automatic leak detection system;

(2) The annual audit and calibration of the system;

(3) A record of each date the automatic leak detection system triggers an alert; and

(4) The location of the leak.

§ 84.110 Emissions from fire suppression equipment.

(a) As of January 1, 2025, no person installing, servicing, repairing, or disposing of fire suppression equipment containing a regulated substance may knowingly vent or otherwise release into the environment any regulated substances used in such equipment.

(1) Release of regulated substances during testing of fire suppression equipment is not subject to this prohibition under paragraph (a) of this section if the following four conditions are met:

(i) Equipment employing suitable alternative fire suppression agents are not available;

(ii) Release of fire suppression agent is essential to demonstrate equipment functionality;

(iii) Failure of the system or equipment would pose great risk to human safety or the environment; and

(iv) A simulant agent cannot be used in place of the regulated substance for testing purposes.

(2) This prohibition under paragraph (a) of this section does not apply to qualification and development testing during the design and development process of fire suppression equipment containing regulated substances when such tests are essential to demonstrate equipment functionality and when a suitable simulant agent cannot be used in place of the regulated substance for testing purposes.

(3) This prohibition does not apply to the emergency release of regulated substances for the legitimate purpose of fire extinguishing, explosion inertion, or other emergency applications for which the equipment were designed.

(b) As of January 1, 2025, no owner or operator of fire suppression equipment containing regulated substances shall allow the release of regulated substances to occur as a result of failure to maintain such equipment.

(c) As of January 1, 2025, recycled regulated substances must be used for the initial installation of new fire suppression equipment, including both total flooding systems and streaming applications, that is installed in the United States, and for the servicing and/or repair of existing fire suppression equipment in the United States, including both total flooding systems and streaming applications. This requirement does not apply to onboard aerospace fire suppression applications

that qualify for application-specific allowances under regulations at § 84.13.

(1) Any person using equipment to recover, store, and transfer regulated substances used in fire suppression equipment must evacuate equipment used to recover, store, and transfer regulated substances prior to each use to prevent contamination, arrange for destruction of the recovered regulated substances as necessary, and collect and dispose of wastes from recycling process.

(2) Any person using recovery and recycling equipment to recover regulated substances from fire suppression equipment must (1) operate and maintain recovery and recycling equipment in accordance with manufacturer specifications to ensure that the equipment performs as specified; (2) repair leaks in storage, recovery, recycling, or charging equipment used with regulated substances before use; and (3) ensure that cross-contamination does not occur through the mixing of regulated substances that may be contained in similar cylinders.

(d) Any person who employs fire suppression technicians who install, service, repair, or dispose of fire suppression equipment containing regulated substances shall train technicians hired on or before January 1, 2025, on emissions reduction of regulated substances by June 1, 2025. Fire suppression technicians hired after January 1, 2025, shall be trained regarding emissions reduction of regulated substances within 30 days of hiring, or by June 1, 2025, whichever is later.

(1) The fire suppression technician training shall cover an explanation of the purpose of the training requirement, including the significance of minimizing releases of HFCs and ensuring technician safety, (b) an overview of regulated substances and environmental concerns with regulated substances, including other federal, state, local, or Tribal fire, building, safety, and environmental codes and standards, (c) a review of relevant regulations concerning regulated substances, including the requirements of the regulated substances emissions reduction program for fire suppression equipment, and (d) specific technical instruction relevant to avoiding unnecessary emissions of regulated substances during the servicing, repair, disposal, or installation of fire suppression equipment at each individual facility.

(2) [Reserved]

(e) As of January 1, 2025, no person shall dispose of fire suppression equipment containing regulated substances except by recovering the regulated substances themselves or by arranging for the recovery of the regulated substances by a fire suppression equipment manufacturer, a distributor, or a fire suppressant recycler.

(f) As of January 1, 2025, no person shall dispose of regulated substances used as a fire suppression agent except by sending it for recycling to a fire suppressant recycler or a reclaimer certified under 40 CFR 82.164, or by arranging for its destruction using one of the controlled processes listed in § 84.29.

(g) Recordkeeping and reporting. (1) As of January 1, 2025, any person who performs first fill of fire suppression equipment, service (*e.g.,* recharge) of fire suppression equipment and/or recycles regulated substances recovered from fire suppression equipment, such as equipment manufacturers, distributors, agent suppliers or installers that recycle regulated substances must submit a report to EPA annually by February 14th of each year (covering prior year's activity from January 1 through December 31): the quantity of material (the combined mass of regulated substance and contaminants) by regulated substance broken out by sold, recovered, recycled, and virgin for the purpose of installation of new equipment and servicing and/or repair of existing fire suppression equipment; the total mass of each regulated substance broken out by sold, recovered, recycled, and virgin; and the total mass of waste products sent for disposal, along with information about the disposal facility if waste is not processed by the reporting entity. Such records must be maintained for three years in either electronic or paper format.

(2) As of January 1, 2025, any person who employs fire suppression technicians who service, repair, install, or dispose of fire suppression equipment containing regulated substances must maintain an electronic or paper copy of the fire suppression technician training used, and make available to EPA upon request a copy of the training. These entities must document that they have provided training to personnel and must maintain these records for three years in either electronic or paper format.

(3) As of January 1, 2025, owners and operators of fire suppression equipment containing regulated substances must maintain records documenting that regulated substances are recovered from the fire suppression equipment before it is sent for disposal, either by recovering the regulated substances themselves before sending the equipment for disposal or by leaving the regulated substances in the equipment and sending it for disposal to a facility, such as a fire suppression equipment manufacturer, distributor, or a fire suppressant recycler. Such records must be maintained for three years in either electronic or paper format.

§ 84.112 Reclamation.

(a) No person may sell, identify, or report refrigerant as being reclaimed for use in the installation, servicing, or repair of refrigerant-containing equipment if the regulated substance component of the resulting refrigerant contains more than 15 percent, by weight, of virgin regulated substance.

(b) No person may sell, identify, or report refrigerant as being reclaimed if it contains any recovered regulated substance that has not had bona fide use in equipment, unless that refrigerant was removed from the heel or residue of a container that had a bona fide use in the servicing, repair, or installation of refrigerant-containing equipment.

(c) Labeling. As of January 1, 2026, reclaimers certified under 40 CFR 82.164 must affix a label to any container being sold or distributed or offered for sale or distribution that contain reclaimed regulated substances to certify that the contents do not exceed 15 percent, by weight, of virgin regulated substances.

(1) The label must read: ''The contents of this container do exceed the limit on virgin regulated substance per *40 CFR 84.112(a).*''

(2) The label must be:

(i) In English;

(ii) Durable and printed or otherwise labeled on, or affixed to, an external surface of the container;

(iii) Readily visible and legible;

(iv) Able to withstand open weather exposure without a substantial reduction in visibility or legibility; and

(v) Displayed on a background of contrasting color.

(d) Recordkeeping. As of January 1, 2026, reclaimers certified under 40 CFR 82.164 must generate a record to certify that the reclaimed regulated substances being used to fill a container that will be sold or distributed or offered for sale or distribution do not exceed 15 percent, by weight, of virgin regulated substances.

(1) The record must be generated electronically, in a format specified by EPA.

(2) The record must contain the following information:

(i) the name, address, contact person, email address, and phone number of the reclaimer certified under 40 CFR 82.164;

(ii) the date the container was filled with reclaimed regulated substance(s);

(iii) the amount and name of the regulated substance(s) in the container(s);

(iv) certification that the contents of the container are from a batch where the amount of virgin regulated substances does not exceed 15 percent, by weight, of the total regulated substances;

(v) the unique serial number associated with the container(s) filled from the batch;

(vi) identification of the batch of reclaimed regulated substances used to fill the container(s); and

(vii) the percent, by weight, of virgin regulated substance(s) in the batch used to fill the container(s).

(3) The record must be maintained by the reclaimer certified under 40 CFR 82.164 for three years.

(e) As of January 1, 2028, reclaimed refrigerant must be used for the initial charge, whether charged in a factory or in the field, for new refrigerant-containing equipment that is installed in the United States in the following subsectors, if the refrigerant-containing equipment being charged uses a refrigerant that contains a regulated substance:

(1) Residential and light commercial air conditioning and heat pumps;

(2) Cold storage warehouses;

(3) Industrial process refrigeration;

(4) Stand-alone retail food refrigeration;

(5) Supermarkets;

(6) Refrigerated transport; and

(7) Automatic commercial ice makers.

(f) As of January 1, 2028, reclaimed refrigerant must be used when servicing and/or repairing refrigerant-containing equipment in the following subsectors, if the refrigerant-containing equipment serviced and/or repaired uses a refrigerant that contains a regulated substance:

(1) Stand-alone retail food refrigeration;

(2) Supermarket systems;

(3) Refrigerated transport; and

(4) Automatic commercial ice makers.

§ 84.114 Exemptions.

(a) The regulations under this subpart do not apply to a regulated substance or a substitute for a regulated substance that is contained in a foam.

(b) [Reserved]

§ 84.116 Requirements for disposable cylinders.

(a) As of January 1, 2025, any person who uses a disposable cylinder must send such disposable cylinder to either a reclaimer certified under 40 CFR 82.164 or fire suppressant recycler, consistent with the requirements in paragraph (b) of this section, for its remaining contents to be removed, when:

(1) The disposable cylinder contains a regulated substance;

(2) The disposable cylinder was used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment; and

(3) The person does not intend to use the disposable cylinder in future servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment.

(b) Disposable cylinders that meet the criteria in paragraphs (a)(1), (2), and (3) of this section must be sent to:

(1) A reclaimer certified under 40 CFR 82.164, if the disposable cylinder was used in the servicing, repair, or installation of refrigerant-containing equipment, or

(2) A fire suppressant recycler, if the disposable cylinder was used in the servicing, repair, or installation of fire suppression equipment.

(c) As of January 1, 2025, a reclaimer certified under 40 CFR 82.164 or a fire suppressant recycler who receives a disposable cylinder meeting the criteria in paragraphs (a)(1), (2), and (3) of this section must remove all remaining contents from the disposable cylinder prior to disposal.

(d) Small cans of refrigerant that contain no more than two pounds of refrigerant and that qualify for the exemption described in 40 CFR 82.154(c)(1)(ix) are not required to be sent to a reclaimer certified under 40 CFR 82.164 and such small cans are not required to have remaining regulated substance removed from them prior to disposal.

§ 84.118 Container tracking system.

(a) *Scope and applicability.* Machine-readable tracking identifiers may only be generated by a person that produces, imports, reclaims, recycles for fire suppression use, repackages, or fills into a container regulated substances for distribution or sale in U.S. commerce that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment and that reports to EPA consistent with paragraph (d) of this section. All containers of regulated substances that enter U.S. commerce and that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment, with the limited exceptions described in paragraph (b)(4) of this section, must have a machine-readable tracking identifier affixed to them on the following schedule:

(1) As of January 1, 2025, all containers of regulated substances imported and all containers sold or distributed or offered for sale or distribution by producers and importers that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment must have a machine-readable tracking identifier affixed on them.

(2) As of January 1, 2026, all containers of regulated substances filled and all containers sold or distributed or offered for sale or distribution that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment by all other repackagers and cylinder fillers in the United States not included in paragraph (a)(1) of this section, including reclaimers and fire suppressant recyclers, must have a machine-readable tracking identifier affixed on them.

(3) As of January 1, 2027, every container of regulated substances that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment sold or distributed, offered for sale or distribution, purchased or received, or attempted to be purchased or received must have a machine-readable tracking identifier affixed on them.

(b) *Prohibitions.* Every kilogram of regulated substances that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment that is sold or distributed, offered for sale or distribution, purchased or received, or attempted to be purchased or received in violation of this section is a separate violation of this subpart. Sale or distribution, offer for sale or distribution, purchase or receipt, or attempt to purchase or receive less than one kilogram of regulated substances in violation of this section is a separate violation of this subpart.

(1) No person may sell or distribute, or offer for sale or distribution, and no person may purchase or receive, or attempt to purchase or receive, a container of regulated substance(s) that could be used in servicing, repair, or refrigerant-containing equipment or fire suppression installation of equipment unless the container has a valid machine-readable tracking identifier affixed on it.

(2) No person may sell or distribute, or offer for sale or distribution, regulated substances that could be used in servicing, repair, or installation of

refrigerant-containing equipment or fire suppression equipment unless that person is registered with EPA consistent with paragraph (d) of this section.

(3) No person may purchase or receive, or attempt to purchase or receive, regulated substances that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment from a person that is not registered with EPA consistent with paragraph (d) of this section;

(4) The following situations are exempt from the prohibitions in paragraphs (b)(1) through (3) of this section:

(i) The regulated substances were recovered from a motor vehicle air conditioner (MVAC) or MVAC-like appliance in accordance with 40 CFR part 82, subpart B and are sold or distributed or offered for sale or distribution by the same person who recovered the regulated substances for use only in MVAC equipment or MVAC-like appliances.

(ii) The regulated substances were previously used, have been recovered from refrigerant-containing equipment or fire suppression equipment, and are intended for reclamation or fire suppressant recycling; and

(A) The person selling or distributing the regulated substances certifies in writing to the person purchasing or receiving the regulated substances that they were recovered from refrigerant-containing equipment or fire suppression equipment and provides the date of recovery; and

(B) The person purchasing or receiving the regulated substances is an EPA-certified reclaimer, a registered fire suppressant recycler consistent with paragraph (d) of this section, or a registered supplier of regulated substances consistent with paragraph (d) of this section.

(iii) The regulated substances are contained in small cans of refrigerant that contain no more than two pounds of refrigerant and that qualify for the exemption described in 40 CFR 82.154(c)(1)(ix).

(iv) The regulated substances are intended solely for uses other than in refrigerant-containing equipment or fire suppression equipment.

(c) *Required practices.* The following practices are required, unless listed in paragraph (b)(4) of this section:

(1) Any person producing, importing, reclaiming, recycling for fire suppression uses, repackaging, selling or distributing, or offering to sell or distribute regulated substances that could be used in servicing, repair, or installation of refrigerant-containing or fire suppression equipment must register with EPA consistent with paragraph (d) of this section.

(2) Any person who imports, sells, or distributes, or offers for sale or distribution a container of regulated substance or reclaimed regulated substance that could be used in servicing, repair, or installation of any refrigerant-containing or fire suppression equipment, or recycled regulated substances that could be used in servicing, repair, or installation of fire suppression equipment, must permanently affix a machine-readable tracking identifier to the container using the standards defined by EPA prior to the import, sale or distribution, or offer for sale or distribution of the container. For the purposes of this section, examples of when a container of regulated substances, reclaimed regulated substances, or recycled regulated substances is imported, sold or distributed, or offered for sale or distribution include the date of importation (consistent with 19 CFR 101.1) and departure from a production, reclamation, fire suppressant recycling, repackaging or filling facility.

(3) At the time of sale or distribution or offer for sale or distribution, a person selling or distributing or offering for sale or distribution a container of regulated substance that could be used in servicing, repair, or installation of refrigerant-containing or fire suppression equipment must ensure there is a valid and legible machine-readable tracking identifier on each container of regulated substance, scan the machine-readable tracking identifier to identify a transaction, identify the person receiving the regulated substance, and indicate whether the person receiving the regulated substance is a supplier or final customer.

(4) At the time of sale or distribution, a person taking ownership of a container of regulated substance that is a registered supplier must ensure there is a valid and legible machine-readable tracking identifier on each container of regulated substance and scan the machine-readable tracking identifier in the tracking system to identify a transaction.

(d) *Recordkeeping and reporting.*

(1) *Importers.* Any person importing a container of regulated substance that could be used in servicing, repair, or installation of refrigerant-containing or fire suppression equipment must enter the following information in the tracking system to generate a machine-readable tracking identifier for each container of regulated substance imported: the name or brand the regulated substance is being sold and/or marketed under, the date it was imported, the unique serial number associated with the container, the size of the container, the amount and name of the regulated substance(s) in the container, the name, address, contact person, email address, and phone number of the responsible party at the facility where the container of regulated substance(s) was filled, the entry number and entry line number associated with the import, and certification that the contents of the container match the substance(s) identified on the label.

(2) *Reclaimers.* Any person filling a container with a reclaimed regulated substance that could be used in servicing, repair, or installation of refrigerant-containing equipment must enter the following information in the tracking system to generate a machine readable-tracking identifier for each container of regulated substance sold or distributed or offered for sale or distribution: the name or brand the regulated substance is being sold and/or marketed under, when the regulated substance was reclaimed and by whom, the date the reclaimed regulated substance was put into a container, the unique serial number associated with the container, the size of the container, the amount and name of the regulated substance(s) in the container, certification that the contents of the container match the substance(s) identified on the label, and certification that the purity of the batch was confirmed to meet the specifications in appendix A to 40 CFR part 82, subpart F. If a container is filled with reclaimed and virgin regulated substance(s), the reclaimer must provide the amount of virgin regulated substance included in the container and that the contents of the container are certified per § 84.112(d).

(3) *Fire suppressant recyclers.* Any person filling a container with a recycled regulated substance that could be used in servicing, repair, or installation of fire suppression equipment must enter the following information in the tracking system to generate a machine-readable tracking identifier for each container of regulated substance sold or distributed or offered for sale or distribution: the name or brand the regulated substance is being sold and/or marketed under, the date the container was filled and by whom, the unique serial number associated with the container, the size of the container, certification that the contents of the container match the substance(s) identified on the label, and the amount and name of the regulated substance(s) in the container. If a container is filled

with recycled and virgin regulated substance(s), the recycler must provide the amount of virgin regulated substance included in the container.

(4) *Producers and repackagers.* Anyone who is filling a container, whether for the first time after production or when transferring regulated substances from one container to one or more smaller or larger containers, must enter information in the tracking system and generate a machine-readable tracking identifier for the container(s) of packaged regulated substances that could be used in servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment that are sold or distributed or offered for sale or distribution: the name or brand the regulated substance is being sold and/or marketed under, the date the container was filled and by whom, the unique serial number associated with the container, the amount and name of the regulated substance(s) in the container, the quantity of containers it was packaged in, the size of the containers, certification that the contents of the container match the substance(s) identified on the label, and the name, address, contact person, email address, and phone number of the responsible party at the facility where the container(s) were filled.

(5) *Machine-readable tracking identifier generators registration.* Any person who produces, imports, reclaims, recycles for fire suppression uses, repackages or fills a container of regulated substances or reclaimed regulated substances that could be used in servicing, repair, or installation of refrigerant-containing equipment or recycled regulated substances that could be used in the servicing, repair, or installation of fire suppression equipment must register with EPA in the tracking system no later than the first time they would be required to generate a machine-readable tracking identifier. The registration information provided must contain the name and address of the company, contact information for the owner of the company, the date(s) of and State(s) in which the company is incorporated and State license identifier(s), the address of each facility that sells or distributes or offers for sale or distribution regulated substances, and how the company introduces regulated substances into U.S. commerce. If any of the registration information changes, these reports must be updated and resubmitted within 60 days of the change.

(6) *Supplier registration.* Any person who sells, distributes, or offers for sale or distribution, regulated substances that could be used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment must register with EPA in the tracking system no later than first time the person would be required to update tracking information in the system. The registration information provided must contain the name and address of the company, contact information for the owner of the company, the date(s) of and State(s) in which the company is incorporated and State license identifier(s), and the address of each facility that sells or distributes regulated substances. If any of the registration information changes, these reports must be updated and resubmitted within 60 days of the change.

§ 84.120 Container tracking of used cylinders.

(a) Scope and applicability. Cylinders that contain regulated substances and that have been used in the servicing, repair, or installation of refrigerant-containing equipment or fire suppression equipment and that have a machine-readable tracking identifier affixed on them are subject to the following tracking requirements, as applicable, as of January 1, 2026:

(1) Any person receiving a cylinder subject to requirements under paragraph (a) of this section must be registered in the tracking system no later than the first time they would be required to update information in the tracking system.

(2) [Reserved]

(b) Disposable cylinders. (1) *Reclaimers and fire suppressant recyclers.*

(i) Upon receipt of a disposable cylinder meeting the applicability criteria in paragraph (a) of this section, reclaimers certified under 40 CFR 82.164 and fire suppressant recyclers must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the disposable cylinder was received and the name, address, contact person, email address, and phone number of the person who sent the disposable cylinder.

(ii) Upon removal of any remaining regulated substance from the disposable cylinder meeting the applicability criteria in paragraph (a) of this section, reclaimers certified under 40 CFR 82.164 and fire suppressant recyclers must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date that the regulated substances were removed from the disposable cylinder; certification that all regulated substances were removed; and the amount and name of the removed regulated substance(s).

(2) *Suppliers.* (i) Upon receipt of a disposable cylinder meeting the applicability criteria in paragraph (a) of this section, distributors and wholesalers must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the disposable cylinder was received and the name, address, contact person, email address, and phone number of the person who sent the disposable cylinder.

(ii) [Reserved]

(c) Refillable cylinders. (1) *Exemptions.*

(i) Refillable cylinders that contain only regulated substances that were previously used and have been recovered refrigerant-containing equipment or fire suppression equipment and are intended for reclamation or fire suppressant recycling are exempt from the requirements under this section.

(ii) [Reserved]

(2) *Reclaimers and fire suppressant recyclers.*

(i) Upon receipt of a refillable cylinder meeting the applicability criteria in paragraph (a) of this section, reclaimers certified under 40 CFR 82.164 and fire suppressant recyclers must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the refillable cylinder was received and the name, address, contact person, email address, and phone number of the person who sent the refillable cylinder.

(ii) Upon removal of any remaining regulated substance from the refillable cylinder meeting the applicability criteria in paragraph (a) of this section, reclaimers certified under 40 CFR 82.164 and fire suppressant recyclers must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the remaining regulated substance was removed from the refillable cylinder, certification that all remaining regulated substances were removed, and the amount and name of the removed regulated substance.

(3) *Suppliers.* (i) Upon receipt of a refillable cylinder meeting the applicability criteria in paragraph (a) of this section, distributors and wholesalers must scan the machine-readable tracking identifier affixed to the cylinder and update the following

information in the tracking system: the date the refillable cylinder was received and the name, address, contact person, email address, and phone number of the person who sent the refillable cylinder.

(ii) [Reserved]

(4) Any person, other than those meeting the requirements per paragraphs (c)(2)(i) and (ii) of this section, who refills a refillable cylinder with regulated substances or a blend containing regulated substances, is subject to the following requirements:

(i) Upon receipt of a refillable cylinder meeting the applicability criteria in paragraph (a) of this section, any person as described per paragraph (c)(4) of this section must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the refillable cylinder was received and the name, address, contact person, email address, and phone number of the person who sent the refillable cylinder.

(ii) Upon removal of any remaining regulated substance from the refillable cylinder meeting the applicability criteria in paragraph (a) of this section, any person as described per paragraph (c)(4) of this section must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the remaining regulated substances were removed from the refillable cylinder; and the amount and name of the removed regulated substance(s).

(iii) Upon refilling a refillable cylinder, without removing the remaining amount of regulated substances, meeting the applicability criteria in paragraph (a) of this section with additional regulated substance or a blend containing a regulated substance, any person as described per paragraph (c)(4) of this section must scan the machine-readable tracking identifier affixed to the cylinder and update the following information in the tracking system: the date the refillable cylinder is refilled; and the amount and the name of the regulated substance(s) that remained in the refillable cylinder before it was refilled.

(d) Small cans of refrigerant that contain no more than two pounds of regulated substances and that qualify for the exemption at 40 CFR 82.154(c)(1)(ix) are exempt from the tracking requirements under this section.

§ 84.122 Treatment of data submitted under 40 CFR part 84, subpart C.

(a) Except as otherwise provided in this section, 40 CFR 2.201 through 2.215 and 2.301 do not apply to data submitted under this subpart that EPA has determined through rulemaking to be either of the following:

(1) Emission data, as defined in 40 CFR 2.301(a)(2), determined in accordance with section 114(c) and 307(d) of the Clean Air Act; or

(2) Data not otherwise entitled to confidential treatment.

(b) Except as otherwise provided in paragraph (d) of this section, 40 CFR 2.201 through 2.208 and 2.301(c) and (d) do not apply to data submitted under this subpart that EPA has determined through rulemaking to be entitled to confidential treatment. EPA shall treat that information as confidential in accordance with the provisions of 40 CFR 2.211, subject to paragraph (d) of this section and 40 CFR 2.209.

(c) Upon receiving a request under 5 U.S.C. 552 for data submitted under this subpart that EPA has determined through rulemaking to be entitled to confidential treatment, the relevant Agency official shall furnish the requestor a notice that the information has been determined to be entitled to confidential treatment and that the request is therefore denied. The notice shall include or cite to the appropriate EPA determination.

(d) A determination made through rulemaking that information submitted under this subpart is entitled to confidential treatment shall continue in effect unless, subsequent to the confidentiality determination through rulemaking, EPA takes one of the following actions:

(1) EPA determines through a subsequent rulemaking that the information is emission data or data not otherwise entitled to confidential treatment; or

(2) The Office of General Counsel issues a final determination, based on the requirements of 5 U.S.C. 552(b)(4), stating that the information is no longer entitled to confidential treatment because of change in the applicable law or newly discovered or changed facts. Prior to making such final determination, EPA shall afford the business an opportunity to submit comments on pertinent issues in the manner described by 40 CFR 2.204(e) and 2.205(b). If, after consideration of any timely comments submitted by the business, the Office of General Counsel makes a revised final determination that the information is not entitled to confidential treatment, the relevant agency official will notify the business in accordance with the procedures described in 40 CFR 2.205(f)(2).

§ 84.124 Relationship to other laws.

Section (k) of the AIM Act states that sections 113, 114, 304, and 307 of the Clean Air Act (42 U.S.C. 7413, 7414, 7604, 7607) shall apply to this section and any rule, rulemaking, or regulation promulgated by the Administrator pursuant to this section as though this section were expressly included in title VI of that Act (42 U.S.C. 7671 *et seq.*). Violation of this part is subject to Federal enforcement and the penalties laid out in section 113 of the Clean Air Act.

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

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

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

Subpart A—General

■ 4. In § 261.6, revise paragraph (a)(2) and add paragraph (a)(2)(v) to read as follows:

§ 261.6 Requirements for recyclable materials.

(a) * * *

(2) The following recyclable materials are not subject to the requirements of this section but are regulated under subparts C through Q of part 266 of this chapter and all applicable provisions in parts 268, 270, and 124 of this chapter.

* * * * *

(v) Ignitable spent refrigerants recycled for reuse (40 CFR part 266, subpart Q).

* * * * *

Subpart M—Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials

■ 5. In § 261.400, revise the introductory text and add paragraph (c) to read as follows:

§ 261.400 Applicability.

The requirements of this subpart apply to those areas of an entity managing hazardous secondary materials excluded under § 261.4(a)(23), (a)(24), and/or, for ignitable spent refrigerants, regulated under the alternative standards at § 266 subpart Q, where hazardous secondary materials are generated or accumulated on site.

* * * * *

(c) Reclamation facilities receiving refrigerant from off-site to be recycled for reuse under § 266 subpart Q must comply with §§ 261.410 and 261.420.

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

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

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

Subpart A—General

■ 7. In § 262.14, revise paragraph (a)(5)(vi) to read as follows:

§ 262.14 Conditions for exemption for a very small quantity generator.

(a) * * *

(5) * * *

(vi) A facility which:

(A) Beneficially uses or reuses, or legitimately recycles or reclaims its waste; or

(B) Treats its waste prior to beneficial use or reuse, or legitimate recycling or reclamation; and

(C) For ignitable spent refrigerants regulated under part 266 subpart Q, meets the requirements of that subpart; or

* * * * *

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

■ 8. The authority citation for part 266 continues to read as follows:

Authority: 42 U.S.C. 1006, 2002(a), 3001–3009, 3014, 3017, 6905, 6906, 6912, 6921, 6922, 6924–6927, 6934, and 6937.

■ 9. Add to part 266, subpart Q consisting of §§ 266.600 through 266.602 to read as follows:

Subpart Q—Ignitable Spent Refrigerants Recycled for Reuse

Sec.

§ 266.600 Purpose and applicability.

(a) The purpose of this subpart is to reduce emissions of ignitable spent refrigerants to the lowest achievable level by maximizing the recovery and safe recycling for reuse of such refrigerants during the maintenance, service, repair, and disposal of appliances.

(b) The requirements of this subpart operate in lieu of parts 262 through 270 and apply to lower flammability spent refrigerants, as defined in § 266.601, where the refrigerant exhibits the hazardous waste characteristic of ignitability per § 261.21 and is being recycled for reuse in the U.S.

(c) These requirements do not apply to other ignitable spent refrigerants. Ignitable spent refrigerants not subject to this subpart are subject to all applicable requirements of parts 262 through 270 when recovered (*i.e.,* removed from an appliance and stored in an external container) and/or disposed of.

§ 266.601 Definitions for this subpart.

For the purposes of this subpart, the following terms have the meanings given below:

(a) *Refrigerant* has the same meaning as defined in 40 CFR 82.152.

(b) *Recycle for reuse,* when referring to an ignitable spent refrigerant, means to process the refrigerant to remove contamination and prepare it to be used again. ''Recycle for reuse'' does not include recycling that involves burning for energy recovery or use in a manner constituting disposal as defined in § 261.2(c), or sham recycling as defined in § 261.2(g).

(c) *Lower flammability spent refrigerant* means a spent refrigerant that does not have a flammability classification of 3 (highly flammable) under the most recent edition of ANSI/ASHRAE Standard 34 *Designation and Safety Classification of Refrigerants.*

§ 266.602 Standards for facilities that recycle ignitable spent refrigerant for reuse under this subpart.

(a) Persons who recycle ignitable spent refrigerants for reuse either on-site for further use in equipment of the same owner, or in compliance with motor vehicle air conditioner (MVAC) standards in 40 CFR part 82, subpart B must:

(1) Recover (*i.e.,* remove from an appliance and store in an external container) and/or recycle for reuse the ignitable spent refrigerant using equipment that is certified for that type of refrigerant and appliance under § 82.36 and 82.158; and

(2) Not speculatively accumulate the ignitable spent refrigerant per § 261.1(c).

(b) Persons receiving refrigerant from off-site to be recycled for reuse under this subpart must:

(1) Maintain certification by EPA under § 82.164,

(2) Meet the emergency preparedness and response requirements of 40 CFR part 261, subpart M; and

(3) Not speculatively accumulate the ignitable spent refrigerant per § 261.1(c).

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

■ 10. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

Subpart A—General Information

■ 11. In § 270.1, add paragraph (c)(2)(xi) to read as follows:

§ 270.1 Purpose and scope of the regulations in this part.

* * * * *

(c) * * *

(2) * * *

(xi) Recyclers of ignitable spent refrigerants subject to regulation under 40 CFR part 266, subpart Q.

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

■ 12. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6926, and 6939g.

Subpart A—Requirements for Final Authorization

■ 13. Amend § 271.1 by:

■ a. In table 1 in paragraph (j)(2) adding the entry ''[Date of publication of the final rule in the **Federal Register**]'' in chronological order.

■ b. In table 2 in paragraph (j)(2) adding the entry ''[Date of publication of the final rule in the **Federal Register**]'' in chronological order.

The additions read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

(2) * * *

TABLE 1—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	**Federal Register** reference	Effective date
* *	* *	* *	* *
[Date of publication of the final rule in the **Federal Register**].	Standards for the Management of Ignitable Spent Refrigerants Recycled for Reuse.	[**Federal Register** citation of the final rule].	[Date of publication of the final rule in the **Federal Register**].

[1] These regulations implement HSWA only to the extent that they apply to tank systems owned or operated by small quantity generators, establish leak detection requirements for all new underground tank systems, and establish permitting standards for underground tank systems that cannot be entered for inspection.
[2] These regulations, including test methods for benzo(k)fluoranthene and technical standards for drip pads, implement HSWA only to the extent that they apply to the listing of Hazardous Waste No. F032, and wastes that are hazardous because they exhibit the Toxicity Characteristic. These regulations, including test methods for benzo(k)fluoranthene and technical standards for drip pads, do not implement HSWA to the extent that they apply to the listings of Hazardous Waste Nos. F034 and F035.
[3] The following portions of this rule are not HSWA regulations: §§ 264.19 and 265.19 for final covers.
[4] The following portions of this rule are not HSWA regulations: §§ 260.30, 260.31, 261.2.
[5] These regulations implement HSWA only to the extent that they apply to the standards for staging piles and to §§ 264.1(j) and 264.101(d) of this chapter.

TABLE 2—SELF-IMPLEMENTING PROVISIONS OF THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Effective date	Self-implementing provision	RCRA citation	**Federal Register** reference
* *	* *	*	* *
[Date of publication of the final rule in the **Federal Register**].	Standards for the Management of Ignitable Spent Refrigerants Recycled for Reuse.	3001(d)(4), 3004(n)	[**Federal Register** citation of the final rule].

[1] Note that the effective date was changed to Jan. 29, 1986 by the Nov. 29, 1985 rule.
[2] Note that the effective date was changed to Sept. 22, 1986 by the Mar. 24, 1986 rule.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 679
Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon; Amendment 16; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 679

[Docket No. 231005–0237]

RIN 0648–BM42

Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon; Amendment 16

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

ACTION: Proposed rule; notice of availability of a fishery management plan amendment; request for comments.

SUMMARY: NMFS proposes Amendment 16 to the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone (EEZ) Off Alaska (Salmon FMP) and associated implementing regulations. If approved, Amendment 16 and this proposed rule would establish Federal fishery management for all salmon fishing that occurs in the Cook Inlet EEZ, which includes commercial drift gillnet and recreational salmon fishery sectors. This action is necessary to comply with rulings from the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Alaska, and to ensure the Salmon FMP is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This action is intended to promote the goals and objectives of the Magnuson-Stevens Act, the Salmon FMP, and other applicable laws.

DATES: Submit comments on or before December 18, 2023.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2023–0065, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0065 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of proposed Amendment 16; the Environmental Assessment, the Regulatory Impact Review, and the Social Impact Analysis (contained in a single document and collectively referred to as the ''Analysis''); and the draft Finding of No Significant Impact prepared for this action may be obtained from *http://www.regulations.gov* or from the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/region/alaska.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS at the above address and to *https://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: Doug Duncan, 907–586–7228 or *doug.duncan@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for Action

NMFS manages U.S. salmon fisheries off of Alaska under the Salmon FMP. The North Pacific Fishery Management Council (Council) prepared, and the Secretary of Commerce (Secretary) approved, the Salmon FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the Salmon FMP are located at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600. NMFS is authorized to prepare an FMP amendment necessary for the conservation and management of a fishery managed under the FMP if the Council fails to develop and submit such an amendment after a reasonable period of time (section 304(c)(1)(A); 16 U.S.C 1854(c)(1)(A)). Because the Council failed to take action to recommend a required FMP amendment in time for NMFS to implement it by a court-ordered deadline, NMFS developed a Secretarial FMP amendment and this proposed rule.

NMFS has determined that it is necessary and appropriate, under section 304(c)(1)(A) of the Magnuson-Stevens Act, to develop a Secretarial amendment—Amendment 16 to the Salmon FMP—and proposed regulations in order to comply with rulings from the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Alaska, and to ensure the Salmon FMP is consistent with the Magnuson-Stevens Act. Amendment 16 would incorporate the Cook Inlet EEZ Area (defined as the EEZ waters of Cook Inlet north of a line at 59°46.15′ N) into the Salmon FMP's Fishery Management Unit. This proposed rule would implement Amendment 16. Amendment 16 adds another management area to the Salmon FMP in addition to the existing West Area and East Area. This action would not modify management of the West Area and East Area.

NMFS is soliciting public comments on Amendment 16 and this proposed rule. All relevant written comments received by the end of the comment period for this action (See **DATES**), whether specifically directed to the proposed FMP amendment or the implementing regulations, will be considered by NMFS in deciding whether to adopt and implement Amendment 16.

Amendment 16 Overview

This action, if approved, would incorporate the Cook Inlet EEZ into the Salmon FMP as the Cook Inlet EEZ Area, thereby bringing the salmon fishery that occurs within it under Federal management by the Council and NMFS.

Two different sectors participate in the Cook Inlet EEZ Area salmon fishery: the commercial drift gillnet sector and the recreational sector. The commercial drift gillnet fleet harvests over 99.99 percent of salmon in the Cook Inlet EEZ Area. Currently, both drift gillnet and recreational salmon fishing occur in the State and EEZ waters of Cook Inlet under State management without regard to the boundary between State and Federal waters. Under this action, the Cook Inlet EEZ salmon fishery will be managed by NMFS and the Council separately from adjacent State water salmon fisheries.

Amendment 16 would revise the Salmon FMP, beginning with an updated history of the FMP and introduction in Chapter 1, as well as a revised description of the fishery management unit in Chapter 2 that would include the Cook Inlet EEZ Area as a separate and distinctly managed

area. The management and policy objectives in Chapter 2 would also be revised to include consideration of the Cook Inlet EEZ Area. Current chapters describing management of the Salmon FMP's East Area and West Area would be consolidated into Chapter 3. No substantive changes would be made to Salmon FMP content related to the East Area and West Area.

A new Chapter 4 would include a comprehensive description of Federal management for the Cook Inlet EEZ Area. This chapter would describe management measures and the roles and responsibilities of NMFS and the Council in managing the Cook Inlet EEZ Area salmon fishery. Centrally, Chapter 4 would include descriptions of all conservation and management measures, including maximum sustainable yield (MSY), optimum yield (OY), status determination criteria, and an outline of the harvest specifications process. Chapter 4 would also describe authorized fishery management measures and authorities including required Federal permits; fishing gear restrictions; fishing time and area restrictions; NMFS inseason management provisions; and monitoring, recordkeeping, and reporting requirements, as well as information about ongoing Council review of the FMP.

Chapter 5 would contain all content related to domestic annual harvesting and processing capacity, which indicates that all salmon fisheries off Alaska can be fully utilized by U.S. harvesters and processors, which is unchanged by this action.

Chapter 6 contains information on Essential Fish Habitat and Habitat Areas of Particular Concern and would not be modified by this action. Amendment 16 would remove the outdated Fishery Impact Statement in the Salmon FMP. The Analysis prepared for Amendment 16 contains the Fishery Impact Statement for the Cook Inlet EEZ salmon fishery and this action.

History of the Salmon FMP

The Council's Salmon FMP manages the Pacific salmon fisheries in the EEZ from 3 nautical miles (nmi) to 200 nmi off Alaska. The Council developed the Salmon FMP under the Magnuson-Stevens Act, and it first became effective in 1979. The Salmon FMP was comprehensively revised by Amendment 3 in 1990 (55 FR 47773, November 15, 1990) and again by Amendment 12 in 2012 (77 FR 75570, December 21, 2012).

Since 1979, the Council has divided the Salmon FMP's coverage into the West Area and the East Area, with the boundary between the two areas at Cape Suckling, at 143°53.6′ W longitude. Prior to Amendment 12, the Salmon FMP authorized commercial fishing in the East Area, recreational salmon fishing in both areas, and prohibited commercial salmon fishing in the West Area. However, the commercial salmon fishing prohibition in the West Area was not applied to three adjacent areas of the EEZ where commercial salmon fishing with nets was originally authorized by the International Convention for the High Seas Fisheries of the North Pacific Ocean, as implemented by the North Pacific Fisheries Act of 1954 (1954 Act). The Salmon FMP referred to the three areas of the EEZ where commercial net fishing for salmon occurs as the ''Cook Inlet EEZ,'' the ''Alaska Peninsula EEZ,'' and the ''Prince William Sound EEZ,'' and collectively as the ''traditional net fishing areas.'' Under the authority of the 1954 Act, NMFS issued regulations that set the outside fishing boundaries for the traditional net fishing areas as those set forth under State of Alaska (State) regulations and stated that any fishing in these areas was to be conducted pursuant to State regulations.

In 1990, the Council amended the Salmon FMP, continuing to prohibit commercial salmon fishing with nets in the EEZ, with the exception of the traditional net fishing areas managed by the State. The next major modification to the Salmon FMP occurred when the Council recommended Amendment 12 in December 2011. In developing Amendment 12, the Council recognized that the law governing the three traditional net fishing areas (the 1954 Act) had changed and the Salmon FMP was vague with respect to Federal management of the traditional net fishing areas. After considering various alternatives, the Council recommended and NMFS approved Amendment 12, which removed the three traditional net fishing areas from the Salmon FMP's Fishery Management Unit.

By removing the traditional net fishing areas from the Salmon FMP's West Area, the Council intended for the State to continue managing these areas, which the State has done since before the inception of the Salmon FMP in 1979. In developing Amendment 12, the Council considered recommending Federal management of salmon fishing in the three traditional net fishing areas, but determined that (1) the State was managing the salmon fisheries within these three areas consistent with the policies and standards of the Magnuson-Stevens Act, (2) the Council and NMFS did not have the expertise or infrastructure (such as personnel, monitoring and reporting systems, and processes for salmon stock assessments) to manage Alaska salmon fisheries, and (3) Federal management of these areas would not serve a useful purpose or provide additional benefits and protections to the salmon fisheries within these areas. The Council recognized that salmon are best managed as a unit throughout their range and determined that dividing management into two separate salmon fishery jurisdictions—State and Federal—would not be optimal. The Council also recognized the State's expertise and well-developed management infrastructure from managing the salmon fisheries in Alaska since Statehood. The Council determined that Amendment 12 was consistent with the management approach established in the original Salmon FMP in 1979.

The final rule implementing Amendment 12 was published in the **Federal Register** on December 21, 2012 (77 FR 75570). On January 18, 2013, Cook Inlet commercial salmon fishermen and seafood processors filed a lawsuit challenging Amendment 12 and its implementing regulations. In *United Cook Inlet Drift Ass'n* v. *NMFS,* 2014 WL 10988279 (D. Alaska 2014), the district court held that Amendment 12's removal of the Cook Inlet EEZ from the Salmon FMP was lawful. On appeal, the Ninth Circuit held that section 302(h)(1) of the Magnuson-Stevens Act (16 U.S.C. 1852(h)(1)) clearly and unambiguously requires a Council to prepare and submit FMPs for each fishery under its authority that requires conservation and management. *United Cook Inlet Drift Ass'n* v. *NMFS,* 837 F.3d 1055, 1065 (9th Cir. 2016). Because NMFS determined that the Cook Inlet EEZ salmon fishery requires conservation and management by some entity, the Ninth Circuit ruled that it must be included in the Salmon FMP.

Developing Management Alternatives for Amendment 14

In response to the Ninth Circuit's ruling, the Council began work on Amendment 14. Because the history of Amendment 14 is integral to the need for and development of this action, a brief history is provided here. The Council worked from 2017 to 2020 developing and evaluating management alternatives for Amendment 14. The Council broadly identified two management approaches to amend the FMP to include the Cook Inlet EEZ: one that would delegate authority over specific management measures to the State with review and oversight by the Council, and one that would retain all management within the Federal process.

The Council also formed the Cook Inlet Salmon Committee (Committee), consisting of Cook Inlet salmon fishery stakeholders tasked with developing recommendations for management of the fishery. The Committee proposed delegating management to the State, but with expanded Federal oversight and a management scope that included State marine and fresh waters in addition to the EEZ waters of Cook Inlet. This recommendation was not carried forward for further consideration because NMFS does not have jurisdiction over State waters.

Generally, information in the analysis prepared for Amendment 14 indicated that Federal management would be unlikely to appreciably change salmon conservation metrics and thresholds established in Cook Inlet, but would increase costs, complexity, and management uncertainty without corresponding benefits. While the Council identified some flexibility with the specific management measures that could be implemented under either Federal management approach, neither the Council, NMFS, the State, nor stakeholders identified a fundamentally different management approach that could satisfy the Ninth Circuit ruling, the Magnuson-Stevens Act, and other applicable law.

After the State announced it would not accept delegated management authority for Cook Inlet, the Council ultimately recommended expanding the existing adjacent West Area to include the Cook Inlet EEZ, thereby incorporating the Cook Inlet EEZ into the Salmon FMP and closing the area to commercial salmon fishing. In short, the rationale was that closure was a precautionary management approach, consistent with management throughout the West Area, avoided significantly increased costs and uncertainty, and drift gillnet fishing could continue entirely within State waters. On November 3, 2021, NMFS published a final rule to implement Amendment 14 to the Salmon FMP (86 FR 60568, November 3, 2021).

Amendment 14 was challenged by Cook Inlet commercial salmon fishermen before the first fishing season. On June 21, 2022, the U.S. District Court for the District of Alaska vacated the implementing regulations for Amendment 14. *United Cook Inlet Drift Ass'n* v. *NMFS,* 2022 WL 2222879 (D. Alaska 2022). The Court found that the final rule was arbitrary and capricious, in part because NMFS failed to include management measures for the Cook Inlet EEZ recreational fishery in the FMP and because the Court determined the rule still implicitly deferred too much management authority to the State of Alaska without formally delegating such authority. *Id.* at *8–*9, *13–*15. The Court later ordered NMFS to promulgate a new FMP amendment to federally manage the Cook Inlet EEZ in accordance with the Magnuson-Stevens Act by May 1, 2024. The 2022 and 2023 Cook Inlet EEZ fishing seasons were managed by the State under pre-Amendment 14 conditions.

Now, NMFS proposes Amendment 16 and implementing regulations that would federally manage all Cook Inlet EEZ salmon fishing, consistent with the Magnuson-Stevens Act and the decisions of the Ninth Circuit and the District Court.

Developing Management Alternatives for Amendment 16

In response to the District Court's ruling, at its first meeting since the ruling (October 2022), the Council initiated an analysis for a new amendment to the Salmon FMP for initial review at its December 2022 meeting. The Amendment 14 analysis was used as a basis for developing Amendment 16 because it contained the reasonable range of potential management alternatives. NMFS informed the Council that it would need to make a recommendation at its April 2023 meeting to allow NMFS sufficient time to implement a new FMP amendment by the Court's deadline.

The Council reviewed the updated analysis at its December 2022 meeting, and after considering public comment tasked staff with analyzing four alternatives for final action: Alternative 1 (status quo), Alternative 2 (delegated Federal management), Alternative 3 (Federal management), and Alternative 4 (Federal closure). NMFS, the Council, and the public did not identify any fundamentally new alternatives. The Council requested staff analyze Alternative 2 and Alternative 3, include management measures for the recreational salmon fishery sector, and identify any possible variations in management approaches under either alternative. Alternative 1 and Alternative 4 were not viable options because of the courts' rulings, but were retained for analytical comparison.

Prior to the scheduled Council final action in April 2023, staff worked to improve Alternative 2 and Alternative 3. For Alternative 2, this included work to identify any added flexibilities under delegated management that might make delegation more appealing to the State while still complying with all Magnuson-Stevens Act requirements. Previously, the State has expressed concerns over (1) the resources needed to manage fishing in the EEZ through the Council process (in addition to its Board of Fisheries process), and (2) Council review of State management targets that would be used to manage both the EEZ and State water fisheries that are not subject to the Magnuson-Stevens Act. A fundamental constraint for delegated management under the Magnuson-Stevens Act is that neither the Council nor the Secretary can force the State to accept delegated management authority. Though some additional flexibilities were identified in the analysis, ultimately the State still declined to accept a delegation of management authority for the fishery.

Alternative 3 was further refined to address concerns expressed by fishery stakeholders and the Council. The proposed management policy and objectives were updated to more closely reflect and balance the Council's approach to salmon management with the proposed Federal responsibilities under Alternative 3. Options for NMFS to prepare the fishery stock assessments and a multi-year harvest specification process were also evaluated in an effort to increase efficiency. Generally, the description of management measures was refined and improved to describe the most practicable management regime. This included the addition of a potential season closure date, expected Federal regulatory prohibitions, and proposed legal drift gillnet gear configurations.

During the Council process, Cook Inlet drift gillnet fishery stakeholders generally expressed their perspective that this action, and all Magnuson-Stevens Act requirements, must be applied to both the Federal and State waters of Cook Inlet. However, under the Magnuson-Stevens Act, there is only one narrow authority for NMFS to extend Federal jurisdiction into State waters. In order for a Federal FMP to govern fisheries occurring within State marine waters, both of the following conditions must be met under Magnuson-Stevens Act section 306(b) (16 U.S.C. 1856(b)): (1) the fishery must occur predominantly within the EEZ, and (2) State management must substantially and adversely affect the carrying out of the FMP. As approximately 75 percent of the total annual upper Cook Inlet salmon harvest occurs within State waters, there is no authority for NMFS to assert management authority over the State water salmon fisheries in Cook Inlet. In addition, even when the two conditions above are met, under no circumstance does NMFS or the Council have authority to manage fishing within State internal waters where salmon spawning

takes place (*i.e.,* landward of the coastline).

Further, NMFS interprets Magnuson-Stevens Act language conferring ''exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources'' as granting NMFS jurisdiction to manage salmon further than 200 nmi from shore—*i.e.,* beyond sovereign jurisdictional limits—rather than within 3nmi. The Magnuson-Stevens Act acknowledges that marine waters from the Alaskan coastline out to 3 nmi are under State jurisdiction (16 U.S.C. 1801(b)(1)) and provides for Federal management of those waters only when specific requirements described above are met, as they are not here. Therefore, Federal authority to manage Cook Inlet salmon fishing is limited to EEZ waters. Of course, to manage the EEZ NMFS must and would, pursuant to Amendment 16, consider the condition of salmon stocks as a whole and the impacts that State salmon fisheries have on management of the EEZ. But NMFS lacks statutory authority to establish harvest limits or implement a harvest strategy that applies in State waters.

As most public commenters during the Council process emphasized, the jurisdictional issues in Cook Inlet are challenging because salmon are harvested in both State and Federal waters but originate from the same stocks that spawn entirely in State freshwaters. This makes separately managed State and Federal fisheries complex. Stakeholders and the Council noted with near unanimity that the State has significantly better tools, data, flexibility, and experience for inseason management of Cook Inlet salmon fisheries. NMFS agrees with this assessment. NMFS would have preferred delegated management under Alternative 2 so that State expertise and flexibility could be directly utilized for management of the Cook Inlet EEZ Area. The State has more than 60 years of experience managing salmon fisheries in Cook Inlet while NMFS has no prior experience managing these fisheries. However, because, pursuant to court order, the Cook Inlet EEZ must be managed under the FMP and the State declined to accept delegated management, the only remaining option was to create a new fishery in the Cook Inlet EEZ managed by the Council and NMFS.

Another concern of stakeholders was transitioning from a management system that could most quickly open and close an EEZ fishery based on real-time escapement data to one with established annual catch limits (ACLs). Federal salmon management challenges are compounded by various constraints on NMFS's management flexibility: Magnuson-Stevens Act requirements that FMPs include a mechanism to establish ACLs; and notice and publication requirements for in-season actions under the Administrative Procedure Act that NMFS must abide by for all fishery management, including management of the Cook Inlet EEZ. These requirements make it infeasible for NMFS to implement an escapement-based salmon management approach in the Cook Inlet EEZ that is identical to that currently used by the State and familiar to stakeholders.

Another consistent concern voiced by stakeholders and the Council was about the impacts and difficulty of coordinating management of salmon stocks across separate State and Federal jurisdictions. Management measures under Alternative 3 were designed, within the limits of Federal authority, to address the impacts of managing salmon fisheries across jurisdictions. Because Federal managers have less administrative flexibility and less salmon management expertise than State managers, NMFS expects initial management of the Cook Inlet EEZ to be conservative to account for the significant uncertainty and minimize the risk of overfishing. For example, all existing data on harvests in the EEZ are estimates because management and catch reporting have never differentiated between State and EEZ waters. After the implementation of Federal management, NMFS can begin collecting the data needed to address some of these uncertainties. Eventually, with better data NMFS may be able to more accurately project harvestable surpluses of salmon and liberalize future Cook Inlet EEZ Area harvests on stocks that can support additional harvest. However, NMFS does not see a way to immediately increase salmon harvests with less information, less flexibility, less expertise, more management uncertainty, and more scientific uncertainty at a time when salmon runs are experiencing significant volatility across most of Alaska and the Pacific coast. Further, no data can entirely eliminate the uncertainty associated with setting preseason catch limits—as required under the Magnuson-Stevens Act—based on run forecasts that are never perfectly accurate. Over time, management measures may be refined as Federal managers gain experience and better data is available to assess harvest and stock composition within the Cook Inlet EEZ Area.

Another central contention of drift gillnet fishery stakeholders is that NMFS must manage to achieve MSY under the Magnuson-Stevens Act, and that appropriate management targets for Cook Inlet salmon stocks are not being used. Under any management alternative, NMFS's mandate is to achieve OY and prevent overfishing, not to achieve MSY. National Standard 1 states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the OY from each fishery. Magnuson-Stevens Act section 3(33) defines ''optimum,'' with respect to the yield from a fishery, as the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities and taking into account the protection of marine ecosystems; that is prescribed on the basis of the MSY from the fishery, as reduced by any relevant economic, social, or ecological factor; and, in the case of an overfished fishery, that provides for rebuilding to a level consistent with producing the MSY in such fishery (16 U.S.C. 1802(33)). Simply put, MSY must be considered in establishing OY, but the actual management targets established for the fishery can vary considerably depending on the balancing of factors identified above. The catch limits established for federally-managed crab, groundfish, and scallop fisheries off Alaska are regularly set significantly below their respective MSY values in consideration of these factors.

Drift gillnet fishery stakeholders have also opined that because overfishing has been so rarely observed, there are no conservation concerns in Cook Inlet and therefore harvests may be increased. NMFS agrees that the State has successfully avoided overfishing over the long term. However, this is a result of proactive management that continually assesses conditions of the various stocks in Cook Inlet and implements restrictions in real time to avoid overfishing, rather than an indication that all salmon stocks are healthy and can support significant additional harvest in all instances. Additional discussion of the specific factors that may constrain harvest on healthy salmon stocks in Cook Inlet is provided below in *Cook Inlet EEZ Commercial Salmon Fishing Management Measures.*

When evaluating management alternatives, the Council also noted that Alternative 3 would have increased

costs, increased burdens on all participants, and overall decreased efficiencies relative to Alternatives 1 or 2. However, the Council did not identify any alternative solutions consistent with the applicable court decisions and did not convince the State to accept delegated management under Alternative 2. The Council failed to take necessary action to recommend management measures for the Cook Inlet EEZ salmon fishery in April 2023 and thus, to comply with the governing court order, NMFS began developing Amendment 16 and this proposed rule.

When the Secretary develops an FMP Amendment, according to section 304(c)(2)(A) of the Magnuson-Stevens Act, the Secretary must ''conduct public hearings, at appropriate times and locations in the geographical areas concerned, so as to allow interested parties an opportunity to be heard in the preparation and amendment of the plan and any regulations implementing the plan.'' In addition to the opportunities for public input provided at two Council meetings in Anchorage, AK, NMFS published a notice of a public hearing (88 FR 25382) on April 26, 2023 and held a public hearing on May 18, 2023. This public hearing was held virtually to maximize accessibility, and written public comments were accepted through May 25, 2023. Approximately 40 people attended the public hearing and NMFS received 12 written comments. Nearly all commenters were drift gillnet fishery stakeholders.

In general, drift gillnet fishery stakeholders that participated in the hearing expressed concerns about management that would establish preseason harvest limits rather than open and close the fishery throughout the fishing season based on real-time escapement data. In addition, they objected to any commercial fishery season closure date earlier than August or September, and any management that did not increase the number of weekly fishing periods over status quo, citing concerns about the economic viability of the drift gillnet fishery under conservative management, including existing State management. Participants emphasized that certain sockeye, chum, and pink salmon stocks have not been fully utilized in some years under the State management regime. NMFS took these comments into consideration during the development of Amendment 16 and this proposed rule. A more detailed description of comments received can be found in Section 1.5 of the Analysis.

NMFS also received multiple requests from tribal entities in the region for engagement meetings and consultations on the issue. NMFS held 3 tribal consultations and 3 tribal engagement sessions from February 2023 to June 2023 to provide information, receive input, and fulfill NMFS's responsibilities to conduct government to government consultations with tribes. Tribal members throughout Cook Inlet participate in all Cook Inlet salmon fisheries, including the drift gillnet, as well as other commercial, recreational, subsistence, tribal, ceremonial, educational, and personal use salmon fisheries. Participants were universally concerned about the health of Cook Inlet salmon stocks. There were discussions about the complexity of salmon management throughout Cook Inlet, including information noting that Kenai and Kasilof sockeye salmon stocks are healthy and can support additional harvest while others are severely depressed or otherwise require careful consideration. Many tribal groups expressed a particular concern about the health of Cook Inlet Chinook salmon stocks.

Throughout all of the tribal meetings, there was support for Alternatives 3 and 4, but not for Alternative 2. There was general concern about State management. Several tribal groups reported the challenges they had getting tribal priorities addressed by the State, with one group specifically citing the difficulty of getting the Ninilchik subsistence salmon fishery recognized and implemented. There was broad support for the establishment of new Federal tribal and subsistence fisheries in the Cook Inlet EEZ Area. Some also expressed the sentiment that under the existing State management regime, and likely Alternative 2, the Federal trust responsibility would be impeded by the State's involvement. Many felt that this would improve under either Alternative 3 or 4 with direct Federal management. There were divergent perspectives on possible management measures for the commercial fisheries, with some groups advocating for additional restrictions that would provide more salmon to subsistence harvesters and others requesting that current EEZ drift gillnet commercial salmon harvests be maintained or expanded. Finally, there was a general acknowledgement of the limitations of the Magnuson-Stevens Act in the context of salmon management, but tribes expressed the view that this did not absolve the Federal responsibility to work to improve the health of Cook Inlet salmon stocks.

Several tribes indicated that the window of time available was too short and did not allow sufficient time for meaningful tribal consultations, and that this action should be delayed to allow for it. NMFS noted it was unable to delay action due to the Court deadline. A more detailed summary of feedback received at meetings with tribal groups is provided in Section 1.6 of the Analysis.

Action Summary and Rationale

This action would amend the Salmon FMP and revise Federal regulations. Amendment 16 would add the Cook Inlet EEZ Area to the Salmon FMP's fishery management unit. The FMP would also be amended to include all status determination criteria required by the Magnuson-Stevens Act for determining whether a stock is overfished (in terms of biomass) or subject to overfishing (in terms of the rate of removal). Amendment 16 would describe annual management processes, including the framework approach for establishing harvest specifications. The FMP would describe management measures related to fishing time, area, gear, and permits for the Cook Inlet EEZ Area.

This proposed rule would modify Federal regulations to implement Amendment 16 by revising the definition of Salmon Management Area at 50 CFR 679.2 to redefine the Cook Inlet Area as the Cook Inlet EEZ Area and incorporate it into the Federal Salmon Management Area. This proposed rule would also create Figure 22 to 50 CFR part 679 to depict the location of the Cook Inlet EEZ Area. Regulations at 50 CFR 600.725 would be modified to authorize the use of drift gillnet gear for the Cook Inlet EEZ Area commercial salmon fishery. Existing regulations related to salmon fisheries under the Salmon FMP throughout 50 CFR 679 would be moved to Subpart J—Salmon Fishery Management beginning at 50 CFR 679.110. Management measures necessary for the Cook Inlet EEZ Area would be added to Subpart J. The following sections provide a summary of management measures that would be implemented by this proposed rule.

Maximum Sustainable Yield and Optimum Yield

Amendment 16 would amend the Salmon FMP to include definitions of MSY and OY. All FMPs must be consistent with the 10 National Standards for fishery conservation and management under the Magnuson-Stevens Act. National Standard 1 requires that fishery management measures prevent overfishing while achieving OY on a continuing basis. OY is the amount of fish that will provide the greatest overall benefit to the Nation

in terms of food production and recreational opportunities, while taking into account the protection of marine ecosystems. Establishing the biological reference points used to prevent overfishing and achieve OY is a key component of Federal management. One of the required foundational reference points is MSY, which is the largest long-term average catch that can be taken from a stock or stock complex under prevailing conditions. OY is prescribed on the basis of MSY, and MSY informs the status determination criteria that are used to determine whether a stock is overfished or subject to overfishing. MSY therefore also informs the harvest limits set to achieve OY and prevent overfishing. As further explained below, MSY is a reference point, informed by the best available scientific information, related to maximum possible sustainable removals of a stock or stock complex throughout its range. Therefore, MSY must be defined at the stock or stock complex level without reference to management jurisdictions. In contrast, OY is a long term average amount of desired yield from a particular stock or fishery and is generally set below MSY. Under Amendment 16, OY would be defined at the EEZ fishery level to both account for the interactions between salmon stocks in the ecosystem and provide Federal managers with a target that is within their control to achieve.

To have a sustainable salmon fishery, sufficient numbers of salmon from each stock must avoid harvest and reproduce (spawn) in freshwater. The number of spawning salmon is termed ''escapement'' because they have escaped capture by all fisheries and predators to spawn. Estimates of how many salmon are expected to return from a given number of spawning salmon can be developed through the long term process of comparing escapement numbers to subsequent return numbers. For most stocks, the long term management objective is to allow a range of spawners that is likely to result in the highest potential for future yield (harvest in excess of spawning escapement). There is always uncertainty in what number of spawners will result in the highest future yield because the percentage of salmon that survive is different each year due to environmental conditions, the quality of the spawning population, and other factors. As such, the same numbers of spawning salmon could produce different numbers of returning offspring in different years. Because of this, the target number of spawning salmon (escapement goal) is generally defined as a range that is likely to achieve high yields over a broad range of expected conditions.

For example, if an escapement goal range for a stock is established as 750,000 to 1,000,000 fish based on the best available scientific information, then management is adjusted to try and achieve escapement within that range each year. The escapement target is fixed regardless of any other factor, unless or until better information becomes available that would cause fishery managers to revise an escapement goal. However, because of both changes to actual escapement and the survival of salmon, the management measures required to achieve the escapement goal can be very different across years. If the survival rate of offspring is poor in any given year—perhaps due to prevailing ocean conditions that year—then it is possible that few or no returning salmon could be harvested by fisheries while still allowing sufficient numbers to spawn and achieve the escapement goal. In contrast, when the survival rate is high, then fishing opportunities can be liberalized while still meeting the escapement goal. Escapement goals are often fixed for multiple years, and are only changed when multiple additional years of spawning and returning salmon show that a different number of spawning salmon is likely to optimize yields due to changing environmental conditions, better data, or other considerations. As described in the Salmon FMP, escapement goals for each stock will be vetted through the Federal management process. Harvest specifications established under Federal management would set ACLs to achieve at least the lower bound of spawning escapement goals for each stock to provide as much harvest opportunity as possible while avoiding overfishing on all stocks.

Under the Magnuson-Stevens Act, MSY is defined as the largest long-term average catch that can be taken by the fishery under prevailing ecological, environmental conditions and fishery technological characteristics (*e.g.,* gear selectivity), and the distribution of catch among fishery sectors (50 CFR 600.310(e)(1)(i)). Under Amendment 16, MSY would be specified for salmon stocks and stock complexes in Cook Inlet, consistent with the National Standard Guidelines. MSY would be defined as the maximum potential yield, which is calculated by subtracting the lower bound of the escapement goal (or another value as recommended by the Council's Scientific and Statistical Committee (SSC) based on the best scientific information available) from the total run size for stocks where data are available. Any fish in excess of that necessary to achieve the escapement goal for each stock or stock complex are theoretically available for harvest under this definition of MSY. For stocks where escapement is not known, historical catch would be used as a proxy for MSY.

This definition of MSY is based on escapement goals established for salmon stocks in Cook Inlet, as informed by salmon stock assessments that use the best scientific information available, and undergo peer review by the Council's SSC. Escapement goals account for biological productivity and other ecological factors. Representative indicator stocks are used to determine a suitable MSY proxy for stock complexes where escapement is not directly known for each component stock. Currently, the best scientific information available to determine escapement goals for stocks in Cook Inlet are contained in the escapement goal analysis reports developed by the State of Alaska, which have been vetted by the SSC (Sections 3.1 and 12 of the Analysis). The escapement goals and catch history used to establish MSY for each stock and stock complex would continue be evaluated by the SSC during the annual stock assessment and harvest specification process and changed if necessary as new scientific information becomes available.

As discussed in Section 14 of the Analysis, prior to endorsing this definition of MSY, the SSC reviewed an independent analysis of the primary sockeye salmon stocks harvested by the fishery (Late-Run Kenai and Kasilof) that found that estimates of spawning abundance expected to maximize yield were in agreement with the State escapement goal ranges established for these stocks. Further, the SSC considered alternate analyses submitted through public comment at the Council and did not find that they provided a better estimate of MSY.

OY is another critical reference point because it defines the long-term management target for the fishery. Magnuson-Stevens Act section (3)(33) defines ''optimum,'' with respect to the yield from a fishery, as the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; that is prescribed on the basis of the MSY from the fishery, as reduced by any relevant economic, social, or ecological factor; and, in the case of an overfished fishery, that provides for rebuilding to a level

consistent with producing the MSY in such fishery. Achieving, on a continuing basis, the OY from each fishery means producing, from each stock, stock complex, or fishery, an amount of catch that is, on average, equal to the Council's specified OY; prevents overfishing; maintains the long term average biomass near or above the level expected to produce MSY; and rebuilds overfished stocks and stock complexes consistent with timing and other requirements of section 304(e)(4) of the Magnuson-Stevens Act and National Standard 1.

Because OY must be defined on the basis of MSY, the potential upper bound would be all excess yield above the lower bound of the escapement goal for each stock in the EEZ. However, because it is not possible to harvest one stock at a time in this mixed stock fishery, because there are weak stocks intermingled with stocks that regularly exceed their escapement goal, and because harvest of all Cook Inlet stocks also occurs in State marine and fresh waters, OY must be reduced from MSY to account for these various ecological, economic, and social factors. For this reason, OY would be defined at the fishery level to account for mixed stock harvest and variabilities in run strength.

Defining OY for the Cook Inlet EEZ salmon fishery is particularly challenging. Scientific information critical to defining OY for the Cook Inlet EEZ includes estimates of stock-specific historical harvests by fishery sector and escapements, as well as salmon stock assessments. All of these elements have varied substantially over time as a result of changes in salmon productivity, the relative abundance of salmon stocks, management measures intended to protect weak stocks, and management measures that have changed the allocations among salmon harvesters in Cook Inlet as the regional population has grown and fisheries have further developed.

Amendment 16 would define the OY range for the Cook Inlet EEZ salmon fisheries in the Salmon FMP as the range between the averages of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021. The intent of using averages of the years with lowest and highest years of harvests is to temper the influence of extreme events in defining OY (*e.g.,* fishery disasters at the low end, or extremely large harvests at the high end), thereby resulting in a range of harvests that are likely to be sustainable and provide the greatest net benefit to the Nation into the future. The period of time under consideration (1999–2021) represents the full range of years for which reliable estimates of Cook Inlet EEZ harvest are currently available, and represents a broad range of recent conditions in the fishery that may also be reasonably foreseeable in the future. This includes periods when State regulations allowed additional drift gillnet harvest in the Cook Inlet EEZ, as well as periods when time and area restrictions have limited harvest in the area. Harvests by the recreational sector in the area have averaged under 100 salmon per year, but are also included in the OY range. This results in a proposed OY range of approximately 291,631 to 1,551,464 salmon of all species.

This OY also reflects a range of harvests that have provided for viable fisheries in the Cook Inlet EEZ in both high and low salmon abundance years across a wide range of ecological conditions while also avoiding overfishing and achieving escapement goals for most stocks in most years. Looking at average total EEZ salmon harvest in years of high and low abundance accounts for the fact that the different stocks and species of salmon will have varying total and relative abundances each year—a high abundance year for one species may be a low abundance year for another. It also acknowledges that the Cook Inlet EEZ commercial salmon fishery sector, which harvests over 99.99 percent of salmon in the EEZ (the remaining harvest being recreational), cannot individually target strong stocks of salmon without also harvesting other stocks that may not be able to support as much harvest and still meet their escapement goal. OY would therefore be defined as the average range of target EEZ harvest across all species that maximizes fishing opportunities while preventing overfishing on any one stock. This OY range provides the greatest overall net benefits to the Nation because it would ensure sustainable stock levels throughout the ecosystem, preserve a viable commercial fishery sector that ensures continued food production, maintain a viable recreational fishing sector that attracts participants from throughout the Nation, and protect subsistence harvest opportunities.

Status Determination Criteria and Annual Catch Limits

Amendment 16 would specify objective and measurable criteria for determining when a stock or stock complex is subject to overfishing or overfished. These are referred to as status determination criteria, and are established during the harvest specification process and evaluated each year after fishing is complete.

Amendment 16 would establish a tier system to assess salmon stocks based on the amount of available information for each stock. NMFS would annually assign each salmon stock into a tier based on the best available scientific information during the harvest specifications process as follows:

- *Tier 1:* salmon stocks with escapement goals and stock-specific estimates of harvests
- *Tier 2:* salmon stocks managed as a complex, with specific salmon stocks as indicator stocks
- *Tier 3:* salmon stocks or stock complexes with no reliable estimates of escapement

The tier system uses a multi-year approach for calculating the status determination criteria. This accounts for high uncertainty in the estimate of fishery mortality in the most recent year, high stock abundance fluctuations, assessments that are not timely enough to forecast such changes, and the fact that a cohort of salmon spawned in a single year may return at different ages to be harvested or spawn.

For stocks and stock complexes where escapement is known (*e.g.,* Tier 1), or is thought to be a reliable index for the number of spawners in a stock complex (Tier 2), overfishing is defined as occurring when the fishing mortality rate in the Cook Inlet EEZ Area (F_{EEZ}) exceeds the maximum fishery mortality threshold (MFMT). The MFMT for a stock or stock complex is calculated as the sum of maximum potential yield for that stock in the EEZ for the most recent generation (*e.g.,* the most recent 5 years for sockeye salmon), divided by the sum of total run size of that stock for the most recent generation. This calculation would be used to evaluate whether overfishing occurred each year. For this definition, maximum potential yield in the EEZ means harvest in excess of the spawning escapement goal (*e.g.,* lower bound of the spawning escapement goal) when accounting for harvests in other fisheries. Escapement goals used in calculating the status determination criteria for each stock would be recommended by NMFS and adopted by the SSC based on the best scientific information available.

For Tier 3 stocks, which have no reliable estimates of escapement, overfishing would occur when harvest exceeds the overfishing limit (OFL). The OFL for Tier 3 stocks would be set as the maximum EEZ catch of the stock multiplied by the generation time (years). The result of this calculation would be compared against the

cumulative EEZ catch of the stock for the most recent generation. The SSC may recommend an alternative catch value for OFL on the basis of the best scientific information available.

Under National Standard 1, a stock or stock complex is considered ''overfished'' when its biomass declines below a minimum stock size threshold (MSST). MSST means the level of biomass below which the capacity of the stock or stock complex to produce MSY on a continuing basis has been jeopardized. Escapement is used to evaluate a salmon stock's capacity to produce MSY. For Cook Inlet salmon, the MSST will be calculated for stocks in Tier 1 and 2 as follows: a stock or stock complex is overfished when summed escapements over a generation fall below one half of summed spawning escapement goals over that generation. Escapement goals used in establishing Federal status determination criteria would be recommended by NMFS and adopted by the SSC.

For Tier 1 and Tier 2 stocks, the Salmon FMP would specify OFL as the amount of salmon harvest in the EEZ for the coming year that would correspond with the MFMT, based on information available preseason. Acceptable biological catch (ABC) would then be established based on OFL. As an ABC control rule, ABC must be less than or equal to OFL, and the SSC may recommend reducing ABC from OFL to account for scientific uncertainty, including uncertainty associated with the assessment of spawning escapement goals, forecasts, harvests, and other sources of uncertainty. The annual catch limit (ACL) for each stock would then be set equal to ABC.

For Tier 3 stocks there is not information to determine MSST. ABC for these stocks would be based on the OFL with an additional buffer for scientific uncertainty. As an ABC control rule, ABC could be set lower by applying a more conservative buffer to the OFL to account for greater scientific uncertainty regarding the stock. ACL would then be set at ABC.

While ABC and ACL would be calculated based on the best scientific information available preseason when harvest specifications must be established, realized harvest and escapement data would be used postseason to determine whether ACLs were exceeded, whether overfishing occurred, and if any stocks were overfished. Accountability measures would be applied to prevent the recurrence of any ACL overages.

De Minimis Fishing Provision

There are significant concerns about some Cook Inlet salmon stocks that are at low levels of abundance and productivity. For example, despite extensive fishery restrictions, there have been several recent years in which Chinook salmon escapements for some stocks did not meet their escapement goals and drift gillnet fishing was still allowed. As discussed later in *Mixed Stock Management Considerations,* the drift gillnet fleet harvests only small quantities of Chinook salmon, and they are not a primary target species for the fishery.

De minimis fishing provisions would allow small amounts of incidental catch of stocks that are at low levels of abundance and for which there is minimal or no available projected yield, so long as de minimis harvest would not result in overfishing or the stock becoming overfished. De minimis fishing provisions give flexibility to the process of setting status determination criteria when the escapement goals for limiting stocks are projected to not be met, but harvest by the fishery is not expected to have significant impacts to the stock or result in a conservation concern. This can provide opportunity to harvest salmon stocks that are more abundant and reduce the risk of fishery restrictions that impose severe economic consequences on fishing communities without substantive management or conservation benefits. While de minimis provisions would be intended to provide management flexibility, there is an overriding mandate to prevent overfishing on and preserve the long-term productive capacity of all stocks to ensure meaningful contributions to all fisheries in the future.

Under Amendment 16, if a preseason forecast suggests that the lower bound of the escapement goal will not be achieved for a given stock, de minimis harvest on the stock may be allowed if the SSC determines that the de minimis harvest will not result in overfishing. Thus, the maximum allowable de minimis harvest amount would be established to keep the post-season fishing mortality rate below MFMT.

The SSC may recommend limiting allowable de minimis catch as needed to address uncertainties or year-specific circumstances. When recommending a de minimis catch limit in a given year, the SSC may also consider recent and projected abundance levels; the predicted magnitude of harvest in the EEZ; the status of other stocks in the mixed-stock fishery; indicators of marine and freshwater environmental conditions; impacts from other fisheries; whether the stock is currently subject to overfishing or approaching an overfished condition; whether the stock is currently overfished; and any other scientific considerations as appropriate.

Management measures and any required accountability measures necessary to implement a de minimis harvest provision and prevent overfishing or any stock becoming overfished would be considered during the harvest specifications process.

Harvest Specifications and Annual Processes

Amendment 16 would establish the annual harvest specification process for the Cook Inlet EEZ Area, along with specific definitions of required status determination criteria using the tier system described in the previous section.

The Federal fishery management cycle begins with the preparation of a Stock Assessment and Fisheries Evaluation (SAFE) report. The SAFE report would provide the SSC and Council with a summary of the most recent biological condition of the salmon stocks, including all status determination criteria, and the social and economic condition of the fishing and processing industries. NMFS would develop the SAFE for the Cook Inlet EEZ Area and public review would occur through the SSC and Council process. The Council could choose to establish a plan team through subsequent action.

The SAFE report would summarize the best available scientific information concerning the past, present, and possible future condition of Cook Inlet salmon stocks and fisheries, along with ecosystem considerations. This would include recommendations of OFL, ABC, ACL, and MSST that are calculated following the tier system in the FMP and described in Section 2.5.2 of the Analysis. The SAFE report would include a final post-season evaluation of the previous fishing year based on realized catches and escapement with all information needed to make ''overfishing'' and ''overfished'' determinations, as well as recommendations to develop harvest specifications for the upcoming fishing year. All recommendations would be based on the best scientific information available and would take into account any applicable uncertainty. In providing this information, the Salmon SAFE would use a time series of historical catch for each salmon stock, including estimates of retained and discarded catch taken in the salmon fishery; bycatch taken in other fisheries; catch in

State commercial, recreational, personal use, and subsistence fisheries; and catches taken during scientific research (*e.g.,* test fisheries).

The Salmon SAFE report would also provide information to the Council for documenting significant trends or changes in the stocks, marine ecosystem, and fisheries over time, as well as the impacts of management. The Cook Inlet EEZ Area Salmon SAFE would be structured like other Council SAFEs such that stock assessments, economic analyses, and ecosystem considerations comprise the three major themes of the SAFE document. The SAFE could contain economic, social, community, essential fish habitat, and ecological information pertinent to the success of salmon management or the achievement of Salmon FMP objectives.

The SSC would review the SAFE and recommend the OFL, ABC, ACL, MFMT, and MSST, which are cumulatively used to determine the maximum allowable harvest for each stock based on biology and scientific uncertainty in the assessments. This SSC review would constitute the official, peer review of scientific information used to manage the Cook Inlet EEZ Area salmon fishery for the purposes of the Information Quality Act. Upon review and acceptance by the SSC, the Salmon SAFE and any associated SSC comments would constitute the best scientific information available for purposes of the Magnuson-Stevens Act.

The Council would then recommend total allowable catches (TACs) for each salmon species in the Cook Inlet EEZ salmon fishery to the Secretary. The TAC is referred to as an ''Annual Catch Target'' in the National Standard 1 guidelines, but hereafter referred to as a TAC given common usage of the term by the Council. Closing a fishery when TACs are met is a recommended form of an accountability measure (AM) used to ensure an ACL is not exceeded. A TAC is an amount of annual catch of a stock, stock complex, or species that is the management target of the fishery, accounts for management uncertainty in controlling the catch at or below the ACL, and must be set equal to or less than ABC. The TACs would be set at the species level because estimates of stock contribution to EEZ fishery harvests cannot currently be made until after the fishing season. As such, in setting the TAC for each species, the Council would consider the estimated proportional contribution of each stock to total harvest of a species such that ACLs are not expected to be exceeded for any component stock if the TAC is fully achieved. If inseason genetic information becomes available, it may be possible to establish and manage for TACs for individual stocks within the same species (*e.g.,* Kenai River sockeye and Kasilof River sockeye). Because NMFS and the Council have never previously managed a drift gillnet salmon fishery in Alaska, and as described in Section 2.5.2.6 of the Analysis, there are significant new management uncertainties that are introduced by this action, TACs will be a crucial management tool.

To establish these Magnuson-Stevens Act required ACLs and their implementing TACs, NMFS would publish proposed and final salmon harvest specifications in the **Federal Register**. Under the Federal rulemaking process, the public is informed through the **Federal Register** of Federal actions and can comment on them and provide additional information to the agency. A final rule is then issued with modifications, as needed, and includes the agency responses to issues raised by public comments. This is a lengthy process: it takes a significant amount of time to conduct the stock assessments, review them through the SSC and Council, make any overfishing or overfished determinations, recommend TACs, and then conduct notice and comment rulemaking under the Administrative Procedure Act.

Because harvest specifications must be in place before the fishery begins, this process must rely on salmon forecasts. NMFS would use Alaska Department of Fish and Game (ADF&G) pre-season salmon forecasts (subject to NMFS and SSC review) or develop suitable alternate forecasts. Fundamentally, status determination criteria and harvest specifications would be calculated in terms of potential yield for the Cook Inlet EEZ and would be based, in part, on the forecasted run size minus the minimum number of salmon required for spawning and the expected mortality in other fisheries. If no forecasts are available, NMFS would use fishery catch in prior years to inform harvest specification, as it does for other data-limited fisheries.

Cook Inlet EEZ Commercial Salmon Fishing Management Measures

Salmon fisheries in Cook Inlet are complex and must take into account many different factors when establishing management measures for each component sector. The drift gillnet fleet generally harvests the largest proportion of salmon in Cook Inlet of any fishery sector and has significant harvest power. The State has historically managed the drift gillnet fishery through the combination of time and areas open to fishing. This section provides a discussion of key considerations related to status quo management of the Cook Inlet drift gillnet fleet and proposed Cook Inlet EEZ management measures under this action.

Seasonal Fishery Progression

Commercial salmon fishing in Cook Inlet is bounded by when salmon return to the Cook Inlet en route to natal freshwater locations to spawn. Commercial salmon fisheries in Cook Inlet begin in June under State regulations. Around this time, Chinook salmon are already present in Cook Inlet and sockeye salmon begin migrating into Cook Inlet from the Gulf of Alaska. As salmon begin to move into Cook Inlet, with the exception of Chinook, they typically group in large tide rips in the middle of Cook Inlet (*i.e.,* the EEZ) to start moving north up the inlet toward their spawning streams, rivers, and lakes. The first commercial fishery that salmon typically encounter when moving up Cook Inlet is the upper Cook Inlet drift gillnet fishery. Commercial salmon fisheries south of this area occur entirely in State waters.

In the Cook Inlet EEZ, salmon stocks originating from throughout Cook Inlet are mixed together. As they move northward up farther into Cook Inlet, individual salmon stocks will eventually move shoreward into State waters to reach their spawning streams. Stocks returning to freshwater systems farther north in Cook Inlet tend to stay close to the middle of the inlet when they move through the Cook Inlet EEZ Area. The Upper Cook Inlet drift gillnet fishery occurs entirely within the State's ''Central District,'' which are waters north of the Anchor Point line at 59°46.15′ N to approximately Boulder Point at 60°46.39′ N. Commercial, subsistence, recreational, and personal use salmon fisheries also occur northward of Boulder Point, which includes the waters of Turnagain Arm and Knik Arm, and this area is generally referred to as the State's ''Northern District.'' All salmon returning to the Northern District must first past through fisheries in the Central District before reaching fisheries and spawning grounds in the Northern District.

Mixed Stock Management Considerations

In recent years, the State's management of Cook Inlet salmon has been complicated by the relative abundance of salmon stocks, and the characteristics of the different user groups and gear types. Central District

drift gillnet, set gillnet, recreational, and personal use fishermen all target valuable Kenai and Kasilof sockeye salmon, which in recent years have been in relatively high abundance. As described in Section 4.5 of the Analysis, sockeye salmon accounted for more than 80 percent of the salmon caught in the drift gillnet fishery, and an even greater percentage of fishery value from 1990–2021. Over this same time, the drift gillnet fishery has harvested approximately 42 percent of the sockeye salmon in Cook Inlet, while the set gillnet fishery harvested around 40 percent, and non-commercial harvests accounted for the remainder.

The amount and proportion of harvest by each fishery is significantly impacted by which salmon stocks it targets, or cannot avoid, and whether unintended catch can be released alive. Gillnet gear generally catch all species of salmon in the area and cannot target individual stocks. It is assumed that salmon that become entangled in commercial gillnet gear generally do not survive being released. Therefore, management must consider all stocks that would be harvested by each drift gillnet fishery opening, the conservation status of each stock, and their relative abundance. While Kenai and Kasilof sockeye salmon stocks have been abundant in recent years, salmon abundance can be highly variable over time and management plans must be able to account for a wide variety of absolute and relative salmon stock abundance scenarios.

The drift gillnet fishery harvests only approximately 1 percent of upper Cook Inlet Chinook salmon, on average. This is because Chinook salmon generally migrate in State waters near the shore outside of EEZ and State waters open to drift gillnet fishing, or at depths below drift gillnet gear. However, the drift gillnet fishery, particularly in the Cook Inlet EEZ, can catch significant quantities of Cook Inlet sockeye and coho salmon stocks bound for the Northern District. These are smaller and less productive stocks that cannot support as much harvest as co-occurring Kenai and Kasilof sockeye salmon stocks. The Cook Inlet EEZ is a productive fishing area for all Cook Inlet sockeye salmon and coho stocks, as they are aggregated in tide rips within the Cook Inlet EEZ.

Fishing at a rate to fully harvest the most abundant stocks would likely result in overfishing on these weaker or less abundant salmon stocks. Therefore, to support conservation of these Northern District stocks, and to ensure at least some harvestable surplus for Northern District salmon fisheries, the State has reduced the number of drift gillnet fishing periods in Cook Inlet EEZ waters after July 15 to minimize mixed stock harvests. After this date, State management measures in the last decade generally reduced fishing time in the EEZ and provided additional fishing time in State waters on the east side of Cook Inlet, adjacent to the Kenai and Kasilof Rivers to focus harvests on Kenai and Kasilof salmon stocks during the peak of the run. This management approach was in response to significant declines in coho salmon stocks and long term yield concerns for Northern District sockeye salmon, as well as an increasing populations in the Anchorage and Kenai Peninsula areas utilizing Cook Inlet salmon resources. This has also limited the drift gillnet fleet's harvests of pink and chum salmon stocks.

Additionally, reducing Cook Inlet EEZ harvests after July 15 allows for the collection of more data on escapement and realized salmon abundance in order to either avoid overharvesting a given stock or increase harvest to more fully utilize abundant runs. After July 15, the amount of fishing time available to the drift gillnet fleet under State management has varied widely depending on run strength. For Kenai and Kasilof sockeye salmon stocks, managers get robust information on run strength from an inseason abundance model around July 25. Prior to July 25, there is significant uncertainty from the inseason model about run strength for these stocks, which increases management uncertainty. A major concern is harvesting too many fish and not meeting spawning escapement goals, potentially resulting in overfishing. This issue is exacerbated for Northern District stocks, for which there is significant time lag (relative to Kenai and Kasilof stocks) between harvest in the Cook Inlet EEZ and information on escapement becoming available.

The State has adjusted management within State waters, where stocks are more distinctly separated, to focus on harvests on Kenai or Kasilof stocks while minimizing drift gillnet harvests of Northern District salmon stocks. Fishery managers must also account for harvest in freshwater fisheries upstream of escapement monitoring when making management decisions to reach final escapement goal targets (*e.g.,* 1.4 million salmon may be counted at the monitoring station, but if 200,000 are subsequently caught in freshwater fisheries, than only 1.2 million salmon would actually spawn).

Proposed Federal Commercial Fishing Season and Fishing Periods

Under this proposed rule, the Cook Inlet EEZ Area would open to commercial drift gillnet fishing on a Monday, either the third Monday in June or the Monday on or after June 19, whichever is later. Prior to this time, salmon stocks harvested by the drift gillnet fleet are not present in commercially viable quantities. Historically, estimated harvests in the EEZ have been relatively small during the initial openings as sockeye salmon are just beginning to move into the area and the bulk of the fish do not arrive until July. Opening after mid-June helps avoid potential additional impacts to early-run Cook Inlet Chinook salmon stocks. These stocks migrate through upper Cook Inlet in May and early June. Opening the drift gillnet fishery after mid-June would also continue to provide consistent data to inform State and Federal managers about preliminary estimates of run strength compared to historical averages. The scientific test fishery carried out by the State, which also helps provide information about salmon run strength in Cook Inlet, would not be affected by this action and could continue to occur.

After the season start date, this proposed rule would open the Cook Inlet EEZ Area for drift gillnet fishing for two,12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday until either (1) the TAC is reached, or (2) August 15, whichever comes first. This schedule would align possible drift gillnet fishing periods in the Cook Inlet EEZ with current State drift gillnet periods, thereby maintaining a similar number of regular drift gillnet fishing periods per week. If the State and Federal fisheries were open on separate days, there could be additional drift gillnet openings that could result in significantly increased harvest (the drift gillnet fleet has the potential to harvest over 300,000 salmon per opening), and there are not existing data to inform managers about the potential impacts of additional openings on spawning escapement and other salmon users.

Some drift gillnet fishery stakeholders requested that NMFS open the drift gillnet fishery for three, 12-hour periods per week from June through October. If NMFS were to allow that amount of fishing opportunity, overfishing on some Cook Inlet salmon stocks—particularly Northern District stocks of low abundance—would be more likely. Under such a management approach, it is possible that even a complete closure

of State fisheries would be insufficient to prevent overfishing on low abundance stocks.

NMFS received input from other Northern District salmon users and tribes in Northern Cook Inlet requesting that Federal management measures limit EEZ harvests during the middle of the season to allow for a harvestable surplus of salmon for Northern District salmon fisheries.

As a result of this conflicting feedback, NMFS carefully considered when the commercial drift gillnet fishery in the EEZ should be closed. Under the Magnuson-Stevens Act, ACLs must be established for each fishery, along with accountability measures to prevent ACLs from being exceeded. Because there is both scientific and management uncertainty surrounding the ACLs set for each stock or stock complex, TACs are set as the management target for the fishery to prevent exceeding ACLs. The fishery would be closed when the TAC for a single species is reached. Because of the mixed-stock nature of the fishery, the drift gillnet fleet could not avoid continuing to harvest stocks for which the TAC had been reached and target only those stocks for which there was still TAC remaining.

In addition to closing the fishery when a TAC is reached, NMFS considered whether a fixed commercial fishery season closure date may be required. Season closure dates are commonly used to end fisheries when a TAC is not reached, and to achieve other conservation and management objectives. To describe how these management measures would interact, the fishery would close before the closure date if the TAC is reached prior to that date. NMFS may also close the fishery before a TAC or the closure date is reached in the event it has information showing further fishery openings could result in overfishing of any stock. One potential example of this is if actual salmon returns were significantly below the salmon forecasts. In this instance, fishing to fully achieve a TAC based on a forecast that is much higher than realized abundance could result in not meeting at least the lower bound of the escapement goal, overfishing occurring, or both.

In developing this proposed rule NMFS evaluated a range of potential options, including no closure date and a closure date as early as July 9. After receiving input from drift gillnet stakeholders that a fixed July closure could severely restrict fishing opportunities and would not account for delayed run timing that has been observed in recent years, NMFS is proposing an August 15 closure date. In years when there is sufficient TAC and salmon abundance to support a longer fishing season, this could result in additional EEZ fishing days in mid-July and greater harvest of one or more stocks in the EEZ relative to status quo management. However, due to mixed stock management considerations, total annual removals in the Cook Inlet EEZ and throughout Cook Inlet would generally be expected to remain consistent with historical averages that, when accounting for run size, have prevented overfishing. NMFS would still manage to protect weak stocks in Northern Cook Inlet in years of low abundance. As under existing management, the number of EEZ fishing days is expected to vary based on the abundance of salmon (*i.e.,* amount of fishing time required to achieve the target harvest when accounting for all stocks that are being harvested before the fishery is closed). NMFS also received input from other Cook Inlet stakeholders concerned about the potential negative impacts of an extended EEZ drift gillnet fishery on salmon stocks and later occurring fisheries in Cook Inlet, particularly without restrictions in mid-July that have been occurring under State management. These stakeholders raised concerns about reduced harvestable surplus for other fisheries outside of the EEZ and concerns about achieving spawning escapement goals. NMFS anticipates addressing these concerns through the annual harvest specification process, which would account for total removals of each stock and scientific uncertainty.

NMFS is particularly interested in feedback from the public about the implications of an August 15 closure date—or an earlier or later closure date—on fishery resources and participants, or impacts on any other part of the ecosystem. NMFS will take all public comments into consideration and may modify the closure date in the final rule.

NMFS has significant concerns about management measures that would significantly increase salmon harvests above the status quo, particularly of Northern District salmon stocks, because that may decrease prey availability for endangered Cook Inlet beluga whales. Reduced availability of salmon prey in the Northern District, where Cook Inlet beluga whales are concentrated during the summer, has been identified in the Cook Inlet Beluga Whale Recovery Plan as a threat for Cook Inlet beluga whales. If this proposed action results in reduced prey availability, take of belugas would need to be authorized under the Endangered Species Act (ESA) assuming such take could be authorized and would not jeopardize the continued existence of the species. NMFS Sustainable Fisheries Division is consulting under ESA section 7 with NMFS Protected Resources Division to evaluate the potential impacts of these proposed management measures to all ESA listed species that may be affected.

Inseason Management

NMFS would carry out inseason management of the commercial salmon fishery in the Cook Inlet EEZ Area. Fishing would occur during the regularly scheduled fishing periods described above. As the fishing season progresses, NMFS would project the additional harvest expected from each additional opening of the fishery based on the number of participating vessels, catch rates, and any other available information. NMFS would carry out an inseason action to close the fishery if projections indicate that an additional fishery opening would be expected to exceed the TAC specified for one or more salmon stocks or species. Inseason actions also may be necessary to ensure that overfishing of salmon stocks or species does not occur. NMFS would publish every inseason action in the **Federal Register** to notify the public of the effectiveness.

NMFS would monitor all available sources of information during the fishery to evaluate whether the TAC was specified correctly. If information indicates that the number of salmon returning to Cook Inlet is significantly different than what was forecasted, NMFS may make adjustments to management of the fishery. If information indicates that run strength is significantly below what was forecasted, then fishing to fully achieve that TAC would likely result in overfishing. Therefore, NMFS may close the fishery before the season closure date to prevent overfishing if information indicates that abundance is significantly lower than expected. This may be determined based on fishery catches, test-fishery catches, escapement, or any other scientific information.

NMFS may consider an inseason adjustment to modify the TAC if scientific information indicates that salmon abundance is significantly higher than forecasted. To implement an inseason adjustment, NMFS must publish a temporary rule in the **Federal Register** and consider all public comments on the action. Any such action must not result in overfishing on any other co-occurring fish stocks and

would also consider the potential impacts of such an action to all Cook Inlet salmon harvesters. Depending on the specifics of the situation, it may take up to 30 days to implement an inseason adjustment to the TAC. NMFS could not adjust the TAC above any ABC or allowable de minimis amounts set forth in the harvest specifications established for the Cook Inlet EEZ Area in that fishing year without engaging in notice and comment rulemaking to amend the specifications.

This proposed rule also considers the potential for adjustments to fishing time and area, as well as reopening the fishery within the fishing season defined in regulation to achieve conservation and management goals. These tools may be used to either increase or decrease harvests in the Cook Inlet EEZ Area drift gillnet fishery as appropriate based on the specified TAC amounts, the amount already harvested, and other available information. NMFS expects to refine application of these management tools as it develops management expertise and collects data over time.

Proposed Federal Management Area

The proposed management area is all Federal waters of upper Cook Inlet (EEZ waters of Cook Inlet north of a line at 59°46.15′ N). This is analogous to previous State management of the area under ''Area 1'' openings, excluding the State water portion of the area off the Southeast corner of Kalgin Island. The State's ''Districtwide'' openings included all of the Federal waters in ''Area 1'' and also allowed fishing in all State waters of the Central District. The State's openings of these areas include approximately all Federal waters of upper Cook Inlet.

Retention of Bycatch

Drift gillnet vessels fishing in the Cook Inlet EEZ Area would be able to retain and sell non-salmon bycatch including groundfish (*e.g.,* Pacific cod, pollock, flounders, *etc.*). These are referred to as incidental catch species and this proposed rule allows fishermen to retain these species up to a specified maximum retainable amount (MRA). Drift gillnet vessels retaining non-salmon incidental catch species would be required to have a groundfish Federal fisheries permit (FFP) as well as comply with all State requirements when landing these fish in Alaska. The MRA of an incidental catch species is determined as a proportion of the weight of salmon on board the vessel.

Table 10 to 50 CFR part 679 is used to calculate MRA amounts in the Gulf of Alaska, and would also be used to calculate MRA amounts for the Cook Inlet EEZ Area. For commercial salmon fishing in the Cook Inlet EEZ Area, the basis species would be salmon, which would be classified as ''Aggregated amount of non-groundfish species'' for the purposes of the calculation. To obtain the MRAs for each incidental catch species, multiply the retainable percentage for the incidental catch species by the round weight of salmon (Basis Species—Aggregated amount of non-groundfish species) on board. For example, if there were 100 pounds (45.36 kg) of salmon aboard the vessel, then 20 pounds (9.07 kg) of pollock could be retained, 5 pounds (2.27 kg) of aggregated rockfish, 20 pounds (9.07 kg) of sculpins. Pacific halibut are not defined as a groundfish and could not be retained by drift gillnet vessels.

Vessels landing bycatch species in Alaska would have to comply with all State requirements, including any applicable State permits.

Cook Inlet EEZ Commercial Salmon Fishery Monitoring, Recordkeeping, and Reporting Requirements

This action would manage the Cook Inlet EEZ salmon fishery separately from the adjacent State waters salmon fisheries. To manage the fishery successfully and avoid overfishing, Federal managers need accurate and rapidly reported catch data from the EEZ. The eLandings system is an electronic system for reporting commercial fishery landings in Alaska used to manage both State and Federal fisheries. Landings submitted through eLandings are transmitted to NMFS multiple times per day which would allow managers to have the most up to date information possible. This proposed rule would require processors to report all landings of Cook Inlet salmon harvested in the EEZ through eLandings by noon of the day following completion of the delivery. In order to implement this reporting requirement and other monitoring, recordkeeping, and reporting measures, fishing vessels (harvesters), processors, and other entities receiving deliveries of Cook Inlet EEZ salmon (*i.e.,* fish transporters, catcher sellers, and direct markets) would have to obtain Federal permits and comply with Federal recordkeeping, reporting, and monitoring requirements.

Requirements for Catcher Vessels

Harvesting vessel owners would be required to obtain a Salmon Federal Fisheries Permit (SFFP). NMFS would issue SFFPs at no charge to the owner or authorized representative of a vessel. An SFFP would authorize a vessel of the United States to conduct commercial salmon fishing operations in the Cook Inlet EEZ Area, subject to all other Federal requirements. An SFFP applicant must be a citizen of the United States. NMFS would issue SFFPs after receipt, review, and approval of a complete SFFP application. SFFPs would have a 3-year application cycle. Once a vessel owner or authorized representative obtains an SFFP, it would be valid for 3 years. Participants must maintain a physical or electronic copy of their valid SFFP aboard the named vessel. As with other Federal fisheries, if a vessel owner or authorized representative surrenders an SFFP, they could not obtain a new SFFP for that vessel until the start of the next 3-year permit cycle. This prevents vessels from regularly surrendering and reobtaining SFFPs to avoid Federal monitoring requirements.

The SFFP is associated with a specific vessel and not transferable to another vessel. If the vessel is sold, the new owner would need to apply for an SFFP amendment from NMFS to reflect the new owner or authorized representative of the vessel. A vessel could not operate in the Cook Inlet EEZ Area fishery until the SFFP amendment was complete and the amended SFFP issued. The SFFP number would be required to be displayed on the vessel's hull and buoys attached to the vessel's drift gillnet.

For a vessel being leased, the vessel operator would be considered the authorized representative of the SFFP holder and no amendments to the permit would be required. The vessel operator would be subject to all SFFP requirements and limitations and liable for any violations.

To monitor participation in the fishery and help Federal managers estimate expected removals from each opening, as well as to ensure that participants remain within EEZ waters open to fishing, the proposed rule would require commercial salmon fishing vessels to operate a Vessel Monitoring System (VMS). VMS transmits the real-time GPS location of fishing vessels to NMFS. This would also help ensure that vessels are not fishing in both State and EEZ waters during the same fishing trip, which would be prohibited under this proposed rule to improve the accuracy of catch accounting for Federal managers. VMS would also aid in verifying when a vessel may be lawfully transiting through Cook Inlet EEZ Area waters after participating in a State fishery. A vessel with an SFFP would be required to keep their VMS active within State waters to ensure that entire fishing trips are monitored and to help verify that no fishing occurred within

State waters during a fishing trip that included salmon harvest in the Cook Inlet EEZ.

During fishing operations, a drift gillnet is not always attached to the vessel. Therefore, the position of the vessel as determined by VMS may be different than the exact location of the net it deployed. However, because drift gillnet vessels in Cook Inlet remain relatively close to their nets due to the significant tidal currents in the area, VMS data, when combined with logbook information and vessel or aircraft enforcement patrols, provides robust information to determine compliance with Federal fishing area, time, and catch accounting regulations. This approach is also more practicable and cost-efficient to fishery participants than the alternatives of comprehensive electronic monitoring systems or human fishery observers.

To collect catch and bycatch information, this proposed rule would require a Federal fishing logbook. Commercial salmon fishing vessels would record the start and end time and GPS position of each set, as well as a count of the catch and bycatch. In addition, any interactions or entanglements with marine mammals would be required to be recorded in the logbook. Logbook sheets would be submitted electronically to NMFS by the vessel operator when the fish are delivered to a processor. There is currently no quantitative information available on discards of salmon and groundfish in the Cook Inlet drift gillnet salmon fisheries or other closely analogous fisheries to estimate bycatch amounts and mortality. The data provided by the logbooks would provide this information and satisfy the Magnuson-Stevens Act Standardized Bycatch Reporting Methodology (SBRM) requirement (16 U.S.C. 1853(a)(11)). Information from logbooks would also be used to corroborate VMS data in the event of a suspected Federal fishery violation.

State requirements, including an appropriate State Commercial Fisheries Entry Commission (CFEC) permit(s), would still apply for drift gillnet vessels to land salmon or other species caught in the EEZ within the State or enter State waters.

This proposed rule would prohibit commercial salmon harvesting vessels from landing or otherwise transferring salmon caught within the Cook Inlet EEZ Area in the EEZ. Harvesting vessels delivering to tenders would have to do so within State waters. This proposed rule would also prohibit processing salmon (as defined by Federal regulations) in the EEZ aboard either the harvesting vessel or another vessel. Harvesting vessels would be permitted to gut, gill, and bleed salmon prior to landing, but could not freeze or further process salmon prior to landing their catch.

Requirements for Processors and Other Entities Receiving Deliveries of Commercially Caught Cook Inlet EEZ Salmon

The proposed rule would require processors that receive and process landings of salmon caught in the Cook Inlet EEZ Area by a vessel authorized by an SFFP to obtain a Salmon Federal Processor Permit (SFPP). This includes any person, facility, vessel, or stationary floating processor that receives, purchases, or arranges to purchase and processes unprocessed salmon harvested in the Cook Inlet EEZ Area, except registered salmon receivers. Persons or businesses that receive landings (deliveries) of Cook Inlet EEZ salmon from harvesting vessels but do not immediately process it, or transport it to another location for processing, would be required to obtain a Registered Salmon Receiver Permit (RSRP).

SFPP and RSRP holders would be required to be report all salmon landings through eLandings by noon of the day following completion of the delivery. This would ensure that Federal fishery managers would receive timely catch information from all Federal landings to inform Federal management actions. Landings would be reported using existing Cook Inlet drift gillnet statistical areas, with the addition of an EEZ identifier and a requirement to identify the Federal permit associated with each landing. This approach would maintain the continuity of long-term datasets for fishery managers and scientists while clearly delineating EEZ harvests.

NMFS would issue SFPPs and RSRPs on a 1-year cycle. The shorter timeframe reflects the need to maintain a current and comprehensive inventory of all Federal salmon landings in Cook Inlet given frequent business or ownership changes for Cook Inlet salmon processing and buying operations. If the ownership of an entity holding a SFPP or RSRP changes, the new owner would need to submit an application for an amended permit. The amended permit would be issued with a new permit number to reflect the change.

Because SFPPs would be facility-specific, one SFPP would be required for every processing facility, even if a facility was controlled by a company already holding an SFPP at another processing facility. An RSRP would be required for each entity receiving but not processing landings of Cook Inlet EEZ salmon at the location of the delivery. This includes fish transporters or buying stations that receive deliveries directly from harvesting vessels. The RSRP would ensure that there is not a significant time lag between a landing occurring across all entities that receive deliveries of Cook Inlet salmon and that information being reported to Federal managers.

These proposed regulations are intended to accommodate vessels that catch and then sell unprocessed or processed fish directly to consumers. For direct-marketing operations where the owner or operator of a harvesting vessel catches and processes their catch, both an SFFP and an SFPP would be required. For catcher-seller operations where the owner or operator of a harvesting vessel catches and sells unprocessed salmon (*e.g.,* whole fish or headed and gutted) themselves, both an SFFP and an RSRP would be required.

The proposed rule would prohibit processing Cook Inlet EEZ salmon in EEZ waters in order to ensure historical participants and operation types are not displaced. Viscera and gills may be removed at sea. Freezing is considered processing per Federal regulations and therefore would be prohibited in Cook Inlet EEZ waters.

Other Commercial Fishery Management Measures and Prohibitions

This proposed rule would define the legal gear for the Cook Inlet EEZ Area drift gillnet fishery consistent with existing State gear to the extent practicable. Legal drift gillnet gear would be no longer than 200 fathoms (365.76 m) in length, 45 meshes deep, and have a mesh size no greater than 6 inches (15.24 cm). Maintaining gear definitions consistent with State regulations would prevent participants from having to acquire new gear to participate in the Federal fishery, and is expected to help maintain existing gear selectivity for comparability with historical data that would help Federal managers estimate expected catches. Buoys at each end of the drift gillnet would have to be marked with the participants' SFFP number.

Gillnets would be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only. It would be illegal to stake or otherwise fix a drift gillnet to the seafloor. The float line and floats of drift gillnets would be required to float on the surface of the water while the net is fishing, unless

natural conditions cause the net to temporarily sink.

This proposed rule includes the following prohibitions for drift gillnet fisheries in the Cook Inlet EEZ Area.

- Vessels would be prohibited from fishing in both State and Federal waters on the same day, or otherwise have on board or deliver fish harvested in both EEZ and State waters, to ensure accurate catch accounting for Federal managers.
- Vessels could not have salmon harvested in any other fishery on board.
- Vessels would be prohibited from having gear in excess of the allowable configuration or deploying multiple nets.
- Vessels would be prohibited from participating in other fisheries while drift gillnetting for salmon in the Cook Inlet EEZ Area and would not be allowed to have other fishing gear on board capable of catching salmon while commercial fishing (*e.g.,* drift gillnetting) for salmon in the Cook Inlet EEZ Area.
- Because vessels legally participating in adjacent salmon fisheries transit across the Cook Inlet EEZ Area, vessels could have other fishing gear on board while moving through the Cook Inlet EEZ Area, but would be prohibited from commercial fishing for salmon within the Cook Inlet EEZ Area.
- Manned or unmanned aircraft could not be used to locate salmon or otherwise direct fishing.
- Vessels would be prohibited from discarding any salmon caught while drift gillnetting for salmon in the Cook Inlet EEZ Area.

Cook Inlet EEZ Recreational Salmon Fishing

The saltwater recreational fishery sector in the Cook Inlet EEZ is extremely small relative to the drift gillnet sector, harvesting an estimated annual average of 66 salmon of all species, or less than 0.01 percent of all salmon harvests in the Cook Inlet EEZ. This includes harvests by both guided (charter) anglers and unguided anglers. Over the course of a year, the limits historically established by the State are not constraining, and nearly all recreational salmon fishing occurs within State waters. Therefore, relatively limited management of Cook Inlet EEZ recreational salmon fishing is required at this time.

Recreational fishing in the Cook Inlet EEZ Area primarily targets Chinook and coho salmon. Pink and chum salmon are sometimes also caught and retained for personal consumption and bait. Sockeye salmon are rarely caught in the saltwater recreational fishery as recreational fishing gear does not target them effectively.

A small portion of recreational salmon fishing occurs during the winter, targeting immature Chinook salmon originating from stocks outside of Cook Inlet from October to the end of March. Other salmon species are not generally available and are not harvested by the recreational salmon fishery during this period.

The primary salmon species of potential conservation concern are Chinook salmon. Cook Inlet origin Chinook salmon generally migrate through Cook Inlet close to shore and are almost exclusively caught within State waters. Declines in Cook Inlet Chinook salmon stocks have resulted in significant restrictions and closures of this early season recreational fishery. In some years, restrictions on recreational anglers retaining coho salmon may also be required.

Cook Inlet EEZ Recreational Salmon Fishery Management Measures

This proposed rule includes management measures for recreational salmon fishing in the Cook Inlet EEZ Area. NMFS would establish bag and possession limits in Federal regulations consistent with current State regulations. For Chinook salmon, from April 1 to August 31, the bag limit would be one Chinook salmon per day including a total limit of one in possession of any size. From September 1 to March 31, the bag limit would be two Chinook salmon per day including a total limit of two in possession of any size. For coho (silver) salmon, sockeye salmon, pink salmon, and chum salmon there would be a combined six fish bag limit per day, including a total limit of six in possession of any size. However, only 3 per day, including a total limit of three in possession, may be coho salmon.

In addition to these proposed Federal limits, recreational anglers would also be constrained by State bag and possession limits if landing fish in Alaska. Because of this, an angler could not exceed State limits when landing fish in Alaska, or otherwise have both an EEZ limit and a State limit on board at the same time in either area.

Recreational fishing would be open for the entire calendar year. Because recreational anglers can release fish with limited mortality, NMFS could prohibit retention of individual salmon species while still allowing harvest of other salmon stocks if necessary. Inseason management actions for the recreational sector would be published in the **Federal Register** for effectiveness and subject to the same process and timing limitations outlined for the commercial sector in the Cook Inlet EEZ. Given the limited Cook Inlet EEZ recreational salmon harvest and slow pace of the fishery, these notice and publication requirements are expected to be less problematic for managing the recreational sector.

Recreational fishing for salmon in the Cook Inlet EEZ Area could only be done using hook and line gear with a single line per angler with a maximum of two hooks. Salmon harvested could not be filleted or otherwise mutilated in a way that could prevent determining how may fish had been retained prior to landing. Gills and guts could be removed from retained fish prior to landing. Any salmon that is not returned to the water with a minimum of injury would count toward an angler's bag limit.

There is little or no inseason catch information available for the recreational salmon sector in the Cook Inlet EEZ Area. However, Federal managers would review any available developing inseason information, including escapement data, and may prohibit retention of one or more salmon species if additional harvest could not be supported. This proposed rule would not establish a TAC specific to the recreational sector, but estimated removals in combination with commercial harvests would still be evaluated against the ABC and ACL to ensure they are not exceeded, and to implement accountability measures, if required, for future seasons. This is analogous to the process used to account for recreational harvests in Federal groundfish and halibut fisheries.

Information provided by the State's existing Saltwater Charter Logbook, the Statewide Harvest Survey, and creel surveys provide information to account for recreational harvest in the Cook Inlet EEZ Area, as well as satisfy the Magnuson-Stevens Act SBRM requirement. This is consistent with the measures established for recreational salmon fishing in the East Area.

If the recreational sector in the Cook Inlet EEZ Area significantly increases its harvests of salmon, additional management measures may be required and implemented through subsequent actions.

Consistency of Proposed Action With the National Standards

In developing Amendment 16 and this proposed rule, NMFS considered whether the proposed action is consistent with the Magnuson-Stevens Act's 10 National Standards (16 U.S.C. 1851) and designed this proposed action

to balance their competing demands. While all of the National Standards were considered in Section 5.1 of the Analysis, five National Standards figured prominently in the NMFS's recommendation for Amendment 16 and this proposed rule: National Standard 1, National Standard 2, National Standard 3, National Standard 7, and National Standard 8.

National Standard 1

National Standard 1 states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the OY from each fishery for the United States fishing industry. OY is the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities and taking into account the protection of marine ecosystems, that is prescribed on the basis of the MSY from the fishery, as reduced by any relevant economic, social, or ecological factor. As described above, this action specifies MSY on the basis of escapement goals and proxies that were evaluated through the analytical process for this action and determined to be consistent with the goals and objectives of the Salmon FMP and the conservation objectives of the Magnuson-Stevens Act. The escapement goal values that inform OY will be regularly assessed and updated as new information becomes available.

For the Cook Inlet EEZ salmon fishery, as further discussed above, OY is prescribed on the basis of MSY in that it represents a range of total fishery removals in the EEZ that target harvesting as much of the EEZ potential yield in excess of escapement goals as possible for each stock without causing any stock to miss the lower bound of its escapement goal or result in overfishing. Because the Cook Inlet EEZ Area fishery is a mixed-stock fishery and involves harvest of co-occurring stocks of varying abundance, OY is based on a range of harvest levels that have provided for a viable fisheries and avoided overfishing over the long-term. This OY ensures the Cook Inlet salmon fishery produces the greatest net benefit to the Nation by maintaining an economically viable commercial fishery while still providing recreational and subsistence opportunities for people dependent on these same salmon stocks, accounting for consumption of salmon by a variety of marine predators, and protecting weaker stocks. NMFS finds that the proposed OY for the Cook Inlet salmon fishery would be achieved on a continuing basis under Amendment 16.

National Standard 2

National Standard 2 states that conservation and management measures shall be based upon the best scientific information available. Among other things, NMFS considered the relevance, inclusiveness, objectivity, transparency, timeliness, and peer review of available information when evaluating the available biological, ecological, environmental, economic, and sociological scientific information to determine how to most effectively conserve and manage Cook Inlet salmon. This process included SSC review of proposed fishery management policies and reference points, evaluation of uncertainty in the development of salmon escapement goals used to initially inform Federal reference points (Section 12 of the Analysis), a comprehensive description of social and economic conditions in the Cook Inlet salmon fishery (Section 4 of the Analysis), and consideration of alternative scientific points of view regarding the potential for overcompensation in Cook Inlet salmon stocks (Section 14 of the Analysis). From this analysis, NMFS determined that escapement goals established by the State currently rely on the best scientific information available to manage Cook Inlet salmon fisheries. It is on the basis of this information that Federal status determination criteria are initially established. Each year, NMFS will rely on the best scientific information available to assess the status of the stocks and calculate the status determination criteria—the best scientific information available is not static and may change with developments in data collection and processing. NMFS will collect data from the fisheries, routinely evaluate the best scientific information available, and may modify the escapement goals used in Federal management as scientific information related to Cook Inlet salmon stocks is improved. In addition, the SSC will provide objective, ongoing scientific advice to the Council regarding appropriate harvest specifications for the Cook Inlet EEZ Area based on information the SSC determines to meet the guidelines for the best scientific information available.

National Standard 3

Management of salmon in the Cook Inlet EEZ Area is highly complex, requiring consideration of other management jurisdictions in order to achieve sustainable harvest of Cook Inlet salmon stocks that benefits all user groups. National Standard 3 states that to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination. Given the significant degree of interaction among salmon fisheries in Cook Inlet, management of salmon stocks as a unit or in close coordination throughout all Cook Inlet salmon fisheries is particularly important. Management action in one Cook Inlet salmon fishery often has direct relationships with harvest rates and harvest composition (by stock) in other regional salmon fisheries. Federal management of the Cook Inlet EEZ Area under Amendment 16 achieves National Standard 3 objectives through coordination with the State before, during, and after each fishing season, as described in *Harvest Specifications and Annual Processes.* NMFS and the Council will evaluate both where harvest of salmon stocks may be constrained by the presence of weak stocks and where there may be opportunities to harvest additional salmon that would not otherwise be utilized. NMFS will provide data on early EEZ catches to the State to inform run-strength forecasts for management of all other upper Cook Inlet salmon fisheries. As stated above, because NMFS has no jurisdiction over State marine or fresh water salmon fisheries, it is impossible for NMFS to unilaterally manage Cook Inlet salmon as a unit throughout their range, and the State of Alaska declined to accept delegated management authority for the EEZ. Thus, two separate management jurisdictions are unavoidable in Cook Inlet. Still, under Amendment 16 NMFS anticipates close coordination with the State and Cook Inlet salmon stocks would be managed as a unit throughout their range to the extent practicable.

National Standard 7

National Standard 7 states that conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication. Though some Federal management measures for the Cook Inlet EEZ Area may duplicate similar requirements in adjacent State waters, any such duplication is necessary to implement a new Federal management regime and incorporate the Cook Inlet EEZ Area into the Salmon FMP consistent with the applicable court decisions. Amendment 16 would include no unnecessary duplication of any State or Federal management measures. Further, the management measures proposed under Amendment 16 impose only those costs necessary to ensure accurate catch accounting and reporting. As explained in *Cook Inlet EEZ*

Commercial Salmon Fishery Monitoring, Recordkeeping, and Reporting Requirements, the management infrastructure and resulting costs are required by NMFS for successful management of the fishery. Therefore Amendment 16 is consistent with National Standard 7.

National Standard 8

National Standard 8 requires that conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act, take into account the importance of fishery resources to fishing communities by utilizing economic and social data that are based upon the best scientific information available, in order to (a) provide for the sustained participation of such communities, and (b) to the extent practicable, minimize adverse economic impacts on such communities. This action is expected to result in Cook Inlet EEZ salmon harvests near existing levels. In some years, EEZ harvests may fall below the status quo (as a percentage of total Cook Inlet salmon harvest) to account for increased uncertainty. If EEZ harvests are reduced, additional salmon would be available for harvest in State waters by the drift gillnet fishery sector and all other salmon users. Therefore, any such reductions are not anticipated to result in community level impacts. Some adjustments to EEZ harvest totals are unavoidable as NMFS takes over a management of a new fishery, as NMFS will have less data, experience, and expertise than State managers upon implementation. However, by coordinating with State managers and carefully vetting stock assessments through the SSC, NMFS will be able to continue managing a viable commercial salmon fishery that minimizes adverse impacts on fishing communities to the extent practicable. Providing for the sustained participation of fishing communities by protecting the long-term health of the fishery depends on conserving stocks with low abundance and ensuring no stock becomes overfished, which could result in further restrictions on harvest in some years. The Analysis considered the social and economic importance of the Cook Inlet salmon fisheries to fishing communities, and recognized these communities participate in a variety of salmon fisheries apart from the drift gillnet fishery. In general, total removals of salmon in Cook Inlet are expected to remain consistent with the status quo—harvests will vary from year to year depending on run size and the abundance of any constraining stocks, but all participating fishing communities will continue to have the same access to fishery resources (as constrained by stock status). Community level distributive impacts under this action are not anticipated to substantially affect net benefits to the nation (Section 4.10 of the Analysis). Therefore, the Analysis supports a finding that this action would provide for the sustained participation of fishing communities in Cook Inlet salmon fisheries and minimize any adverse economic impacts to the extent practicable, consistent with National Standard 8.

Potential Impacts of the Action

The entire active salmon drift gillnet fleet likely fishes in the Cook Inlet EEZ Area at some time during each fishing season, but over the entire season, each vessel differs with respect to its level of economic dependency on fishing in this area. Section 4.7.1.4 of the Analysis describes that from 2009 through 2021 an estimated average of 46.9 percent of gross revenue ($13.9 million) for the drift gillnet fleet was generated from salmon caught in the Cook Inlet EEZ Area. In the last 5 years, an estimated average of approximately 41.3 percent of gross revenue ($7.3 million) was generated in the EEZ for the drift gillnet fishery. This action would likely allow drift gillnet fishery participants to continue a significant portion of their EEZ fishing activities. Some reduction in EEZ harvest may occur to account for the uncertainty inherent in creating a new management jurisdiction and establishing pre-season catch limits consistent with Magnuson-Stevens Act requirements, but drift gillnet vessels may also have the opportunity to increase harvests within State waters. This action would also impose some additional costs on fishery participants (such as installing and operating VMS) and involves additional recordkeeping, reporting, and permit requirements compared to the status quo (though at no additional cost beyond the labor needed to comply).

This rule will largely preserve existing EEZ fishing opportunities in terms of time and location, and may result in additional openers compared to the status quo in years with strong runs and a high TAC. Vessels will be able to continue fishing in the same EEZ areas they have historically fished so long as they comply with new Federal permitting, recordkeeping, and reporting requirements in the EEZ. While the uncertainty associated with a new management jurisdiction will require conservative management as NMFS builds expertise and collects data, the goal of this rule is to preserve or facilitate as much fishing opportunity in the EEZ as possible without causing overfishing and creating adverse impacts on stocks of low abundance or any other part of the ecosystem. This action would not directly modify management of salmon fishing in State waters. The drift gillnet fleet is expected to continue to operate in State waters under Amendment 16. Though EEZ harvest levels are expected to remain close to historic averages, the State, in its discretion, could modify management measures in State waters to account for any changes to EEZ harvest levels. In all, total harvests throughout Cook Inlet are expected to remain close to the status quo. As described in Section 3.1.3 of the Analysis, total harvest of Cook Inlet salmon stocks is expected to remain near existing levels resulting in salmon escapements near existing levels. NMFS finds these harvest levels have consistently prevented overfishing and ensured the majority of stocks in Cook Inlet meet their escapement goals, thus ensuring sustainable salmon stocks for future generations. This action is not expected to have significant impacts on salmon stocks or other affected parts of the environment.

This action would also directly regulate salmon processors and buyers. It would impose additional monitoring, recordkeeping, and reporting burden on processors receiving deliveries from the Cook Inlet EEZ. To the extent that this action results in slight decreases in catch by the drift gillnet fleet in the Cook Inlet EEZ that are not offset by increased catch in State waters by the drift gillnet fleet or by other commercial salmon fishing sectors, deliveries of Cook Inlet salmon and associated revenues to processors could be reduced. The impacts to individual processors would be influenced by the dependency on Cook Inlet salmon harvested in the EEZ as described in Section 4.5.1.4 of the Analysis. Because minimal reductions in harvest are anticipated, no significant impacts on processors are expected under this proposed rule compared to the status quo.

While no significant impacts on Cook Inlet salmon stocks are expected, any reductions of salmon harvest in the Cook Inlet EEZ Area could improve the density of salmon prey available to endangered Cook Inlet belugas present in northern Cook Inlet during the summer months as noted in Section 3.3.1.1 of the Analysis. As noted above, NMFS is undertaking consultation pursuant to section 7 of the ESA regarding this proposed action. While increased escapement may not be

desirable for all stocks in all years, conservative management of commercial harvest in the Cook Inlet EEZ Area will prevent overfishing and would be expected to allow utilization to be maximized over the long term as management measures are developed and refined.

Classification

The NMFS Assistant Administrator has determined that this action is consistent with the Salmon FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

A Regulatory Impact Review was prepared to assess costs and benefits of available regulatory alternatives. A copy of this analysis is available from NMFS (see **ADDRESSES**). NMFS proposes Amendment 16 and these regulations based on those measures that maximize net benefits to the Nation when considering the viable management alternatives. Specific aspects of the economic analysis are discussed below in the Initial Regulatory Flexibility Analysis section.

Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis (IRFA) was prepared for this action, as required by Section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603), to describe the economic impact this action, if adopted, would have on small entities. The IRFA describes the action; the reasons why this action is proposed; the objectives and legal basis for this action; the number and description of directly regulated small entities to which this action would apply; the recordkeeping, reporting, and other compliance requirements of this action; and the relevant Federal rules that may duplicate, overlap, or conflict with this action. The IRFA also describes significant alternatives to this action that would accomplish the stated objectives of the Magnuson-Stevens Act, and any other applicable statutes, and that would minimize any significant economic impact of this action on small entities. The description of the action, its purpose, and the legal basis are explained in the preamble and are not repeated here.

For RFA purposes only, NMFS has established small business size standards for businesses, including their affiliates, whose primary industries are commercial fishing, charter fishing, seafood processing, and seafood buying (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. For charter fishing vessels (NAICS code 713990), this threshold is combined annual receipts not in excess of $9 million. For shoreside processors (NAICS code 311710), the small business size is defined in terms of number of employees, with the threshold set at not greater than 750 employees. For entities that purchase seafood but do not process it (NAICS code 424460), the small business threshold is not greater than 100 employees.

Number and Description of Small Entities Regulated by This Action

This action would directly regulate holders of State of Alaska S03H CFEC Limited Entry salmon permits (S03H permits) fishing in the Cook Inlet EEZ Area, charter guides and charter businesses fishing for salmon in the Cook Inlet EEZ Area, and entities receiving deliveries of salmon harvested in the Cook Inlet EEZ Area. From 2019 to 2021, there was an average of 567 S03H permits in circulation, with an average of 361 active permit holders, all of which are considered small entities based on the $11 million threshold. From 2019 to 2021, there was an average of 11 shoreside processors and 6 direct marketers, all of which are considered small entities based on the 750 employee threshold. From 2019 to 2021, there was an average of 4 catcher-sellers, all of which are considered small entities based on the 100 employee threshold. From 2019 to 2021, there was an average of 58 charter guides that fished for salmon at least once in the Cook Inlet EEZ Area, all of which are considered small entities based on the $9 million threshold. Additional detail is included in Sections 4.5 and 4.9 in the Analysis prepared for this action (see **ADDRESSES**).

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

NMFS considered, but did not select three other alternatives. The alternatives, and their impacts to small entities, are described below.

Alternative 1 would take no action and would maintain existing management measures and conditions in the fishery within recently observed ranges, resulting in no change to impacts on small entities. This is not a viable alternative because it would be inconsistent with the Ninth Circuit's ruling that the Cook Inlet EEZ must be included within the Salmon FMP and managed according to the Magnuson-Stevens Act.

Alternative 2 would delegate management to the State. If fully implemented, Alternative 2 would maintain many existing conditions within the fishery. Fishery participants would have the added burdens of obtaining a Salmon Federal Fisheries Permit, maintaining a Federal fishing logbook, and monitoring their fishing position with respect to EEZ and State waters as described in Sections 2.4.8 and 4.7.2.2 of the Analysis. However, section 306(a)(3)(B) of the Magnuson-Stevens Act provides that NMFS cannot delegate management to the State without a three-quarter majority vote by the Council, which did not occur. Therefore, Alternative 2 cannot be implemented and is not a viable alternative.

Alternative 4 would close the Cook Inlet EEZ but not impose any additional direct regulatory costs on participants and would allow directly regulated entities to possibly recoup lost EEZ harvest inside State waters. However, the District Court ruled that Alternative 4 was contrary to law. Therefore, Alternative 4 is not a viable alternative.

This action (Alternative 3) would result in a Cook Inlet EEZ drift gillnet salmon fishery managed directly by NMFS and the Council. Alternative 3 would increase direct costs and burdens to S03H permit holders due to requirements including obtaining a SFFP, installing and operating a VMS, and maintaining a Federal logbook as described in Sections 2.5.6 and 4.7.2.2 of the Analysis. This action would also require that TACs be set before each fishing season. The TAC would likely be set conservatively to reduce the risk of overfishing without the benefit of inseason harvest data, but is likely to remain near existing levels. As is possible under the status quo, salmon harvest in the EEZ could be reduced or prohibited in years when a harvestable surplus is not certain, with an appropriate buffer to account for scientific and management uncertainty.

Processors receiving deliveries of salmon commercially harvested in the Cook Inlet EEZ Area would be required to obtain a SFPP. Entities receiving deliveries of salmon commercially harvested in the Cook Inlet EEZ but not processing the fish would be required to have a RSRP. All of these permits would be available at no cost from NMFS. However, entities with these permits

would be required to use eLandings with its associated requirements and report landings with all associated information by noon of the day following the completion of each delivery, which would increase direct costs and burden.

While these measures do increase costs to commercial fishery participants, all of these elements are required by NMFS to manage the fishery and prevent overfishing. Specific consideration was given in their development to minimize burden to the extent practicable while also providing required information to Federal fishery managers in a timely manner. All entities that would be directly regulated by this action could also choose to continue participating in only the State waters fisheries to avoid being subject to these Federal requirements.

Charter fishing vessels would not have any additional Federal recordkeeping, reporting, or monitoring requirements, but would be subject to Federal bag, possession, and gear regulations. These proposed measures would be the same as existing State requirements and not add additional burdens.

Based upon the best available scientific data, it appears that there are no significant alternatives to the action that have the potential to comply with applicable court rulings, accomplish the stated objectives of the Magnuson-Stevens Act and any other statutes, and minimize any significant adverse economic impact of the action on small entities while preventing overfishing. After public process, NMFS concluded that of the viable alternatives, Alternative 3, the proposed Amendment 16, would best accomplish the stated objectives articulated in the preamble for this action, and in applicable statutes, and would minimize to the extent practicable adverse economic impacts on the universe of directly regulated small entities.

Duplicate, Overlapping, or Conflicting Federal Rules

NMFS has not identified any duplication, overlap, or conflict between this action and existing Federal rules.

Recordkeeping, Reporting, and Other Compliance Requirements

This action would implement new recordkeeping, reporting, and compliance requirements. These requirements are necessary for the management and monitoring of the Cook Inlet EEZ Area salmon fisheries.

All Cook Inlet EEZ Area commercial salmon fishery participants would be required to provide additional information to NMFS for management purposes. As in other North Pacific fisheries, processors would provide catch recording data to managers to monitor harvest. Processors would be required to record deliveries and processing activities to aid in fishery administration.

To participate in the fishery, persons are required to complete application forms, reporting requirements, and monitoring requirements. These requirements impose costs on small entities in gathering the required information and completing the information collections.

NMFS has estimated the costs of complying with the requirements based on information such as the burden hours per response, number of responses per year, and wage rate estimates from industry or the Bureau of Labor Statistics. Persons are required to complete many of the requirements prior to fishing, such as obtaining permits. Persons are required to complete some requirements every year, such as the SFPP and RSRP applications. Other requirements are more periodic, such as the SFFP which is applied for every 3 years. The impacts of these changes are described in more detail in Sections 2.5.6 and 4.7.2 of the Analysis prepared for this action (see **ADDRESSES**).

Vessels commercially fishing for salmon in the Cook Inlet EEZ area would be required to obtain a SFFP, complete a Federal fishing logbook, and install and maintain an operational VMS. The vessel would also be required to mark buoys at each end of their drift gillnet with their SFFP number. While commercially fishing for salmon in the Cook Inlet EEZ Area, participants must remain within Federal waters and cannot also fish in State waters on the same calendar day or conduct any other types of fishing while in Federal waters.

Processors and other entities receiving landings of commercially caught Cook Inlet salmon from the Cook Inlet EEZ Area would be required to obtain a SFPP, a RSRP, and report landings through eLandings by noon of the day following completion of the delivery. NMFS would issue SFPPs and RSRPs at no cost.

For recreational salmon fishing, no additional Federal recordkeeping and reporting requirements are established. The existing recordkeeping and reporting requirements implemented by the State are expected to be sufficient to inform management and satisfy Magnuson-Stevens Act requirements given the small scale and limited removals of the recreational sector. These include creel sampling, the ADF&G's Statewide Harvest Survey, harvest records for annual limits, and the Saltwater Guide Logbooks.

Paperwork Reduction Act

This action contains collection of information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This action would add a new collection of information for the Cook Inlet EEZ salmon fishery under a new OMB control number and revise and extend for 3 years existing collection-of-information requirements for OMB Control Number 0648–0445 (NMFS Alaska Region VMS Program). The public reporting burden estimates provided below for these collections of information include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

OMB Control Number 0648–NEW

A new collection of information would be created for reporting, recordkeeping, and monitoring requirements implemented by this action that are necessary to federally manage the Cook Inlet EEZ salmon fishery. This new collection would contain the applications and processes used by harvesters, processors, and other entities receiving deliveries of Cook Inlet EEZ salmon to apply for and manage their permits; provide catch, landings, and processing data; and mark drift gillnet buoys. The data would be used to ensure that the fishery participants adhere to harvesting, processing, and other requirements for the Cook Inlet EEZ salmon fishery.

The public reporting burden per individual response is estimated to average 15 minutes for the SFFP application, 25 minutes for the SFPP application, 20 minutes for the RSRP application, 15 minutes to register for eLandings, 10 minutes for landing reports, 15 minutes for the daily fishing logbook, and 30 minutes to mark drift gillnet buoys.

OMB Control Number 0648–0445

NMFS proposes to revise and extend by 3 years the existing requirements for OMB Control Number 0648–0445. This collection contains the VMS requirements for the federally managed groundfish and crab fisheries off Alaska. This collection would be revised because this action would require vessels commercially fishing for salmon in the Cook Inlet EEZ Area to install and

maintain an operational VMS. The public reporting burden per individual response is estimated to average 6 hours for installation of a VMS unit, 4 hours for VMS maintenance, and 2 hours for VMS failure troubleshooting. VMS transmissions are not assigned a reporting burden because the transmissions are automatic.

Public Comment

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; 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, including through the use of automated collection techniques or other forms of information technology. Submit comments on these or any other aspects of the collection of information at *https://www.reginfo.gov/public/do/PRAMain.*

Notwithstanding any other provisions of the law, no person is required to respond or, nor shall any person by subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fish, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: October 10, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR parts 600 and 679 as follows:

TITLE 50—WILDLIFE AND FISHERIES

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. Amend § 600.725, in the table in paragraph (v), under the heading ''VII. North Pacific Fishery Management Council'' by revising entry ''8'' to read as follows:

§ 600.725 General prohibitions.

* * * * *

(v) * * *

VII—North Pacific Fishery Management Council

*	*	*	*	*	*	*
8. Alaska Salmon Fishery (FMP):						
A. East Area				A. Hook and line.		
B. Cook Inlet EEZ Area				B. Drift gillnet, handline, rod and reel, hook and line.		
*	*	*	*	*	*	*

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 3. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.,* 3631 *et seq.;* Pub. L. 108–447; Pub. L. 111–281.

■ 4. Amend § 679.1 by revising paragraph (i)(1) to read as follows:

§ 679.1 Purpose and scope.

* * * * *

(i) * * *

(1) Regulations in this part govern commercial fishing for salmon by fishing vessels of the United States in the West Area and commercial and recreational fishing for salmon in the Cook Inlet EEZ Area of the Salmon Management Area.

* * * * *

■ 5. Amend § 679.2 by:

■ a. Adding in alphabetical order the definition for ''Daily bag limit'';

■ b. Revising the definition of ''Federally permitted vessel'';

■ c. Adding paragraph (7) to the definition of ''Fishing trip'';

■ d. Adding in alphabetical order definitions for ''Possession limit'' and ''Registered Salmon Receiver'';

■ e. Revising the definition of ''Salmon Management Area''; and

■ f. Adding in alphabetical order the definition for ''Salmon shoreside processor''.

The additions and revision reads as follows:

§ 679.2 Definitions.

* * * * *

Daily bag limit means the maximum number of salmon a person may retain in any calendar day from the Cook Inlet EEZ Area.

* * * * *

Federally permitted vessel means a vessel that is named on a Federal fisheries permit issued pursuant to § 679.4(b), a Salmon Federal Fisheries Permit issued pursuant to § 679.114(b), or a Federal crab vessel permit issued pursuant to § 680.4(k) of this chapter. Federally permitted vessels must conform to regulatory requirements for purposes of fishing restrictions in habitat conservation areas, habitat conservation zones, habitat protection areas, and the Modified Gear Trawl Zone; for purposes of anchoring prohibitions in habitat protection areas; for purposes of requirements for the BS and GOA nonpelagic trawl fishery pursuant to § 679.7(b)(9), § 679.7(c)(5), and § 679.24(f); and for purposes of VMS requirements.

* * * * *

Fishing trip means:

* * * * *

(7) For purposes of subpart J of this part, the period beginning when a vessel operator commences commercial fishing for any salmon species in the Cook Inlet EEZ Area and ending when the vessel operator offloads or transfers any unprocessed salmon species from that vessel.

* * * * *

Possession limit means the maximum number of unprocessed salmon a person may possess.

* * * * *

Registered Salmon Receiver means a person holding a Registered Salmon Receiver Permit issued by NMFS.

* * * * *

Salmon Management Area means those waters of the EEZ off Alaska (see Figure 22 and Figure 23 to part 679) under the authority of the Salmon FMP. The Salmon Management Area is divided into three areas: the East Area, the West Area, and the Cook Inlet EEZ Area:

(1) *The East Area* means the area of the EEZ in the Gulf of Alaska east of the longitude of Cape Suckling (143°53.6′ W).

(2) *The West Area* means the area of the EEZ off Alaska in the Bering Sea, Chukchi Sea, Beaufort Sea, and the Gulf of Alaska west of the longitude of Cape Suckling (143°53.6′ W), but excludes the Cook Inlet EEZ Area, Prince William Sound Area, and the Alaska Peninsula Area. The Prince William Sound Area and the Alaska Peninsula Area are shown in Figure 23 to this part and described as:

(i) the Prince William Sound Area means the EEZ shoreward of a line that starts at 60°16.8′ N and 146°15.24′ W and extends southeast to 59°42.66′ N and 144°36.20′ W and a line that starts at 59°43.28′ N and 144°31.50′ W and extends northeast to 59°56.4′ N and 143°53.6′ W.

(ii) the Alaska Peninsula Area means the EEZ shoreward of a line at 54°22.5′ N from 164°27.1′ W to 163°1.2′ W and a line at 162°24.05′ W from 54°30.1′ N to 54°27.75′ N.

(3) *The Cook Inlet EEZ Area,* shown in Figure 22 to this part, means the EEZ of Cook Inlet north of a line at 59°46.15′ N.

* * * * *

Salmon shoreside processor means any person or vessel that receives, purchases, or arranges to purchase, and processes unprocessed salmon harvested in the Cook Inlet EEZ Area, except a Registered Salmon Receiver.

* * * * *

■ 6. Amend § 679.3 by revising paragraph (f) to read as follows:

§ 679.3 Relation to other laws.

* * * * *

(f) *Domestic fishing for salmon.* Management of the salmon commercial troll fishery and recreational fishery in the East Area of the Salmon Management Area, defined at § 679.2, is delegated to the State of Alaska. Regulations governing the commercial drift gillnet salmon fishery and recreational salmon fishery in the Cook Inlet EEZ Area, defined at § 679.2, are set forth in subpart J of this Section.

* * * * *

§ 679.7 Prohibitions [Amended]

■ 7. Amend § 679.7 by removing and reserving paragraph (h).

■ 8. Amend § 679.25 by

■ a. Revising paragraph (a)(1) introductory text;

■ b. Adding paragraphs (a)(1)(vi), (a)(2)(vi) and (vii); and

■ c. Revising paragraph (b) introductory text, (b)(3), and (b)(8).

The additions and revisions read as follows:

§ 679.25 Inseason adjustments.

(a) * * *

(1) *Types of adjustments.* Inseason adjustments for directed fishing for groundfish, fishing for IFQ or CDQ halibut, or fishing for Cook Inlet EEZ Area salmon issued by NMFS under this section include:

* * * * *

(vi) Adjustment of TAC for any salmon species or stock and closure or opening of a season in all or part of the Cook Inlet EEZ Area.

(2) * * *

(vi) Any inseason adjustment taken under paragraph (a)(1)(vi) of this section must be based on a determination that such adjustments are necessary to prevent:

(A) Overfishing of any species or stock of fish or shellfish;

(B) Harvest of a TAC for any salmon species or stock that, on the basis of the best available scientific information, is found by NMFS to be incorrectly specified; or

(C) Underharvest of a TAC for any salmon species or stock when catch information indicates that the TAC has not been reached, and there is not a conservation or management concern for any species or stock that would also be harvested with additional fishing effort.

(vii) The selection of the appropriate inseason management adjustments under paragraphs (a)(1)(vi) of this section must be from the following authorized management measures and must be based on a determination by the Regional Administrator that the management adjustment selected is the least restrictive necessary to achieve the purpose of the adjustment:

(A) Closure of a management area or portion thereof, or gear type, or season to all salmon fishing; or

(B) Reopening of a management area or season to achieve the TAC for any of the salmon species or stock without exceeding the TAC of any other salmon species or stock.

(viii) The adjustment of a TAC for any salmon species or stock under paragraph (a)(1)(vi) of this section must be based upon a determination by the Regional Administrator that the adjustment is based upon the best scientific information available concerning the biological stock status of the species in question and that the currently specified TAC is incorrect. Any adjustment to a TAC must be reasonably related to the change in biological stock status.

(b) *Data.* Information relevant to one or more of the following factors may be considered in making the determinations required under paragraphs (a)(2)(i), (ii), (vi) and (vii) of this section:

* * * * *

(3) Relative distribution and abundance of stocks of groundfish species, salmon species or stocks, and prohibited species within all or part of a statistical area;

* * * * *

(8) Any other factor relevant to the conservation and management of groundfish species, salmon species or stocks, or any incidentally caught species that are designated as prohibited species or for which a PSC limit has been specified.

* * * * *

■ 9. Amend § 679.28 by adding paragraph (f)(6)(x) to read as follows:

§ 679.28 Equipment and operational requirements

* * * * *

(f) * * *

(6) * * *

(x) You operate a vessel named, or required to be named, on an SFFP issued under § 679.114 in the waters of Cook Inlet and have drift gillnet gear on board.

* * * * *

■ 10. Add subpart J, consisting of §§ 679.110 through 679.119, to read as follows:

Subpart J—Salmon Fishery Management

Sec.

Subpart J—Salmon Fishery Management

§ 679.110 Applicability.

This subpart contains regulations governing the commercial and recreational harvest of salmon in the Salmon Management Area (See § 679.2).

§ 679.111 [Reserved]

§ 679.112 [Reserved]

§ 679.113 [Reserved]

§ 679.114 Permits.

(a) *Requirements*—

(1) *What permits are available?* The following table describes the permits available under this subpart that authorize the retention, processing, and receipt of salmon in the Cook Inlet EEZ Area, respectively, along with date of effectiveness for each permit and reference paragraphs for further information:

If permit type is:	Permit is in effect from issue date through the end of:	For more information, see . . .
(i) Salmon Federal Fisheries Permit (SFFP)	3 years or until expiration date shown on permit.	Paragraph (b) of this section.
(ii) Salmon Federal Processor Permit (SFPP) ...	Until expiration date shown on permit	Paragraph (c) of this section.
(iii) Registered Salmon Receiver Permit (RSRP)	1 year	Paragraph (d) of this section.

(2) *Permit and logbook required by participant and fishery.* For the various types of permits issued pursuant to this subpart, refer to § 679.115 for recordkeeping and reporting requirements.

(3) *Permit application.*

(i) A person may obtain an application for a new permit, or for renewal or revision of an existing permit, from NMFS for any of the permits under this section and must submit forms to NMFS as instructed in application instructions. All permit applications may be completed online and printed from the NMFS Alaska Region website (See § 679.2);

(ii) Upon receipt of an incomplete or improperly completed permit application, NMFS will notify the applicant of the deficiency in the permit application. If the applicant fails to correct the deficiency, the permit will not be issued. NMFS will not approve a permit application that is untimely or incomplete;

(iii) The owner or authorized representative of a vessel, owner or authorized representative of a processor, and Registered Salmon Receiver must obtain a separate permit for each vessel, entity, operation, or facility, as appropriate to each Federal permit in this section;

(iv) All permits are issued free of charge;

(v) NMFS will consider objective written evidence in determining whether an application is timely. The responsibility remains with the sender to provide objective written evidence of when an application to obtain, amend, or to surrender a permit was received by NMFS (*e.g.,* certified mail or other method that provides written evidence that NMFS Alaska Region received it); and

(vi) For applications delivered by hand delivery or carrier, the date the application was received by NMFS is the date NMFS staff signs for it upon receipt. If the application is submitted by fax or mail, the receiving date of the application is the date stamped received by NMFS.

(4) *Disclosure.* NMFS will maintain a list of permit holders that may be disclosed for public inspection.

(5) *Sanctions and denials.* Procedures governing permit sanctions and permit denials for enforcement purposes are found at subpart D of 15 CFR part 904. Such procedures are not required for any other purposes under this part.

(6) *Harvesting privilege.* Permits issued pursuant to this subpart, are neither a right to the resource nor any interest that is subject to the ''Takings Clause'' provision of the Fifth Amendment to the U.S. Constitution. Rather, such permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson-Stevens Act and other applicable law.

(7) *Permit surrender.*

(i) NMFS will recognize the voluntary surrender of a permit issued under this subpart, if a permit is authorized to be surrendered and if an application is submitted by the permit holder or authorized representative and approved by NMFS; and

(ii) For surrender of an SFFP and SFPP, refer to paragraphs (b)(3)(ii) and (c)(3)(ii) of this section, respectively.

(b) *Salmon Federal Fisheries Permit (SFFP)*—

(1) *Requirements.*

(i) No vessel of the United States may be used to commercially fish for salmon in the Cook Inlet EEZ Area unless the owner or authorized representative first obtains an SFFP for the vessel issued under this part. Only persons who are U.S. citizens are authorized to obtain an SFFP; and

(ii) Each vessel used to commercially fish for salmon within the Cook Inlet EEZ Area must have a legible copy of a valid SFFP on board at all times. The vessel operator must present the valid SFFP for inspection upon the request of any authorized officer.

(2) *Vessel operation.* An SFFP authorizes a vessel to conduct operations in the Cook Inlet EEZ Area.

(3) *Duration.*

(i) *Length of permit effectiveness.* NMFS issues SFFPs on a three-year cycle, and an SFFP is in effect from the effective date through the expiration date, as indicated on the SFFP, unless the SFFP is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) *Surrendered permit.*

(A) An SFFP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. NMFS will not reissue a surrendered SFFP to the owner or authorized representative of a vessel named on an SFFP until after the expiration date of the surrendered SFFP as initially issued.

(B) An owner or authorized representative who applied for and received an SFFP must notify NMFS of the intention to surrender the SFFP by submitting an SFFP application found at the NMFS Alaska Region website and indicating on the application that surrender of the permit is requested. Upon receipt and approval of an SFFP surrender application, NMFS will withdraw the SFFP from active status.

(4) *Amended permit.* An owner or authorized representative who applied for and received an SFFP must notify NMFS of any change in the permit information by submitting an SFFP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Except as provided under paragraph (b)(3)(ii)(B) of this section, upon receipt and approval of an application form for permit amendment, NMFS will issue an amended SFFP.

(5) *SFFP application.* To obtain, amend, renew, or surrender an SFFP, the vessel owner or authorized representative must complete an SFFP

application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of the vessel must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(6) *Issuance.*

(i) Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFFP required by this section (§ 679.114(b)).

(ii) NMFS will send an SFFP with the appropriate logbooks to the owner or authorized representative, as provided under § 679.115.

(7) *Transfer.* An SFFP issued under this this section (§ 679.114(b)) is not transferable or assignable and is valid only for the vessel for which it is issued.

(c) *Salmon Federal Processor Permit (SFPP)—*

(1) *Requirements.* No salmon shoreside processor, as defined at § 679.2, may process salmon harvested in the Cook Inlet EEZ Area, unless the owner or authorized representative first obtains an SFPP issued under this subpart. A salmon shoreside processor may not be operated in a category other than as specified on the SFPP. A legible copy of a valid SFPP must be on site at the salmon shoreside processor at all times and must be presented for inspection upon the request of any authorized officer.

(2) *SFPP application.* To obtain, amend, renew, or surrender an SFPP, the owner or authorized representative of the salmon shoreside processor must complete an SFPP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of the salmon shoreside processor must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(3) *Issuance.* Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFFP required by this section (§ 679.114(c)).

(4) *Duration—*

(i) *Length of effectiveness.* An SFPP is in effect from the effective date through the date of permit expiration, unless it is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) *Surrendered permit.*

(A) An SFPP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. NMFS may reissue an SFPP to the person to whom the SFPP was initially issued in the same fishing year in which it was surrendered.

(B) An owner or authorized representative who applied for and received an SFPP must notify NMFS of the intention to surrender the SFPP by submitting an SFPP surrender application form found at the NMFS Alaska Region website and indicating on the application form that surrender of the SFPP is requested. Upon receipt and approval of an SFPP surrender application form, NMFS will withdraw the SFPP from active status.

(5) *Amended permit.* An owner or authorized representative who applied for and received an SFPP must notify NMFS of any change in the permit information by submitting an SFPP amendment application form found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Upon receipt and approval of an SFPP amendment application form, NMFS will issue an amended SFPP.

(6) *Transfer.* An SFPP issued under this paragraph (c) is not transferable or assignable and is valid only for the salmon shoreside processor for which it is issued.

(d) *Registered Salmon Receiver Permit (RSRP)—*

(1) *Requirements.* An RSRP authorizes the person identified on the permit to receive a landing of salmon from an SFFP holder at any time during the fishing year for which it is issued until the RSRP expires, as indicated on the RSRP, or is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section. An RSRP is required for any person, other than an SFPP holder, to receive salmon commercially harvested in the Cook Inlet EEZ Area from the person(s) who harvested the fish. A legible copy of the RSRP must be present at the time and location of a landing. The RSRP holder or their authorized representative must make the RSRP available for inspection upon the request of any authorized officer.

(2) *Application.* To obtain, renew, or surrender an RSRP, the owner or authorized representative must complete an RSRP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of a Registered Salmon Receiver must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(3) *Issuance.* Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFFP required by this section (§ 679.114(d)).

(4) *Duration.* An RSRP is issued on an annual cycle defined as May through the end of April of the next calendar year, to persons who submit a Registered Salmon Receiver Permit application that NMFS approves.

(i) An RSRP is in effect from the first day of May in the year for which it is issued or from the date of issuance, whichever is later, through the end of the current annual cycle, unless it is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) An RSRP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. An RSRP may be reissued to the permit holder of record in the same fishing year in which it was surrendered.

(5) *Amended permit.* An owner or authorized representative who applied for and received an RSRP must notify NMFS of any change in the permit information by submitting an RSRP application form found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Upon receipt and approval of an RSRP amendment application form, NMFS will issue an amended RSRP.

§ 679.115 Recordkeeping and Reporting.

(a) *General Recordkeeping and Reporting (R&R) requirement*—R&R requirements include, but are not limited to, paper and electronic documentation, logbooks, forms, reports, and receipts.

(1) *Salmon logbooks and forms.*

(i) The Regional Administrator will prescribe and provide logbooks required under this section. All forms required under this section are available from the NMFS Alaska Region website or may be requested by calling the Sustainable Fisheries Division at 907–586–7228. These forms may be completed online, or submitted according to the instructions shown on the form.

(ii) The operator must use the current edition of the logbooks and current

format of the forms, unless they obtain prior written approval from NMFS to use logbooks from the previous year. Upon approval from NMFS, electronic versions of the forms may be used.

(iii) Commercial salmon harvest that occurred in the Cook Inlet EEZ Area must be recorded in eLandings by an SFPP or RSRP holder. See paragraph (b) of this section for more information.

(2) *Responsibility.* (i) The operator of a vessel, the manager of a salmon shoreside processor (hereafter referred to as the manager), and a Registered Salmon Receiver are responsible for complying with applicable R&R requirements in this section.

(ii) The owner of a vessel, the owner of a salmon shoreside processor, and the owner of a Registered Salmon Receiver are responsible for ensuring their employees and agents comply with applicable R&R requirements in this section.

(3) *Fish to be recorded and reported.* The operator of a vessel or manager must record and report the following information (see paragraphs (a)(3)(i) through (iv) of this section) for all salmon, groundfish (see Table 2a to this part), halibut and crab, forage fish (see Table 2c to this part), and sculpins (see Table 2c to this part). The operator of a vessel or manager may record and report the following information (see paragraphs (a)(3)(i) through (iv) of this section) for other species (see Table 2d to this part):

(i) Harvest information from vessels;

(ii) Receipt information from vessels, buying stations, and tender vessels, including fish received from vessels not required to have an SFFP or FFP, and fish received under contract for handling or processing for another processor;

(iii) Discard or disposition information, including fish reported but not delivered to the operator or manager (*e.g.,* fish used on board a vessel, retained for personal use, discarded at sea), when receiving catch from a vessel, buying station, or tender vessel; and

(iv) Transfer information, including fish transferred off the vessel or out of the facility.

(4) *Inspection and retention of records*—

(i) *Inspection of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must make available for inspection R&R documentation they are required to retain under this section upon the request of an authorized officer; and

(ii) *Retention of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must retain the R&R documentation they are required to make under this section as follows:

(A) Retain these records on board a vessel, on site at the salmon shoreside processor or stationary floating processor (see § 679.2), or at the Registered Salmon Receiver's place of business, as applicable, until the end of the fishing year during which the records were made and for as long thereafter as fish or fish products recorded in the R&R documentation are retained on site.

(B) Retain these records for three years after the end of the fishing year during which the records were made.

(5) *Maintenance of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must maintain all records described in this section in English and in a legible, timely, and accurate manner, based on Alaska local time (A.l.t.); if handwritten, in indelible ink; if computer-generated, as a readable file or a legible printed paper copy;

(6) *Custom processing.* The manager or Registered Salmon Receiver must record products that result from custom processing for another person in eLandings consistently throughout a fishing year using one of the following two methods:

(i) For combined records, record landings, discards or dispositions, and products of custom-processed salmon routinely in eLandings using processor name, any applicable RSRP number or SFPP number, and ADF&G processor code; or

(ii) For separate records, record landings, discards or dispositions, and products of custom-processed salmon in eLandings identified by the name, SFPP number or RSRP number, and ADF&G processor code of the associated business entity.

(7) *Representative.* The operator of a vessel, manager, and RSRP holder may identify one contact person to complete the logbook and forms and to respond to inquiries from NMFS.

(b) *Interagency Electronic Reporting System (IERS) and eLandings*—

(1) *Responsibility.*

(i) An eLandings User must obtain at his or her own expense hardware, software, and internet connectivity to support internet submissions of commercial fishery landings for which participants report to NMFS: landing data, production data, and discard or disposition data. The User must enter this information via the internet by logging on to the eLandings system at *http://elandings.alaska.gov* or other NMFS-approved software or by using the desktop client software.

(ii) If the User is unable to submit commercial fishery landings of Cook Inlet EEZ salmon due to hardware, software, or internet failure for a period longer than the required reporting time, the User must contact NMFS Sustainable Fisheries Division at 907–586–7228 for instructions. When the hardware, software, or internet is restored, the User must enter this same information into eLandings or other NMFS-approved software.

(2) *eLandings processor registration.* (i) Before a User can use the eLandings system to report landings, production, discard, or disposition data, he or she must request authorization to use the system, reserve a unique UserID, and obtain a password by using the internet to complete the eLandings processor registration at *https://elandings.alaska.gov/elandings/Register;*

(ii) Upon registration acceptance, the User must print, sign, and mail or fax the User Agreement Form to NMFS at the address or fax number shown on the form. Confirmation will be emailed to indicate that the User is registered, authorized to use eLandings, and that the UserID and User's account are enabled; and

(iii) The User's signature on the registration form means that the User agrees to the following terms:

(A) To use eLandings access privileges only for submitting legitimate fishery landing reports;

(B) To safeguard the UserID and password to prevent their use by unauthorized persons; and

(C) To ensure that the User is authorized to submit landing reports for the processor permit number(s) listed.

(3) *Information required for eLandings processor registration form.* The User must enter the following information (see paragraphs (b)(3)(i) through (ix) of this section) to obtain operation registration and UserID registration:

(i) Select the operation type from the dropdown list;

(ii) Enter a name that will refer to the specific operation. For example, if the plant is in Kodiak and the company is East Pacific Seafoods, the operation name might read ''East Pacific Seafoods—Kodiak;''

(iii) Enter ADF&G processor code;

(iv) Enter all the Federal permits associated with the operation;

(A) If a processor for Cook Inlet EEZ salmon, enter the SFPP number; and

(B) If a Registered Salmon Receiver, enter the RSRP number;

(v) Enter the home port code (see Tables 14a, 14b, and 14c to this part) for the operation;

(vi) If a tender operation, the operator must enter the ADF&G vessel identification number of the vessel;

(vii) If a buying station or Registered Salmon Receiver operation is a vehicle, enter vehicle license number and the state of license issuance;

(viii) If a buying station, tender vessel, or custom processor, enter the following information to identify the associated processor where the processing will take place: operation type, ADF&G processor code, and applicable SFPP number, and RSRP number; and

(ix) Each operation requires a primary User. Enter the following information for the primary User for the new operation: create and enter a UserID, initial password, company name, User name (name of the person who will use the UserID), city and state where the operation is located, business telephone number, business fax number, business email address, security question, and security answer.

(4) *Information entered automatically for eLandings landing report.* eLandings autofills the following fields from processor registration records (see paragraph (b)(2) of this section): UserID, processor company name, business telephone number, email address, port of landing, operation type (for catcher/processors, motherships, or stationary floating processors), ADF&G processor code, and Federal permit number. The User must review the autofilled cells to ensure that they are accurate for the landing that is taking place. eLandings assigns a unique landing report number and an ADF&G electronic fish ticket number upon completion of data entry.

(5) *Registered Salmon Receiver landing report.* The manager and a Registered Salmon Receiver that receives salmon from a vessel issued an SFFP under § 679.114 and that is required to have an SFPP or RSRP under § 679.114(c) or (d) must use eLandings or other NMFS-approved software to submit a daily landing report during the fishing year to report processor identification information and the following information under paragraphs (b)(5)(i) through (iii) of this section:

(i) Information entered for each salmon delivery to a salmon shoreside processor or Registered Salmon Receiver. The User for a shoreside processor, stationary floating processor, or Registered Salmon Receiver must enter the information specified at (b)(5)(i)(A) through (C) of this section for each salmon delivery provided by the operator of a vessel, the operator or manager of an associated buying station or tender vessel, and from processors for reprocessing or rehandling product into eLandings or other NMFS-approved software:

(A) *Delivery information*—The User must:

(*1*) For crew size, enter the number of licensed crew aboard the vessel, including the operator;

(*2*) Enter the management program name in which harvest occurred (see paragraph (a)(1)(iii) of this section);

(*3*) Enter the ADF&G salmon statistical area of harvest;

(*4*) For date of landing, enter date (mm/dd/yyyy) that the delivery was completed;

(*5*) Indicate (YES or NO) whether delivery is from a buying station or tender vessel;

(*6*) If the delivery is received from a buying station, indicate the name of the buying station;

(*7*) If the delivery is received from a tender vessel, enter the ADF&G vessel registration number;

(*8*) If delivery is received from a vessel, indicate the ADF&G vessel registration number of the vessel; and

(9) Mark whether the vessel logsheet has been received.

(B) *Catch information*—The User must record the number and landed scale weight in pounds of salmon, including any applicable weight modifier such as delivery condition code, and disposition code of fish by species.

(C) *Discard or disposition information*—

(i) The User must record discard or disposition of fish: that occurred on and was reported by a vessel; that occurred on and was reported by a salmon shoreside processor or Registered Salmon Receiver; and that occurred prior to, during, and/or after production at the salmon shoreside processor.

(ii) The User for a salmon shoreside processor or Registered Salmon Receiver must submit a landing report containing the information described in paragraph (b)(5)(i) of this section for each salmon delivery from a specific vessel by 1,200 hours, A.l.t., of the day following completion of the delivery. If the landed scale weight required in paragraph (b)(5)(i)(B) of this section is not available by this deadline, the User must transmit an estimated weight and count for each species by 1,200 hours, A.l.t., of the day following completion of the delivery, and must submit a revised landing report with the landed scale weight for each species by 1,200 hours, A.l.t., of the third day following completion of the delivery.

(iii) By using eLandings, the User for a salmon shoreside processor or a Registered Salmon Receiver and the operator of the vessel providing information to the User for the salmon shoreside processor or Registered Salmon Receiver accept the responsibility of and acknowledge compliance with § 679.117(b)(5).

(c) *Logbooks*—

(1) *Requirements.*

(i) All Cook Inlet EEZ Area logbook pages must be sequentially numbered.

(ii) Except as described in paragraph (c)(1)(iii) or (iv) of this section, no person may alter or change any entry or record in a logbook;

(iii) An inaccurate or incorrect entry or record in printed data must be corrected by lining out the original and inserting the correction, provided that the original entry or record remains legible. All corrections must be made in ink; and

(iv) If after an electronic logsheet is signed, an error is found in the data, the operator must make any necessary changes to the data, sign the new logsheet, and export the revised file to NMFS. The operator must retain both the original and revised logsheet reports.

(2) *Logsheet distribution and submittal.* The operator of a vessel must distribute and submit accurate copies of logsheets to the salmon shoreside processor or Registered Salmon Receiver and to NOAA Fisheries Office of Law Enforcement Alaska Region according to the logsheet instructions.

(3) *Salmon drift gillnet vessel daily fishing log.* The operator of a vessel that is required to have an SFFP under § 679.114(b), and that is using drift gillnet gear to harvest salmon in the Cook Inlet EEZ Area, must maintain a salmon drift gillnet vessel daily fishing log.

(4) *Reporting time limits.* The operator of a vessel using drift gillnet gear must record in the daily fishing log the information from the following table for each set within the specified time limit:

REPORTING TIME LIMITS, CATCHER VESSEL DRIFT GILLNET GEAR

Required information	Time limit for recording
(i) SFFP number, set number, date and time gear set, date and time gear hauled, beginning and end positions of set, length of net deployed, total number of salmon, marine mammal interaction code, and estimated hail weight of groundfish for each set.	Within 2 hours after completion of gear retrieval.
(ii) Discard and disposition information	Prior to landing.
(iii) Submit an accurate copy of the groundfish discards reported on the daily fishing log to shoreside processor or Registered Salmon Receiver receiving catch.	At the time of catch delivery.
(iv) All other required information	At the time of catch delivery.
(v) Operator sign the completed logsheets	At the time of catch delivery.

§ 679.116 [Reserved]

§ 679.117 Salmon Fisheries Prohibitions.

In addition to the general prohibitions specified in *§ 600.725 of this chapter* and § 679.7, it is unlawful for any person to do any of the following:

(a) *The East Area and the West Area.*

(1) Engage in commercial fishing for salmon using any gear except troll gear, defined at § 679.2, in the East Area of the Salmon Management Area, defined at § 679.2 and Figure 23 to this part.

(2) Engage in commercial fishing for salmon in the West Area of the Salmon Management Area, defined at § 679.2 and Figure 23 to this part.

(b) *Cook Inlet EEZ Area.*

(1) *Commercial fishery participants.*

(i) Engage in commercial fishing for salmon in the Cook Inlet EEZ Area with a vessel of the United States that does not have on board a legible copy of a valid SFFP issued to the vessel under § 679.114;

(ii) Engage in commercial fishing for salmon using any gear except drift gillnet gear, described at § 679.118, in the Cook Inlet EEZ Area of the Salmon Management Area, defined at § 679.2 and Figure 22 to this part;

(iii) Have on board, retrieve, or deploy any gear, except a drift gillnet legally configured for the Cook Inlet EEZ Area commercial salmon fishery while commercial fishing for salmon in the Cook Inlet EEZ Area;

(iv) Deploy more than one drift gillnet while commercial fishing for salmon in the Cook Inlet EEZ Area;

(v) Set drift gillnet gear within, or allow any portion of drift gillnet gear to enter, Alaska State waters on the same calendar day that drift gillnet gear is also deployed in the Cook Inlet EEZ Area while commercial fishing for salmon in the Cook Inlet EEZ Area;

(vi) Deploy drift gillnet gear in excess of the allowable configuration for total length and mesh size specified at § 679.118(f) while commercial fishing for salmon in the Cook Inlet EEZ Area;

(vii) Use a vessel named, or required to be named, on an SFFP to fish for salmon in the Cook Inlet EEZ Area if that vessel fishes for salmon in Alaska State waters on the same calendar day;

(viii) Possess salmon, harvested in Alaska State waters, on board a vessel commercial fishing for salmon in the Cook Inlet EEZ Area;

(ix) Have salmon on board a vessel at the time a fishing trip commences in the Cook Inlet EEZ Area;

(x) Conduct recreational fishing for salmon, or have recreational or subsistence salmon on board, while commercial fishing for salmon in the Cook Inlet EEZ Area;

(xi) Use or employ aircraft (manned or unmanned) to locate salmon or to direct commercial fishing while commercial fishing for salmon in the Cook Inlet EEZ Area one hour before, during, and one hour after a commercial salmon fishing period;

(xii) Land salmon harvested in Alaska State waters concurrently with salmon harvested commercially in the Cook Inlet EEZ Area;

(xiii) Land or transfer salmon harvested while commercial fishing for salmon in the Cook Inlet EEZ Area, within the EEZ off Alaska;

(xiv) Operate a vessel named, or required to be named, on an SFFP to commercially fish for salmon in the Cook Inlet EEZ Area without a functioning VMS as described in § 679.28(f).

(xv) Discard any salmon harvested while commercial fishing for salmon in the Cook Inlet EEZ Area.

(2) *Recreational fishery participants.*

(i) Engage in recreational fishing for salmon using any gear except for handline, rod and reel, or hook and line gear, defined at § 600.10, in the Cook Inlet EEZ Area of the Salmon Management Area, defined at § 679.2 and Figure 22 to this part;

(ii) Use more than a single line, with more than two hooks attached, per angler;

(iii) No person shall possess on board a vessel, including charter vessels and pleasure craft used for fishing, salmon that have been filleted, mutilated, or otherwise disfigured in any manner, except that each salmon may be cut into no more than 2 pieces with a patch of skin on each piece, naturally attached. One piece from one salmon on board may be consumed.

(iv) Exceed the daily bag limits and possession limits established under § 679.119.

(3) *Processors and Registered Salmon Receivers.*

(i) Receive, purchase or arrange for purchase, discard, or process salmon harvested in the Cook Inlet EEZ Area without having on site a legible copy of a valid SFPP or valid RSRP issued under § 679.114;

(ii) Process or receive salmon harvested in the Cook Inlet EEZ Area without submitting a timely and complete landing report as required under § 679.115;

(iii) Process salmon harvested in the Cook Inlet EEZ Area in the EEZ off Alaska; and

(iv) Receive or transport salmon caught in the Cook Inlet EEZ Area without an SFPP or RSRP issued under § 679.114.

(4) *Recordkeeping and reporting.*

(i) Fail to comply with or fail to ensure compliance with requirements in §§ 679.114 or 679.115.

(ii) Alter or forge any permit or document issued under §§ 679.114 or 679.115;

(iii) Fail to submit or submit inaccurate information on any report, application, or statement required under this part; and

(iv) Intentionally submit false information on any report, application, or statement required under this part.

(5) Fail to comply with any other requirement or restriction specified in this part or violate any provision under this part.

§ 679.118 Management Measures.

This section applies to vessels engaged in commercial fishing and recreational fishing for salmon in the Cook Inlet EEZ Area.

(a) *Harvest limits*—(1) *TAC.* NMFS, after consultation with the Council, will specify the annual TAC amounts for commercial fishing for each salmon

stock or species after accounting for projected recreational fishing removals.

(2) *Annual TAC determination.* The annual determinations of TAC for each salmon species or stock may be based on a review of the following:

(i) Resource assessment documents prepared regularly for the Council that provide information on historical catch trends; updated estimates of the MSY of the salmon stocks or stock complexes; assessments of the stock condition of each salmon stock or stock complex; SSC recommendations on reference points established for salmon stocks; management uncertainty; assessments of the multispecies and ecosystem impacts of harvesting the salmon stocks at current levels, given the assessed condition of stocks, including consideration of rebuilding depressed stocks; and alternative harvesting strategies and related effects on the salmon species;

(ii) Social and economic considerations that are consistent with Salmon FMP goals for the Cook Inlet EEZ Area, including the need to promote efficiency in the utilization of fishery resources, including minimizing costs; the desire to conserve, protect, and rebuild depleted salmon stocks; the importance of a salmon fishery to harvesters, processors, local communities, and other salmon users in Cook Inlet; and the need to promote utilization of certain species.

(b) *Annual specifications—*

(1) *Proposed specifications.*

(i) As soon as practicable after consultation with the Council, NMFS will publish proposed specifications for the salmon fishery in the Cook Inlet EEZ Area; and

(ii) NMFS will accept public comment on the proposed specifications established by this section for a period specified in the notice of proposed specifications published in the **Federal Register**.

(2) *Final specifications.* NMFS will consider comments received on the proposed specifications and will publish a notice of final specifications in the **Federal Register** unless NMFS determines that the final specifications would not be a logical outgrowth of the notice of proposed specifications. If the final specifications would not be a logical outgrowth of the notice of proposed specifications, NMFS will either:

(i) Publish a revised notice of proposed specifications in the **Federal Register** for public comment, and after considering comments received on the revised proposed specifications, publish a notice of final specifications in the **Federal Register**; or

(ii) Publish a notice of final specifications in the **Federal Register** without an additional opportunity for public comment based on a finding that good cause pursuant to the Administrative Procedure Act justifies waiver of the requirement for a revised notice of proposed specifications and opportunity for public comment thereon.

(c) *Management Authority—*

(1) *Fishery closures.* (i) For commercial fishing, if NMFS determines that any salmon TAC for commercial fishing as specified under paragraph (b) of this section has been or may be reached for any salmon species or stock, NMFS will publish notification in the **Federal Register** prohibiting commercial fishing for salmon in the Cook Inlet EEZ Area.

(ii) For recreational fishing, if NMFS determines that any salmon ABC as specified under paragraph (b) of this section has been or may be reached, NMFS will publish notification in the **Federal Register** prohibiting retention for that salmon species when recreational fishing in the Cook Inlet EEZ Area.

(d) *Commercial Fishery maximum retainable amounts (MRA)—*

(1) *Proportion of basis species.* The MRA of an incidental catch species is calculated as a proportion of the basis species retained on board the vessel using the retainable percentages in Table 10 to this part for the GOA species categories.

(2) *Calculation.* (i) To calculate the MRA for a specific incidental catch species, an individual retainable amount must be calculated with respect to each basis species that is retained on board that vessel.

(ii) To obtain these individual retainable amounts, multiply the appropriate retainable percentage for the incidental catch species/basis species combination, set forth in Table 10 to this part for the GOA species categories, by the amount of the relevant basis species on board, in round-weight equivalents.

(iii) The MRA for that specific incidental catch species is the sum of the individual retainable amounts for each basis species.

(e) *Seasons—*

(1) *Fishing Season.* Directed fishing for salmon using drift gillnet gear in the Cook Inlet EEZ Area may be conducted from 0700 hours, A.l.t., from the third Monday in June or June 19, whichever is later, through 1900 hours, A.l.t., August 15.

(2) *Fishing Periods.* Notwithstanding other provisions of this part, fishing for salmon with drift gillnet gear in the Cook Inlet EEZ Area is authorized during the fishing season only from 0700 hours, A.l.t., until 1900 hours, A.l.t., Mondays and from 0700 hours, A.l.t., until 1900 hours, A.l.t., Thursdays. Fishing for salmon using drift gillnet gear at times other than during the specified fishing periods is not authorized.

(f) *Legal gear—*

(1) *Size.* Drift gillnet gear must be no longer than 200 fathoms (1.1 kilometer) in length, 45 meshes deep, and have a mesh size of no greater than 6 inches (15.24 cm).

(2) *Marking.* Drift gillnet gear must be marked at both ends with buoys that legibly display the vessel's SFFP number.

(3) *Floating.* The float line and floats of gillnets must be floating on the surface of the water while the net is fishing, unless natural conditions cause the net to temporarily sink. Staking or otherwise fixing a drift gillnet to the seafloor is not authorized.

(4) *Measurement.* For purposes of paragraph (f)(1), nets must be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only.

§ 679.119 Recreational Salmon Fisheries.

(a) *Daily bag limits and possession limits*—For each person recreational fishing for salmon in the Cook Inlet EEZ Area, the following daily bag and possession limits apply:

(1) *Chinook salmon.* From April 1 to August 31, the daily bag limit is one Chinook salmon of any size and the possession limit is one daily bag limit (one Chinook salmon). From September 1 to March 31, the daily bag limit is two Chinook salmon of any size and the possession limit is one daily bag limit (two Chinook salmon).

(2) *Coho salmon, sockeye salmon, pink salmon, and chum salmon.* For coho salmon, sockeye salmon, pink salmon, and chum salmon, the daily bag limit is a total of six fish combined, of any size, of which a maximum of three may be coho salmon. The possession limit for coho salmon, sockeye salmon, pink salmon, and chum salmon is one daily bag limit (six fish total).

(3) *Combination of bag/possession limits.* A person who fishes for or possesses salmon in or from the Cook Inlet EEZ Area, specified in paragraph (a) of this section, may not combine such bag or possession limits with any bag or possession limit applicable to Alaska State waters.

(4) *Responsibility for bag/possession limits.* The operator of a vessel that

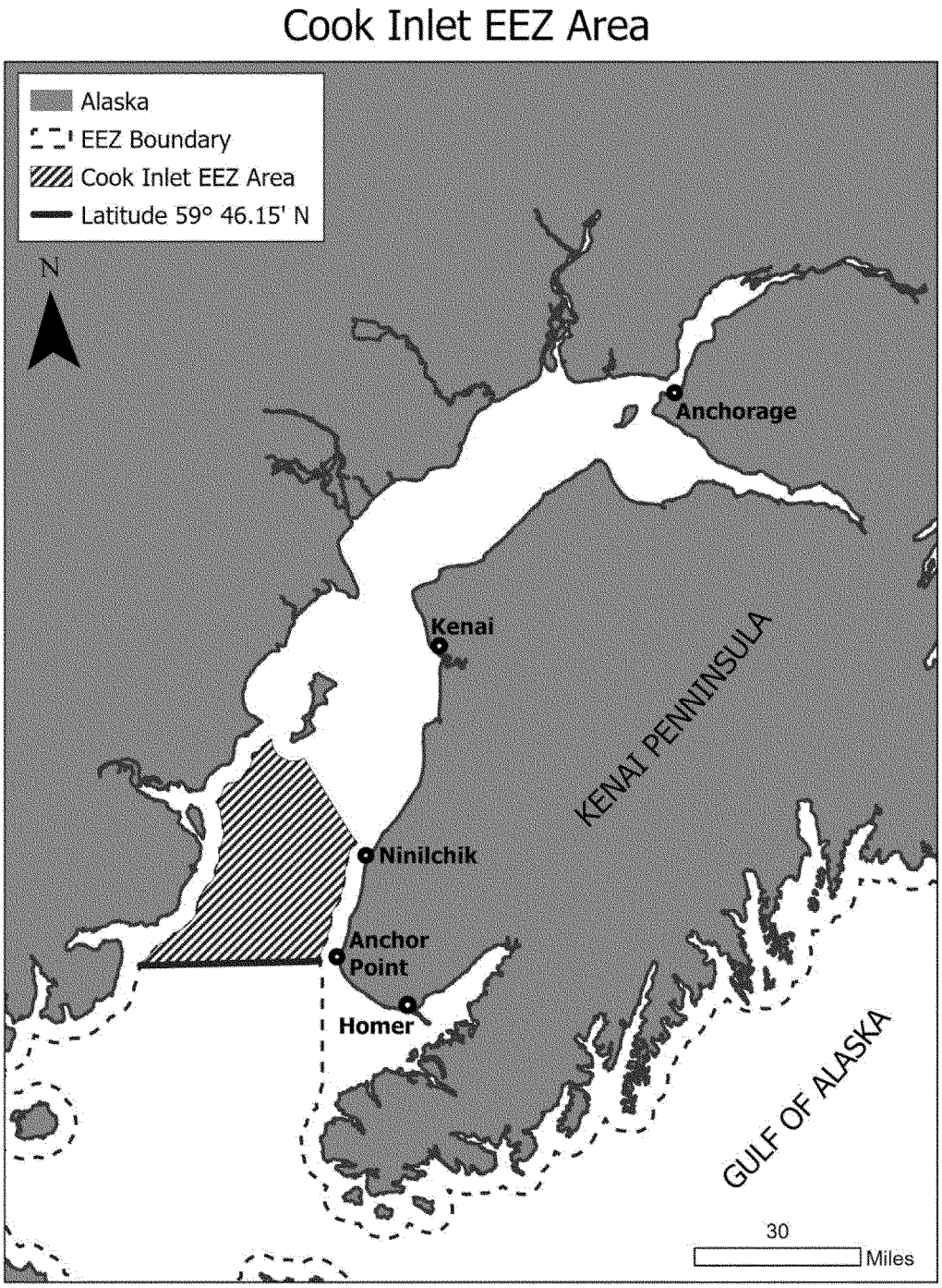
fishes for or possesses salmon in or from the Cook Inlet EEZ Area is responsible for the cumulative bag or possession limit specified in paragraph (a) of this section that apply to that vessel, based on the number of persons aboard.

(5) *Transfer at sea.* A person who fishes for or possesses salmon in or from the Cook Inlet EEZ Area under a bag or possession limit specified in paragraph (a) of this section may not transfer a salmon at sea from a fishing vessel to any other vessel, and no person may receive at sea such salmon.

(b) *Careful release*—Any salmon brought aboard a vessel and not immediately returned to the sea with a minimum of injury will be included in the daily bag limit of the person catching the salmon.

■ 11. Add figure 22 to part 679 to read as follows:

Figure 22 to Part 679—Cook Inlet EEZ Area (see § 679.2).



■ 12. Amend table 15 to part 679 by:

■ a. Adding in alphabetical order the entry ''Gillnet, drift'' under the heading ''NMFS AND ADF&G GEAR CODES''; and

■ b. Removing the entry ''Gillnet, drift'' under the heading ''ADF&G GEAR CODES''.

The addition reads as follows:

TABLE 15 TO PART 679—GEAR CODES, DESCRIPTIONS, AND USE

NMFS and ADF&G Gear Codes								
*	*	*	*	*	*	*		
Gillnet, drift					03	X		X
*	*	*	*	*	*	*		

[FR Doc. 2023–22747 Filed 10–18–23; 8:45 am]
BILLING CODE 3510–22–P

FEDERAL REGISTER

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No. 201 October 19, 2023

Part IV

The President

Notice of October 17, 2023—Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia

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Presidential Documents

Title 3—

The President

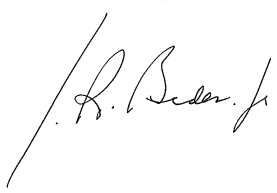
Notice of October 17, 2023

Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia

On October 21, 1995, by Executive Order 12978, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the actions of significant narcotics traffickers centered in Colombia and the extreme level of violence, corruption, and harm such actions cause in the United States and abroad.

The actions of significant narcotics traffickers centered in Colombia continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and cause an extreme level of violence, corruption, and harm in the United States and abroad. For this reason, the national emergency declared in Executive Order 12978 of October 21, 1995, must continue in effect beyond October 21, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to significant narcotics traffickers centered in Colombia declared in Executive Order 12978.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
October 17, 2023.

[FR Doc. 2023–23311
Filed 10–18–23; 11:15 am]
Billing code 3395–F4–P

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Federal Register

Vol. 88, No. 201

Thursday, October 19, 2023

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